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¶ Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Clarification That Early Termination	)
Fees Charged to Cellular Telephone	)
Customers Are "Rates Charged" Within	)
The Meaning of 47 U.S.C. § 332(c)(3)(A).	)

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Federal Communications Commission
Office of Secretary

To: The Commission

PETITION FOR DECLARATORY RULING

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SUMMARY

In this Petition, SunCom requests a declaratory ruling that: (1) early termination fees charged to commercial mobile radio service ("CMRS") customers are "rates charged" under Section 332(c)(3)(A) of the Communications Act; (2) the use by state authorities, including courts, of quasi-contract equitable doctrines such as quantum meruit or money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A) of the Communications Act; and (3) the early termination fees SunCom allegedly charged to members of the putative class in the case styled *Edwards v. SunCom* constitute "rates charged" for purposes of Section 332(c)(3)(A). This petition is filed pursuant to the Court's order in the *Edwards* case (attached as Exhibit A) and seeks adjudication only of issues of federal law within the jurisdiction of the Commission.

The requested rulings are consistent with Commission precedent barring state-level claims that would result in state courts and regulatory authorities engaging in CMRS rate regulation in violation of Section 332(c)(3)(A). They also are consistent with the better-reasoned federal cases dealing with state-level challenges to early termination fees, which have held that those fees are "rates charged" within the meaning of Section 332(c)(3)(A). The requested rulings are necessary to protect Congress's statutory insulation of CMRS rates and rate structures from intrusive and multiplicitous state regulation.

Courts have reached differing conclusions when they apply the Commission's state-claim based analysis of whether particular CMRS practices constitute "rates charged" or "other terms and conditions." This has produced case law reaching divergent opinions on this issue with

respect to particular CMRS rates and practices, including early termination fees. Thus, the Commission must grant this Petition to fulfill Congress's intent that CMRS rates will be set by market forces rather than local regulatory pressures or judicial fiat.

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To: The Commission

PETITION FOR DECLARATORY RULING

SunCom Wireless Operating Company, L.L.C., f/k/a Triton PCS Operating Company, L.L.C. ("SunCom"), by its attorneys and pursuant to Section 1.2 of the Commission's rules,[1] hereby requests that the Commission issue a declaratory ruling clarifying that: (1) early termination fees charged to commercial mobile radio service ("CMRS") customers are "rates charged" under Section 332(c)(3)(A) of the Communications Act;[2] (2) the use by state authorities, including courts,[3] of quasi-contract equitable doctrines such as quantum meruit or money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A) of the Communications Act;[4] and (3) the early

[1] 47 C.F.R. § 1.2 (2004).

[2] 47 U.S.C. § 332(c)(3)(A).

[3] It is well established that "judicial action can constitute state regulatory action for purposes of Section 332." Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17021, 17027 ¶ 12 (2000) ("*Wireless Consumers*").

[4] While such quasi-contractual equitable claims may vary somewhat according to state law, SunCom seeks to include in this declaratory ruling request claims for money had and received,

termination fees SunCom charged to members of the putative class in the case styled *Edwards v. SunCom* (Case No. 02-CP-26-3539 (Horry County, S.C. 2002)) are "rates charged" for purposes of Section 332(c)(3)(A).

The plain language of Section 332(c)(3)(A), in prohibiting states from regulating rates charged by CMRS providers such as SunCom, provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by" a CMRS provider. Despite this clear proscription, in the *Edwards* case, SunCom has been sued in state court in South Carolina in a putative class action posing a direct challenge to its termination rates. The *Edwards* Court seeks expert Commission guidance on whether SunCom's early termination fees are "rates charged" for purposes of Section 332(c)(3)(A) (thereby depriving the Court of subject matter jurisdiction), and therefore directed SunCom to file the instant Petition seeking that guidance. This petition is filed pursuant to the Court's order in *Edwards* (attached as Exhibit A) and seeks adjudication only of issues of federal law within the Commission's jurisdiction.

If such lawsuits and other state-level legal proceedings are permitted to proceed without guidance from the Commission – the federal authority charged with administering the Communications Act – SunCom and other CMRS providers will be subjected to *de facto* state rate regulation in violation of Section 332(c)(3)(A). Resolving such claims will require various state-level decisionmakers to determine the reasonableness of the assessment of contested termination fees and, in effect, retroactively set the appropriate rates for services that complaining parties receive – with the possibility of dramatically different results in different states. Carriers may also be forced to eliminate or reduce early termination fees on a forward-

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quantum meruit, or similar claims, when such claims are raised as a means of altering or avoiding payment of a contractually imposed CMRS early termination fee.

looking basis to avoid future liability. This is precisely the result Congress sought to preclude by enacting Section 332(c)(3)(A). Thus, Commission action is necessary to effectuate Congress's intent that CMRS carriers remain free of intrusive, patchwork rate regulation at the state level.

The requested rulings are dictated by existing Commission precedent. While the Commission has recognized that certain types of state law claims survive the preemptive effect of Section 332(c)(3)(A), it also has recognized that CMRS providers' rates and the elements of those rates are immune from both direct and indirect challenge at the state level. The requested rulings are also consistent with the better-reasoned federal cases dealing with state-level challenges to early termination fees, which have held that where such fees are designed to recoup revenue lost when customers prematurely terminate long-term contracts featuring discounted rates, those fees are "rates charged" within the meaning of Section 332(c)(3)(A). Because they are an indispensable element of CMRS providers' rates, the Commission should find that CMRS early termination fees are entitled to the same level of protection from state challenge that it has recognized in the past for other rate elements, such as incremental billing and "rounding up."

Commission action is particularly warranted in this case because courts around the country have come to differing conclusions regarding Section 332(c)(3)(A)'s preemptive force in this area. Through the 1993 and 1996 amendments to the Communications Act, Congress made clear its intent to establish a national regulatory framework of deregulated CMRS rates. This policy has been very successful, fostering a dynamic, nationwide, and highly competitive industry that continues to innovate in providing its product and service offerings. Not only would Congress' vision be defeated by divergent rulings in the several states, but the technological and competitive progress made in this industry as a result of federal policy choices

also would be undermined, subjecting CMRS carriers to multiple different local regulatory schemes and increasing providers' costs and, ultimately, customers' rates.

BACKGROUND

As explained in more detail below, SunCom's early termination fees are part of SunCom's rates because they are part of the total financial package in exchange for which SunCom provides its customers with CMRS services. Thus, the early termination fees must be considered a part of SunCom's rates and rate structures because they are an essential component in determining what monthly rate customers will pay for its services. Moreover, if the early termination fees are eliminated or modified by operation of state law, that will force SunCom to alter its existing practices regarding handset subsidies and other rate elements of its service.[5]

A. Nature Of Rate Structures.

SunCom offers CMRS service through a variety of rate plans made up of multiple components, including activation fees, monthly access charges, special features, local and long distance airtime, certain roaming charges, and early termination fees. Taken together, the multiple rate components under any given plan are designed to compensate SunCom for the various costs of providing service and to allow SunCom to realize a return on its investment.[6]

The costs of providing CMRS services are considerable. In the competitive CMRS market, new customer acquisition, for example, requires SunCom to subsidize and rebate charges for customer handsets and accessories, and to pay direct and indirect commissions to dealers, retailers, and other salespeople who sell SunCom's services to subscribers. In addition, SunCom faces initial and ongoing costs for advertising and marketing, as well as other standard costs of

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[5] Declaration of Charles Kallenbach, dated February 22, 2005 ("Kallenbach Decl.") ¶¶ 4, 18.

[6] *Id.* ¶ 5.

doing business, including employee salaries and other expenses, rent and other office expenses, and similar types of costs. Finally, SunCom bears considerable ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base. Thus, many of these costs require SunCom to make long-range forecasts of what its customer base will be.[7]

SunCom designs its rates and rate structures to provide a competitive rate to its customers, while enabling SunCom to recover over the contract term its costs and realize a return on its investment in providing service. Of course, SunCom's ability to continue providing service is dependent on the revenue that its customers provide, so it is important to SunCom that it be able to make reasonably accurate projections regarding the revenue that its existing customers will produce.[8]

To provide the stability that allows for this evaluation regarding the future size of its customer base and revenue stream and to make its service packages more attractive to customers, SunCom offers its service at a low initial price (often with a free or discounted handset) and with discounted monthly charges in exchange for a subscriber's commitment to purchase SunCom's service for a minimum length of time, most commonly 12 or 24 months. In establishing these rates, SunCom assumes that customers will take service for the term defined in the service contract each customer signs, and sets its rates accordingly to provide a competitively priced service, while still enabling SunCom to recover its costs and to allow SunCom to realize a return on its investment over the length of the contractual term.[9]

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[7] *Id.* ¶ 6.

[8] *Id.* ¶ 7.

[9] *Id.* ¶ 8.

The length of time required for SunCom to realize a return on its costs of providing service varies with the price plan and with individual customer usage. This means that if a customer terminates service early, SunCom may not earn sufficient revenue to recover its costs of providing service, let alone to realize a return on its investment.[10]

B. The Cost and Revenue Recovery Function Of Early Termination Fees

In the CMRS industry, early termination fees are a standard practice for addressing the problem of revenue shortfalls created by customers who terminate their service early. These fees help enable CMRS providers to recoup some of the costs of providing service and compensate providers for some of the revenue that they would have obtained had the customer completed the contract term.[11]

For precisely these reasons, SunCom charges early termination fees to subscribers who do not fulfill the terms of their long-term service contracts. These fees help enable SunCom to recover some of its costs and some of its planned future earnings from customers who terminate their long-term contracts early.[12] The ability to collect early termination fees allows SunCom to offer its start-up and long-term service discounts without unduly compromising its ability to recover its costs and to earn a return on its investment. These fees help SunCom make up the difference between the amount the customer has paid and the revenue SunCom would have realized had the canceling customer maintained service for their entire service term. Therefore, early termination fees comprise an integral part of SunCom's rate structure because they permit

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[10] *Id.* ¶ 9.

[11] *Id.* ¶ 10. Early termination fees are also common in service industries, such as automobile leasing and satellite television, where the service provider subsidizes entry costs to increase the potential customer base. Economists generally view this as a *positive* solution developed by market forces.

[12] *Id.* ¶ 11.

SunCom to offer discounted rates while still recovering some of the costs of providing service and some of the lost revenue represented by a breaching customer.[13]

C. SunCom's Current Rate Structure

SunCom provides CMRS services mainly to customers in the Southeastern United States. Like most CMRS providers, SunCom offers its services pursuant to different rate plans that generally fall into two separate categories.[14]

First, SunCom offers fixed-term contracts that permit customers to purchase SunCom service for renewable terms of either twelve or twenty-four months. For example, with a two-year commitment, SunCom currently offers its customers the discounted rates of 1000 minutes per month for $39.00 or unlimited calling for $69.00 per month. For customers making a one-year commitment, SunCom currently offers 1000 minutes for $45.00 per month and unlimited calling for $75.00. Customers signing up for long-term contracts generally receive free or discounted handsets. Each of these term plans require customers to pay a $200 fee if they terminate service early.[15]

Second, SunCom also currently offers its customers non-discounted month-to-month and prepaid service plans that do not contain an early termination fee feature. SunCom's month-to-month plan offers customers 1000 minutes for $49.00 per month and unlimited calling for $79.00 per month. SunCom's prepaid service plans enable customers to obtain service on a per-minute basis at a substantially higher rate, e.g., currently $.31 per minute. Customers that elect short-term or prepaid arrangements generally pay full retail value for their handsets. These plans do

[13] *Id.* ¶ 12.

[14] *Id.* ¶ 14.

[15] *Id.* ¶ 15.

not include early termination fees because they do not provide customers with the same discount start-up and service rates offered by term plans.[16]

Thus, the early termination fee component of SunCom's rates provides the customer a choice of how to pay for SunCom's service. The customer can fulfill his contractual obligations and enjoy discounted rates over the life of the contract, he can select a non-term service option and pay higher service rates on a monthly or prepaid basis, or he can terminate service before the term of his contract expires and pay for a portion of SunCom's costs and lost revenue in a lump-sum payment.[17]

If SunCom were unable to collect early termination fees, it would be forced to raise its prices on its term plans or eliminate them altogether. SunCom would no longer have a rate mechanism that would allow it to recover some of the costs of providing discounted start-up and service rates to long-term customers or to recover some of the revenue that it would have obtained from those customers had they not terminated before the end of the contract term. This would deprive customers of the ability to realize long-term discounted CMRS rates and raise barriers to customer entry into CMRS service.[18]

D. The *Edwards* Case.

Despite the restriction on any state regulation of CMRS rates or rate structures found in Section 332(c)(3)(A), the assessment of wireless termination fees has been challenged from time to time in courts around the country.[19] In a gambit that has had varying degrees of success, to

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[16] *Id.* ¶ 16.

[17] *Id.* ¶ 17.

[18] *Id.* ¶ 18.

[19] *See* Section II.B.

avoid the restrictions of Section 332(c)(3)(A), such challenges have often been couched in claims of "breach of contract," "money had and received," or "quantum meruit."

The case that gives rise to this Petition is a perfect example. In the *Edwards* case, SunCom has been sued in South Carolina state court in a putative class action where the plaintiff is claiming that SunCom improperly assessed an early termination fee. Although the lead plaintiff in that case has characterized her claim as one for breach of contract and money had and received/quantum meruit, at bottom, the chief aim of the suit is to preclude SunCom from charging its contractual early termination fee. SunCom moved to dismiss that case, arguing in part that the South Carolina courts, like all state courts, lack subject matter jurisdiction pursuant to Section 332(c)(A)(3) over challenges to "rates charged," thereby precluding a challenge to SunCom's termination fees. In response, the Court stayed the case and directed SunCom to file this Petition requesting the Commission to resolve the questions presented above.[20]

ARGUMENT

I. THE COMMISSION SHOULD DECLARE THAT TERMINATION FEES ARE "RATES CHARGED" WITHIN THE MEANING OF SECTION 332(c)(3)(A).

A. Courts And The Commission Have Recognized That The Plain Language Of Section 332(c)(3)(A) Fully Insulates CMRS Providers' Rate Elements And Rate Structures From State Regulation.

Pursuant to 47 U.S.C. § 332(c)(3)(A), no state or local government may regulate the "rates charged" by CMRS providers like SunCom:

> [N]o 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.[21]

[20] *See* Exhibit A.

[21] 47 U.S.C. §332(c)(3)(A) (emphasis supplied).

The legislative history of this provision demonstrates that Congress intended to preclude state regulation of wireless rates to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[22] The plain language of the statute establishes a dichotomy in CMRS service arrangements between contractual provisions that constitute "rates charged," which states cannot regulate, and "other terms and conditions," the regulation of which is not preempted.

Courts across the country have recognized that this straightforward provision means that "[c]ases that involve 'the entry of or the rates charged by any commercial mobile service or any private mobile service' are the province of federal regulators and courts,"[23] and that the "regulat[ion of] the 'rates charged' by a cellular provider [is] something a state is explicitly prohibited from doing under section 332(c)(3)(A)."[24]

Likewise, the Commission has recognized that Section 332's prohibition of state regulation of CMRS rates "bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers."[25] The Commission has held that the term "rates charged" refers to "both rate levels and rate structures for CMRS" and that states may not "prescribe the rate elements for CMRS or specify which among the CMRS services provided can

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[22] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 260 (1993).

[23] *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) (emphasis supplied).

[24] *Ball v. GTE Mobilnet*, 96 Cal. Rptr. 2d 801, 805 (Cal. Ct. App. 2000). *See In re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996) ("The remedies [plaintiffs] seek would require a state court to engage in regulation of the rates charged by a [commercial mobile radio services] provider, something it is explicitly prohibited from doing.").

[25] *Wireless Consumers*, 15 FCC Rcd at 17028 ¶ 13.

be subject to charges by CMRS providers."[26] Accordingly, the Commission has held that rate practices such as charging for incoming calls or charging in whole minute increments are immune from challenge by or before state authorities.[27]

B. CMRS Early Termination Fees Are "Rates Charged" Under Both Commission and Judicial Precedent.

1. Early Termination Fees Are An Essential Element Of CMRS Rate Structures.

Early termination fees are precisely the type of rate element that Congress and the Commission have sought to shield from state regulation, and permitting state claims to void, modify, or require repayment of these fees would be contrary to Congress's intent that CMRS rates remain unregulated under most circumstances.[28] As the United States District Court for the Northern District of Illinois held in *Gilmore v. Southwestern Bell Mobile Systems,* to determine whether a cause of action concerns "rates charged," a court examines "whether the amount

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[26] *See* Southwestern Bell Mobile Sys., Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19906-07 ¶ 20 (1999) ("*SWBT Mobile*") (emphasis added).

[27] *See id.*

[28] Indeed, Congress laid out with specificity the narrow circumstances in which CMRS rates can be regulated when it established a mechanism for states to petition the Commission for authority to regulate rates. *See* 47 U.S.C. § 332(c)(3) (a State may petition the Commission for authority to regulate rates, which the Commission shall grant if the State demonstrates that market conditions fail to protect subscribers from unjust and unreasonable or discriminatory rates, or that such market conditions exist and the service is a replacement for land line telephone service for a substantial portion of the land line exchange service in the State). Congress also made clear its preference that the federal government take an exceedingly light regulatory touch in the area of CMRS regulation, and the Commission has faithfully implemented that preference, by relying "on market forces, rather than regulation, except when there is market failure." *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8998 ¶ 22 n.69 (2002), *pet. for review denied sub. nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

charged being unreasonable, unjust, or otherwise inappropriate needs to be considered in order to resolve the claim."[29]

Where early termination fees are designed to recoup revenue lost when customers prematurely terminate long-term contracts featuring discounted rates, those fees are "rates charged" within the meaning of Section 332(c)(3)(A). For example, in *Chandler v. AT&T Wireless Services, Inc.*,[30] the United States District Court for the Southern District of Illinois, relying upon the reasoning in *Redfern v. AT&T Wireless Services, Inc.*,[31] held that the early termination fees at issue were "rates charged" and the state law claims were preempted. The reasoning of the *Chandler* and *Redfern* courts is instructive, and fully applicable here:

> This case is similar to *Redfern v. AT&T Wireless Services, Inc.* [citation omitted]. There, the defendant argued that the early termination fee was an essential component of the rates charged for its mobile services. In support of its contention, the defendant explained that lower rates are offered on term plans because the early termination fee accounts for planned future earnings. On the other hand, plans with no expiration date charge higher rates because there is no early termination fee.
>
> It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law. . . .[32]

The factual situation in the instant case is the same as in *Chandler* and *Redfern*. As in those cases, here SunCom offers lower rates on fixed-term plans because the early termination

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[29] *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 923 (N.D. Ill. 2001) (citing 47 U.S.C. § 201(b)).

[30] *Chandler v. AT&T Wireless Services, Inc.*, No. 04-180-GPM, slip op. at 2 (S.D. Ill. July 21, 2004).

[31] *Redfern v. AT&T Wireless Services, Inc.*, No. 03-206-GPM, slip op. at 1-2 (S.D. Ill. June 16, 2003) ("the early termination fee affects the rates charged for mobile services," precluding challenges to those fees under state law).

[32] *Chandler*, slip op. at 2.

fee accounts for planned future earnings, and it charges higher rates on plans with no expiration date, such as prepaid and month to month plans, because those plans have no early termination fee.[33] *See also Simons v. GTE Mobilnet, Inc.*, No. H-95-5169, slip op. at 6 (S.D. Tex. Apr. 11, 1996) (dismissing plaintiff's challenges to a CMRS provider's early termination fee and holding that such challenges were completely preempted by Section 332(c)(3)(A)).

The formulation by these courts is consistent with the Commission's holding in *SWBT Mobile* that "states not only may not prescribe how much may be charged for [CMRS] services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."[34] Following this line of reasoning, the Commission determined in that case that "states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments,"[35] because such practices are integrally related to the rate that the CMRS provider ultimately charges.[36] The Commission also held that these billing practices long had been common for interexchange carriers and were valid because they represented a "'simplified method on which to base charges which still reflects general costs.'"[37]

Early termination fees play the same type of cost and revenue recovery role in SunCom's rate structures as billing for incoming calls and charging in whole minute increments. When setting its rates, SunCom considers many factors, including the costs of acquiring new customers

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[33] Kallenbach Decl. ¶¶ 14-17.

[34] *See SWBT Mobile,* 14 FCC Rcd at 19907 ¶ 20.

[35] *See id.* at 19908 ¶ 23.

[36] *See id.* at 19906 ¶ 19 ("It should be recognized that a 'rate' has no significance without the element of service for which it applies.").

[37] *See id.* at 19904 ¶ 14 & n.27 (citing with approval Petition for Declaratory Ruling of Southwestern Bell Mobile Systems, Inc., filed Nov. 12, 1997).

and providing them with CMRS service as well as a return on its investment.[38] Many of these factors require SunCom to make long-range forecasts of what their customer base will be. Term contracts provide SunCom with the certainty necessary to make the continuing investments required to provide service to its customers. SunCom's long-term 12 and 24-month rate plans are designed to allow customers to pay for services at a discounted rate that, over the length of their contractual term, provides sufficient revenues to allow SunCom the expectation of gradually recovering its costs plus a reasonable return on its investment.[39]

The early termination fee enables SunCom to recover at least some portion of its costs and anticipated revenue if the customer terminates its contract early.[40] If SunCom were not able to collect its early termination fees, its rates and rate structures would change fundamentally. It would no longer have a rate mechanism that would allow it to recover some of the costs of providing discounted start-up and service rates to long-term customers and to recover some of the revenue it would have obtained from those customers had they not terminated before the end of the contract term.[41]

2. Allowing State Authorities To Invalidate Or Modify Wireless Termination Fees Through Equitable Or Quasi-Contract Doctrines Is Prohibited Rate Regulation.

Allowing state bodies to evaluate wireless termination fees under equitable or quasi-contract doctrines like quantum meruit and money had and received inevitably will require those bodies to make a determination as to whether the early termination fee charged was reasonable

[38] Kallenbach Decl. ¶¶ 6-7.

[39] *Id.* ¶ 8.

[40] *Id.* ¶ 10.

[41] *Id.* ¶ 18.

or appropriate. Damages awarded thereunder will constitute ratemaking by assigning a new price to the service that was obtained by the complaining customer. Thus, the disposition of such questions by state courts conflicts with Section 332(c)(3)(A).

The Commission has recognized that the use of such equitable and quasi-contract doctrines to create or modify a price term for wireless service is inappropriate. The use of doctrines like quantum meruit to invalidate or require refunds of charges paid for wireless services inherently requires courts to engage in the very sort of ratemaking and valuation prohibited to them by Section 332(c)(3)(A). In a similar primary jurisdiction referral from a federal district court, the Commission noted that because:

> an award of *quantum meruit* would require the court to establish a value (*i.e.*, set a rate) for the service provided . . . there is substantial question whether a court may award *quantum meruit* or other equitable relief under state law [in a case involving CMRS rates] without running afoul of section 332(c)(3)(A).[42]

Similarly, in *Gilmore*, in finding plaintiffs' unjust enrichment claim to be preempted rate regulation under Section 332, the court explained that the theory "necessarily raises the issue of whether plaintiff received adequate services in return for the Fee. It also raises the question of whether the Fee was unjust."[43] Because answering these questions would require the court to tread directly into prohibited rate regulation, the *Gilmore* court concluded they were preempted by the Communications Act.[44]

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[42] *See* Sprint PCS and AT&T Corp., *Declaratory Ruling*, 17 FCC Rcd 13192, 13198 n.40 (2002) (emphasis added) (citing *Bastien*, 205 F.3d at 986; *Gilmore*, 156 F. Supp.2d at 925).

[43] *Gilmore*, 156 F. Suypp2d at 925.

[44] *Id.* at 924 (emphasis supplied). As the *Gilmore* court properly notes, a decision that challenges CMRS termination fees would not deprive would-be plaintiffs of any right of action or remedy because they still could bring those claims before the Commission or a federal court under Sections 201(b), 207 and 208 of the Communications Act. 47 U.S.C. § 201(b), 207, 208.

As in *Gilmore*, the plaintiff in *Edwards* is challenging the "appropriateness of" the fee charged by SunCom, alleging that SunCom has collected and retained a fee from the plaintiffs without providing a service in return. Indeed, that is the essence of a quantum meruit claim – plaintiffs explicitly seek a return of a money payment on the ground that its collection and retention is unjust. Compl. ¶¶ 28-29.[45]

These authorities establish that when a plaintiff makes an equitable claim for an invalidation or refund of early termination fees, the state court is required to establish – either through the retrospective elimination of a vital rate element or the imposition of a rate not previously charged – a rate for service. Though Section 332(c)(3)(A) does not always preempt the award of monetary damages by state courts based on state tort or contract claims, the Commission has noted that such preemption exists where the suit challenges the "reasonableness" of wireless rates.[46] The invalidation, modification, or refund of an early termination fee is, *a fortiori*, rate regulation, and directly contravenes the prohibition on state rate regulation that Congress enacted and that this Commission has repeatedly enforced. Indeed, this is precisely what the Complaint in the *Edwards* case seeks – paragraphs 32 through 34 make plain that the plaintiffs seek a refund of their early termination fees.

Accordingly, the Commission should declare that CMRS providers' early termination fees are "rates charged" within the meaning of Section 332(c)(3)(A) and bar challenges that seek

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[45] Under South Carolina law, a quantum meruit claim inherently calls into question the reasonableness of the value of the goods and services provided. *See Blanton v. Freidberg*, 819 F.2d 489, 492 (4th Cir. 1987) (quantum meruit in South Carolina permits the recovery of the "'reasonable value of all that the defendant has received'" because "'[t]he underlying purpose of allowing quantum meruit recovery is two-fold, i.e. to prevent the breaching party from being unjustly enriched and to restore the aggrieved party in the contract to the position he occupied prior to entry into the contract. Quantum meruit merely seeks to return to the plaintiff the reasonable value of the services and goods provided to the defendant.'") (citation omitted).

to invalidate, modify, condition, or obtain a refund of those fees on equitable bases such as quantum meruit, money had and received, unjust enrichment, or the like.

3. The Commission Should Apply To CMRS Its Wireline Policy Favoring Early Termination Fees As Integrally Related To Telephone Service Rate Structures.

The Commission has recognized that CMRS carriers may include early termination fees in their service contracts.[47] This recognition follows the Commission's generally-expressed approval of early termination fees in the wireline context:

> Early termination clauses are provisions that are typically found in fixed term contracts that require payment of a fee if a customer terminates the contract prior to the end of the mutually agreed upon contract term. As a general matter, early termination provisions can be mutually beneficial. Providers are given a measure of certainty because such penalty provisions ensure that costs will be recouped in the event a customer fails to utilize the service for the stipulated period of time. On the other hand, customers enjoy discounted and stable priced services over the life of the contract term.[48]

Thus the Commission has recognized that early termination charges generally are both reasonable and an integral element of the rates charged for telephone service.

[46] *Wireless Consumers*, 15 FCC Rcd at 17035 ¶ 25.

[47] Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 ¶ 15 (2003) ("[c]arriers may include provisions in their customer contracts on issues such as early termination and credit worthiness.") (prohibiting early termination provisions that restrict number portability).

[48] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17400 ¶ 692 (2003) (subsequent history omitted).

The Commission affirmed its general policies favoring early termination fees in the wireline context in *Ryder Communications*.[49] Reviewing its case law on the subject, the Commission stated that it:

> has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments.[50] In approving these provisions, the Commission recognized implicitly that they were a valid *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long term service arrangements with their customers.[51]

The Commission therefore has left no doubt that early termination provisions are reasonable because they provide a fair mechanism by which carriers can recover the cost of providing service to customers and that such provisions are, in essence, a supplemental tool for determining the rate charged to customers that terminate their service early.

The Commission should apply the same reasoning to contractual, detariffed CMRS services that it has applied in the tariffed wireline context. Indeed, given Congress's intent that the CMRS market function free of needless government intrusion in rate matters, the Commission should review CMRS early termination fees with less scrutiny than it applies to tariffed wireline early termination provisions. The Commission should explicitly recognize that

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[49] Ryder Communications, Inc. v. AT&T Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 13603 (2003) ("*Ryder Communications*").

[50] SunCom's customer service agreements typically contain minimum volume commitments in which "SunCom reserves the right to terminate your agreement if less that 50% of your overall minutes are on the SunCom Network over 3 consecutive billing cycles for Regional or National Sales Plans." Kallenbach Decl. ¶ 19.

[51] *Ryder Communications*, 18 FCC Rcd 13617 ¶ 33 (emphasis added).

early termination fees are CMRS rate elements that are protected from state regulation as "rates charged" under Section 332(c)(3)(A).

II. THE REQUESTED RULING IS NECESSARY TO ELIMINATE UNCERTAINTY REGARDING THE PROPER BOUNDARIES OF STATE REGULATION OF THE ELEMENTS OF CMRS RATE STRUCTURES.

A. Courts Have Struggled To Apply the Commission's State Law Claim-Based Standard For Determining Whether Claims Against CMRS Early Termination Fees Involve Challenges To "Rates Charged" Or "Other Terms and Conditions."

Under applicable precedent, to determine whether particular state-level lawsuits concern unchallengeable "rates charged" or actionable "other terms and conditions" under the statute, a court examines "whether the amount charged being unreasonable, unjust, or otherwise inappropriate needs to be considered in order to resolve the claim."[52] Courts' application of this analysis has led to divergent decisions and left considerable confusion in the courts regarding the distinction between "rates charged" and "other terms and conditions" under Section 332(c)(3)(A).[53]

Compounding the confusion, a number of cases have arisen in the context of the attempted removal to federal court of cases originally brought in state court. In those cases, the question before the court has been whether Section 332(c)(3)(A) established "complete preemption," thereby making removal of state-law challenges to CMRS carriers' practices

[52] *Gilmore*, 156 F. Supp.2d at 923 (citing 47 U.S.C. § 201(b)).

[53] *Compare Alport v. Sprint Corp.*, 2003 WL 22872134 (N.D. Ill.) (dismissing challenge to fee for regulatory cost recovery) *and Franczyk v. Cingular Wireless, LLC*, 2004 WL 178395 (N.D. Ill.) (same) *with In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp. 2d 838 (W.D. Mo. 2004) (reversing result in *Alport* and *Franczyk* and remanding cases to Illinois state court as part of multidistrict consolidation decision).

proper.[54] Many courts have refused to find complete preemption, noting that it has only been held to exist in a very few highly specialized areas of law, such as the Fair Labor Standards Act and ERISA.[55] Some of those courts have purported to analyze whether the claims at issue implicated "rates charged" or "other terms and conditions," but those discussions are merely dicta supporting the courts' decision that Section 332(c)(3)(A) does not create removal jurisdiction by "completely preempting" state regulation of CMRS carriers.[56] Where "complete preemption" does not exist, state courts nonetheless remain free to find "ordinary preemption," (i.e., a conclusion that Section 332(c)(3)(A) preempts individual state claims), and such a finding obviously is appropriate where claims involving CMRS carriers' early termination fees are at issue.

B. Eliminating Uncertainty Is Essential To Congress's Goal Of Insuring That CMRS Carriers Are Subject To Consistent Regulatory Obligations Nationwide.

As the Commission knows, one of the chief goals of Section 332(c)(3)(A) is to ensure that CMRS carriers would not be subject to conflicting state and local-level regulation of rates and entry.[57] In amendments to the Communications Act, Congress fundamentally altered the regulatory framework applicable to wireless services in two respects.

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[54] *See, e.g.*, *Moriconi v. AT&T Wireless*, 280 F. Supp.2d 867, 876-77 (E.D. Ark. 2003) (explaining issues involved in preemption analysis).

[55] *See Nixon v. Nextel West Corp.*, 248 F. Supp.2d 885, 890 (E.D. Mo. 2003) (collecting cases).

[56] *See, e.g.*, *id.* at 891-92; *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp.2d at 851.

[57] The Commission has recognized that a key component of Congress's rationale in enacting Section 332(c) was to "avoid inconsistent court decisions" which "could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c)." Personal Communications Industry Association's Broadband Personal Communications Services Alliance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16872 ¶ 30 (1998).

First, Congress replaced the dual federal and state regimes governing rate and entry regulation with a uniform "national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[58] To do this, Section 332(c)(3)(A), as discussed at length above, denies the states "any authority" to "regulate the entry of or the rates charged by" any wireless service provider.[59] Congress also amended Section 152(b) to make clear that – unlike wireline service – wireless services have *no* intrastate component.[60]

Second, Congress made clear its "general preference in favor of reliance on market forces rather than regulation."[61] Congress's amendments permitted the emerging wireless market to develop subject to only that regulation "for which the Commission and the states [can] demonstrate a clear-cut need"[62] and reflects Congress's recognition that "[s]tate regulation can be a barrier to the development of competition."[63] The Commission has recognized that, over the past decade these policy changes have fostered dramatic progress in competition and wireless penetration in the United States.[64]

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[58] Petition of the Conn. Dept. of Pub. Util. Control, *Report and Order*, 10 FCC Rcd 7025, 7034 ¶ 14 (1995) ("*CDPUC Order*").

[59] 47 U.S.C. § 332(c)(3)(A).

[60] *See* 47 U.S.C. § 152(b).

[61] Petition of N.Y. State Pub. Serv. Comm'n, *Report and Order*, 10 FCC Rcd 8187, 8190 ¶ 18 (1995).

[62] Petition of State of Haw. Pub. Util. Comm'n, *Report and Order*, 10 FCC Rcd 7872, 7874 ¶ 104 (1995).

[63] *CDPUC Order*, 10 FCC Rcd at 7034 n.44 (citing H.R. Conf. Rep. No. 103-213, 103 Cong., 1st. Sess., 480-81 (1993)).

[64] By the end of 2003, most Americans could choose service from multiple wireless carriers – 97% lived in counties served by at least three wireless carriers and 88% lived in counties served by at least five. Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 19 FCC Rcd 20597, 20608 ¶ 20 (2004) ("*2004 Competition Report*"). Indeed, the Commissions' Office of General Counsel has very recently explained that:

The existing confusion in the state and federal courts regarding the proper boundaries between "rates charged" and "other terms and conditions," however, and particularly the divergence of opinion with respect to early termination charges,[65] threatens both to undermine the consistent national policy fostered by Congress and the Commission and to destroy the dramatic technological and competitive innovations that have been the result of that policy. If the Commission fails to provide the certainty necessary to ensure uniform court determinations regarding the viability of state-law equitable and quasi-contract claims against CMRS early termination fees, the lack of clarity surrounding the scope of "other terms and conditions" and states' misapprehension of their right to regulate the wireless industry will impose enormous business costs and force wireless carriers to defend frivolous lawsuits, the cost of which are substantial. Moreover, this divergent state-by-state regulation will have significant short and long term effects on rates and competition. In the immediate future, divergent, patchwork

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> The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers. Subscribership continues to increase at a rapid and steady rate. During 2003, for example, the mobile telephone sector increased its subscribership from 141.8 million to 160.6 million, producing a nationwide penetration rate of roughly 54 percent. Intense price competition has resulted in affordable rates as well as innovative pricing plans such as free night and weekend minutes and free mobile-to-mobile calling. Wireless carriers' average revenue per minute has fallen consistently, from 44 cents per minute in 1993 to 10 cents per minute in 2003. Consumers continue to increase the use of their wireless phones. The average minutes-of-use per subscriber per month ("MOUs") in 2003 was 599 minutes, an increase of 100 MOUs from a year earlier.

FCC Amicus Brief, at 9-10, *filed in Cellco Partnership v. Hatch*, No. 04-3198 (8th Cir. 2004)).

[65] *Compare Chandler*, No. 04-180-GPM, (S.D. Ill. July 21, 2004) and *Redfern*, No. 03-206-GPM (S.D. Ill. June 16, 2003) (holding that challenges to early termination fees were subject to "complete preemption" because such fees are "rates charged" within the meaning of Section 332(c)(a)(3)) *with Esquivel v. Southwestern Bell Mobile Sys.*, 920 F. Supp 713 (S.D. Tex. 1996) (holding that early termination fees not subject to complete preemption).

regulation of early termination fees will have the effect of distorting CMRS rates. In the longer term, by raising the costs of entry, such disparate regulation will eventually inhibit both regional and national competition.

For all these reasons, the requested declaratory ruling is needed to fulfill the pro-competitive congressional policies underlying Section 332(c)(3)(A), and to protect a vital sector of the national economy from becoming fragmented and less competitively dynamic.

CONCLUSION

For the foregoing reasons, SunCom hereby respectfully requests that the Commission issue a declaratory ruling stating that:

(1) Early termination fees charged to CMRS customers are "rates charged" under Section 332(c)(3)(A) of the Communications Act;

(2) The use by state authorities, including courts, of quasi-contract equitable doctrines such as quantum meruit or money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A) of the Communications Act; and

(3) The early termination fees SunCom allegedly charged to members of the putative class in *Edwards* are "rates charged" for purposes of Section 332(c)(3)(A).

Respectfully submitted,

SunCom Operating Company L.L.C.

Michael D. Hays
J.G. Harrington
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February 22, 2005

EXHIBIT A

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO. 02-CP-26-3539
	)	
Debra Edwards, individually and as class representative for all those similarly situated,	)	
Plaintiff,	)	SUPPLEMENTAL ORDER REQUIRING DEFENDANT TO FILE PETITION FOR DECLARATORY RULING AT THE FEDERAL COMMUNICATIONS COMMISSION AND STAYING CASE UNTIL SUCH RULING IS ISSUED
vs.	)	
SunCom, a member of the AT&T wireless network, d/b/a Triton PCS Operating Company, LLC,	)	
Defendant.	)	

WHEREAS this case involves a challenge to an early termination fee charged to a cellular telephone customer and a purported class; and

WHEREAS the Court's jurisdiction may depend on whether the early termination fee at issue in this case is or is not a "rate[] charged" within the meaning of 47 U.S.C. § 332(c)(3)(A), which section federally preempts state regulation of such a "rate[] charged";

WHEREAS there exists an administrative procedure at the Federal Communications Commission ("FCC") that enables a party to petition the FCC seeking a declaratory ruling as to whether the early termination fee in question is or is not a such a "rate[] charged," and thus, whether the Court has jurisdiction over this matter; and

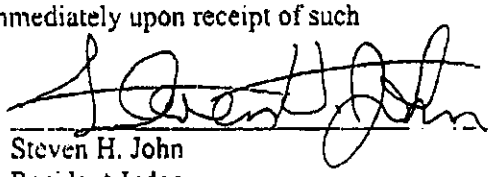
After consideration of the above, and the Court being otherwise fully advised, it is therefore

ORDERED that Defendant within 30 days of the date of this Order invoke the aforementioned procedure by preparing and filing a Petition for Declaratory Ruling at the FCC pursuant to 47 C.F.R. § 1.2, seeking a determination of whether the early termination fee in the

instant case is or is not a "rate[] charged" within the meaning of 47 U.S.C. § 332(c)(3)(A). It is further

ORDERED that this case be stayed until a final ruling has been rendered by the FCC on the Petition for the Declaratory Ruling on whether the early termination fee at issue in this case is such a "rate[] charged"; and it is further

ORDERED that the parties shall notify the Court immediately upon receipt of such ruling.



Steven H. John
Resident Judge
Fifteenth Judicial Circuit

January 18, 2005
Conway, S.C.

DECLARATION OF CHARLES KALLENBACH

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Clarification That Early Termination	)
Fees Charged to Cellular Telephone	)
Customers are "Rates Charged" Within	)
The Meaning of 47 U.S.C. § 332(c)(3)(A).	)

To: The Commission

DECLARATION OF CHARLES KALLENBACH

1. My name is Charles Kallenbach and I am the Senior Vice President, Legal and Regulatory Affairs for SunCom Operating Company, L.L.C.

2. I have read the foregoing "Petition for Declaratory Ruling" (the "Petition") and I am familiar with the contents thereof.

3. I am offering this declaration for the purposes of verifying the facts represented in the Petition and demonstrating that SunCom's early termination fees are part of the rates charged by SunCom for the commercial mobile radio service ("CMRS") it provides. The facts set forth herein, unless otherwise noted, are and have been true at all times relevant to the complaint in the matter of *Edwards v. SunCom,* Case No. 02-CP-26-3539 (Horry County, S.C. 2002).

Introduction

4. As explained in more detail below, SunCom's early termination fees are part of SunCom's rates because they are part of the price SunCom charges for the CMRS services it provides. In other words, those early termination fees comprise a part of the total financial package in exchange for which SunCom provides its customers with CMRS services. The early termination fees must be considered a part of SunCom's rates and rate structures because they are an essential component in determining what monthly rate customers will pay for SunCom's services.

Nature Of Rate Structures

5. SunCom offers CMRS service through a variety of rate plans made up of multiple components, including activation fees, monthly access charges, special features, local and long distance airtime, certain roaming charges, and early termination fees. Taken together, the multiple rate components under any given plan are designed to compensate SunCom for the various costs of providing service and to allow SunCom to realize a return on its investment.

6. The costs of providing CMRS services are considerable. In the competitive CMRS market, new customer acquisition, for example, requires SunCom to subsidize and rebate customer handsets and accessories and to pay direct and indirect commissions to dealers, retailers, and other salespeople who sell SunCom's services to subscribers. In addition, SunCom faces initial and ongoing costs for advertising and marketing, as well as other standard costs of doing business, including employee salaries and other expenses, rent and other office expenses, and similar types of costs. Finally, SunCom bears considerable ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base. Many of these costs require SunCom to make long-range forecasts of what its customer base will be.

7. SunCom designs its rates and rate structures to provide a competitive rate to its customers, while enabling SunCom to recover over the contract term its costs and to realize a return on its investment in providing service. Of course, SunCom's ability to continue providing service is dependent on the revenue that its customers provide, so it is important to SunCom that it be able to make reasonably accurate projections regarding the revenue that its existing customers will produce.

8. To provide this stability that allows for this evaluation regarding the future size of its customer base and revenue stream and to make its service packages more attractive to customers, SunCom offers its service at a low initial price (often with a free or discounted handset) and with discounted monthly charges in exchange for a subscriber's commitment to purchase SunCom's service for a minimum length of time, most commonly 12 or 24 months. In establishing these rates, SunCom assumes that customers will take service for the term defined in the service contract each customer signs, and sets its rates accordingly to provide a competitively priced service, while still enabling SunCom to recover its costs and to allow SunCom to realize a return on its investment over the length of the contractual term.

9. The length of time required for SunCom to realize a return on its costs of providing service varies with the price plan and with individual customer usage. This means that if a customer terminates service early, SunCom may not earn sufficient revenue to recover its costs of providing service, let alone to realize a return on its investment.

The Cost and Revenue Recovery Function of Early Termination Fees

10. Early termination fees are a standard practice in the CMRS industry for addressing the problem of revenue shortfalls created by customers who terminate their service early. These fees help enable CMRS providers to recoup some of the costs of providing service and to compensate providers for some of the revenue that they would have obtained had the customer completed the contract term.

11. For precisely these reasons, SunCom charges subscribers early termination fees to subscribers who do not fulfill the terms of their long-term service contracts. These fees help enable SunCom to recover some of its costs and some of its planned future earnings from customers who terminate their long-term contracts early.

12. The ability to collect early termination fees allows SunCom to offer its start-up and long-term service discounts without unduly compromising its ability to recover its costs and to earn a return on its investment. These fees help SunCom make up the difference between the amount the customer has paid and the revenue SunCom would have realized had the canceling customer maintained service for their entire service term. Therefore, early termination fees comprise an integral part of SunCom's rate structure because they permit SunCom to offer discounted rates while still recovering some of the costs of providing service and some of the lost revenue represented by a breaching customer.

13. Depending upon the rate plan, term, and timing of the breach, even when SunCom does collect an early termination fee from a customer that breaches its service contract, SunCom still does not necessarily recover sufficient funds to defray entirely the costs of providing service, let alone to recover the lost planned future earnings represented by the terminating customer.

SunCom's Current Rate Structure

14. SunCom provides CMRS services mainly to customers in the Southeastern United States. Like most CMRS providers, SunCom offers its services pursuant to different rate plans that generally fall into two separate categories.

15. First, SunCom offers its customers fixed-term contracts that permit customers to purchase SunCom service for renewable terms of either twelve or twenty-four months. For example, with a two-year commitment, SunCom currently offers its customers the discounted rates of 1000 minutes per month for $39.00 or unlimited calling for $69.00 per month. For customers making a one-year commitment, SunCom currently offers 1000 minutes for $45.00 per month and unlimited calling for $75.00. Customers signing up for long-term contracts generally receive free or discounted handsets. Each of these term plans require customers to pay a $200 fee if they terminate service early.

16. Second, SunCom also currently offers its customers non-discounted month-to-month service plans and (currently and at all times relevant to the *Edwards* complaint) has offered prepaid service plans that do not contain an early termination fee feature. SunCom's current month-to-month plan offers customers 1000 minutes for $49.00 per month and unlimited calling for $79.00 per month. SunCom's prepaid service plans enable customers to obtain service on a per-minute basis at a substantially higher rate, e.g., currently $.31 per minute. Customers that elect short-term or prepaid arrangements generally pay full retail value for their handsets. These plans do not include early termination fees because they do not provide customers with the same discount start-up and service rates offered by term plans.

17. Thus, the early termination fee component of SunCom's rates provides the customer a choice of how to pay for SunCom's service. The customer can fulfill his contractual obligations and enjoy discounted rates over the life of the contract, he can select a non-term service option and pay higher service rates on a monthly or prepaid basis, or he can terminate service before the term of his contract expires and pay for a portion of SunCom's costs and lost revenue in a lump-sum payment.

18. If SunCom were unable to collect early termination fees, it would be forced to raise its prices on its term plans or eliminate them altogether. SunCom would no longer have a rate mechanism that would allow it to recover some of the costs of providing discounted start-up and service rates to long-term customers or to recover some of the revenue that it would have obtained from those customers had they not terminated before the end of the contract term. This would deprive customers of the ability to realize long-term discounted CMRS rates and raise barriers to customer entry into CMRS service.

19. SunCom's customer service agreements typically contain minimum volume commitments in which "SunCom reserves the right to terminate your agreement if less that 50% of your overall minutes are on the SunCom Network over 3 consecutive billing cycles for Regional or National Sales Plans."

I declare under penalty of perjury that the facts contained herein and within the foregoing Petition are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Petition is well grounded in fact, that it is warranted by existing law or a good-faith argument for the extension of existing law, and that it is not interposed for any improper purpose.

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February 22, 2005

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of February, 2005, the undersigned caused to be served the foregoing Petition for Declaratory Ruling with accompanying Declaration of Charles Kallenbach, dated February 22, 2005, by first class United States mail on the following:

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Counsel for Plaintiff

Michael D. Hays

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Clarification That Early Termination	)
Fees Charged to Cellular Telephone	)
Customers Are "Rates Charged" Within	)
The Meaning of 47 U.S.C. § 332(c)(3)(A).	)

TO: Wireless Telecommunications Bureau

OPPOSITION TO PETITION FOR DECLARATORY RULING AND CROSS-PETITION FOR DECLARATORY RULINGS

Debra Edwards, et al.

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in **Edwards, et al. v. Triton PCS Operating Company, L.L.C., d/b/a/ SunCom, a Member of the AT&T Wireless Network**, SOUTH CAROLINA COURT OF COMMON PLEAS, FIFTEENTH JUDICIAL CIRCUIT (COUNTY OF HORRY) -- CASE NO. 02-CP-26-3539

Dated: March 4, 2005

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SUMMARY

SunCom Operating Company, L.L.C. ("SunCom") filed a Petition for Declaratory Ruling with the Commission on February 22, 2005 (the "Petition"). The SunCom Petition gives a materially misleading characterization of the underlying state court litigation which led to the court order that SunCom file a petition for declaratory relief, and thus frames the issues for this Commission improperly and inaccurately. Moreover, based on a declaration by its top in-house lawyer offered to the Commission upon "information and belief" as well as "inquiry," submitted for "the extension" of present law, SunCom's Petition inappropriately seeks to predicate any declaratory rulings the Commission might make upon factual assumptions that are untested, that have not been subjected to discovery, that have not been pled or reviewed in the pending state court litigation, and upon which the Commission could not properly rely. In fact, appropriate declaratory rulings can and should be entered without reliance on such purported facts – all to aid the South Carolina courts, which have the decision-making responsibility.

The consumers who are plaintiffs in the pending case against SunCom in the South Carolina state courts ("plaintiffs" or "Cross-Petitioners" herein) oppose the SunCom Petition and hereby cross-petition for contrary declaratory rulings by the Commission on the issues presented.

At the outset it is important to note the specific and narrow claims pending in the state courts which have led to the request for declaratory rulings by the Commission. Cross-Petitioners have presented allegations in the state court that cellular telephone service provider SunCom has used a form of consumer contract requiring an "initial term" of 12 months, subject to a contractual early-termination fee if the customer cancels the contract or switches service providers during "that" term. However, the company has imposed this "early-termination fee" on consumers who switch service providers after the end of the first year of the contract, in violation

of the contract terms and state law.

Thus, contrary to what SunCom's Petition before this Commission implies, the pending lawsuit does not challenge a cellular carrier's option to impose an early-cancellation fee in entering contracts with consumers, nor does the lawsuit challenge the reasonableness of the $200 fee SunCom prescribes in its contract terms and conditions, or the 12-month period set for such a fee. Rather, the pending suit involves only the situation where an "early-termination" fee is imposed ***after*** the contract's stated term has expired. See Appendix A, at ¶¶s 4-8 and 19.

The state suit seeks relief on state-law theories of breach of contract and unjust enrichment. Appendix A, pp. 3-4. This is a matter of state contract law not impinging upon rate regulation.

The state trial court has stayed the action in response to SunCom's assertion, made in a pre-discovery motion for "Judgment on the Pleadings," that the early-termination fee is a "rate" as to which state-law causes of action are unavailable because of the provisions of Communications Act. The court has expressly directed that the Commission be petitioned with a request for Declaratory Rulings on whether state civil suits for breach of contract and unjust enrichment relating to an "early-termination fee" are barred under 47 U.S.C. § 332(c)(3)(A).

The terms of the statute, as already interpreted by the Commission in *Wireless Consumers Alliance* and other dispositions, make it clear that the claims in the pending state-court civil action are not forbidden rate regulation, and they should be allowed to be adjudicated under state law. Cross-Petitioners, the plaintiffs in the underlying case, have argued in the State court, and maintain before the Commission, that it is the responsibility of the court to rule on the impact of the Act on the state-law claims. Without waiving that fundamental position, as Cross-Petitioners the plaintiffs ask the Commission to enter Declaratory Rulings clarifying issues for the State

courts, as set forth in the body of this Petition.

SunCom's Position Undermines Deregulation. SunCom urges the Commission to examine SunCom's business model and determine that the Communications Act permits it to enter express contracts, then violate these contracts with impunity because every provision in the contract is somehow related to "rates." At the core, SunCom is arguing against deregulation. In a deregulated environment, competitive market forces shape the services offered and the compensation paid by the consumer. The written contract embodies the result of the free marketplace at work. The contract governs whether a charge is allowed. SunCom is effectively arguing that the written contract between the parties has no legal reality and that free-market contract principles do not apply.

If SunCom's argument is taken to its logical end, it would mean that all of the agreements that SunCom has with its consumers are worthless because SunCom can always breach those agreements and seek shelter in a "federal regulatory" context to justify its business model. This makes a mockery of truth in billing, and would encourage sharp practices in inveigling customers to enter agreements which have no enforceability for the consumer.

In this particular instance, SunCom's argument is also nonsensical. SunCom does not charge an early termination fee if a consumer ends the relationship in month 12 under a one-year agreement (the customer gives notice that service will be terminated at the end of the 12th month, and no early-cancellation fee is due). Despite the fact that service could be terminated in month 12 with no cancellation fee being due, and the fact that the contract does not provide for a termination fee <u>after</u> the initial term has ended, and the fact that the plaintiffs are customers who continued service beyond the stated period to which the cancellation fee applied, SunCom would like the cloak of federal regulatory authority to re-write the agreement such that it can charge that

same consumer an "early-termination fee" in the middle of year two, three or ten of the relationship. What is "early" in year three?

In his declaration annexed to SunCom's petition, Mr. Kallenbach sedulously uses the term "rate structure" as the umbrella to bring any term, condition or business practice of the company, such as selling handsets at a discount, into the concept of a "rate." However, any charge or business expense can be argued as part of the "rate structure." Under SunCom's approach, myriad remote factors could be asserted to be part of the "rate structure." The business model justification proposed by the Kallenbach declaration is inapposite in a deregulated marketplace. It is the benefit of the bargain between a consumer and SunCom that must be enforced. State courts adjudicate contract rights and responsibilities. Deregulation encourages the marketplace to hold the parties responsible for their contractual obligations. To deem the company unfettered by its contracts because its contracts have financial aspects would effectively nullify the value of any contract and nullify the competitive market forces the Commission has been seeking to encourage for many years.

A carrier can always develop post-hoc rationalizations for why a charge was imposed when none was due, and how such a charge – while not provided for in the parties' contract -- was reasonable in amount and part of the "rate structure." Deregulation, at its core, requires the free marketplace to determine pricing and services. Contracts should have meaning and effect. In light of deregulation during the last decade, neither Congress nor the Commission ever contemplated such a giant step backward as SunCom urges in its Petition for Declaratory Ruling, not only for the industry, but for the American consumers as well.

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Clarification That Early Termination	)
Fees Charged to Cellular Telephone	)
Customers Are "Rates Charged" Within	)
The Meaning of 47 U.S.C. § 332(c)(3)(A).	)

OPPOSITION TO PETITION FOR DECLARATORY RULING AND CROSS-PETITION FOR DECLARATORY RULINGS

Debra Edwards filed the Amended Complaint attached as Appendix A to this Opposition and Cross-Petition as plaintiff in a class action suit pending in the state courts of South Carolina. She hereby petitions the Commission for entry of Declaratory Rulings clarifying for the court in the underlying action that the state-law claims concerning contractual "early-termination fees" being asserted in that litigation do not amount to regulation of cellular telephone service rates proscribed by 47 U.S.C. § 332(c)(3)(A). Rather these claims pertain to contract obligations separate from the rates for telephone service, and the State's adjudication of these claims will not affect cellular telephone rates or interfere with national telecommunications policy in any way. The state-law causes of action are exempted from the statutory ban on state regulation of rates under the express language of the statute itself because these claims relate to the terms and conditions of the private service contract (the early-cancellation fee is described in the "General Conditions" section of the agreement, Appendix B to this Cross-Petition), and these claims are also not impermissible "rate regulation" under well-established decisions of the Commission and the courts.

I

NATURE OF THE UNDERLYING LITIGATION AND THE REQUESTED DECLARATORY RULINGS

A. The Underlying Litigation and the Referral Order

Triton PCS Operating Company, L.L.C., d/b/a/ SunCom, the defendant in the underlying state court class action, entered cellular telephone service contracts with customers for an "initial term" of 12 months, subject to an early-termination fee if the customer cancelled the contract or switched service providers during "that" term. (The Contract form entered with respect to the named plaintiff is set forth as Appendix B to this Petition). SunCom's present Petition (p. 5) describes this as a deal for a "low initial price" based on the "subscriber's commitment" to remain a customer for the specified minimum period, such as the 12 month period in this case.

The lawsuit, which relates to conduct during the period from 2000 to date, alleges that in the case of the named plaintiff and other members of the putative class, SunCom has imposed the "early-termination fee" when customers switch cellular phone companies after the expiration of the initial 12 months of service under the SunCom 12 month contract. It is the imposition of an early-cancellation fee when service has continued ***after*** the initial term of the contract has already been completed that is at issue in the pending lawsuit. See the Amended Complaint in the pending state court litigation, Appendix A to this Opposition and Cross-Petition, at ¶ 4 (imposition of a fee after the 12-month period), ¶ 5 (contract claim relates to imposition of the fee after the initial term ends: "The agreements do not allow for an early termination fee after the initial term"), ¶ 6 (quoting the Edwards contract language: "My service plan has a 12 month service contract and if terminated prior to the end of **that** term I will be charged a cancellation fee of $200 to my account" (emphasis added)). See also ¶ 7 of the Amended Complaint

(SunCom's additional language specifying the applicability of the cancellation fee during the specified term), ¶ 19 (defining the proposed class as those who were charged early-termination fees after the initial term expired) and ¶ 8, quoting the contract language which flatly states that the agreement "will be governed by the laws of the state in which you reside."

The conduct of the defendant thus seeks to impede effective competition in the cellular telephone industry, by deterring customers from changing service providers even after the express period of the contract "early termination" provision has expired. It is not in accord with contract law or common understanding of such terms,[1] and is actionable under state law.

The lawsuit seeks relief solely upon state-law theories of breach of contract and unjust enrichment[2] on behalf of customers who were charged the early termination fee when they sought to end service with SunCom after the period to which the early-termination fee applied under the contract had expired. Absent a very clear written provision extending the "early-termination fee" beyond the initial term, general principles of law require that no fee is due.[3] No claims under federal law have been asserted. (The amended Complaint in the pending state-court proceeding

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[1] The Commission's current electronic brochure, WHAT YOU SHOULD KNOW ABOUT WIRELESS PHONE SERVICE (FCC WebSite http://www.fcc.gov/cgb/information_directory.html) has this to say about early termination fee practices in the industry:
"Most carriers require new subscribers to sign one-year contracts or service agreements when they sign up for a new service plan. Most charge an "early termination fee" to users who cancel their service plans prior to the end of that year. Some carriers offer additional incentives to subscribers who sign up for two-year service agreements. Consumers should carefully read any potential service contract prior to signing up for service."

[2] As discussed below, this form of "unjust enrichment" cause of action asserts that imposing a charge where the contract does not allow for it unjustly enriches the carrier. It is thus quite different from a claim that imposition of all early-cancellation fees unjustly enrich a carrier. The actual claim in this case does not attack the amount of the early-termination fee, or the fairness of such a fee during the stated term. Hence it is not the same sort of "unjust enrichment" theory which, in some other contexts, could require an assessment of the reasonableness of the fee imposed, or its relationship to services and charges of the carrier during the contract term.

[3] This has been the Commission's assumption as well. See Applications of AT&T Wireless Services Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations and Applications, 19 FCC Rcd. 21522 (2004), at ¶ 99 ("We find that . . all subscribers whose original contract periods have expired . . . therefore face no penalties for early termination.") SunCom identifies itself as a member of the AT&T Wireless network.

is set forth as Appendix A to this Petition). Since this is the nature of the litigation involved, the self-serving "BACKGROUND" offered by SunCom (Petition, pp. 4-8) based on the declaration of its in-house counsel projecting the specter that SunCom would be "unable to collect early termination fees" if the Commission does not rule in its favor is baseless. Whatever the value of the attorney's declaration annexed to the SunCom petition (Declaration of Charles H. N. Kallenbach, February 22, 2005), itself remarkably qualified by disclaimer,[4] it is not necessary or appropriate for the Commission to make factual assumptions on any of the issues it raises in order to resolve the pending issues.

No claim is asserted in the pending state-law litigation that the amount of the fee originally imposed is unreasonable, or not justified by the services and rates provided by this carrier. See Appendix A hereto, at ¶¶ 1-9. SunCom's contrary representations to this Commission[5] are either baseless hyperbole,[6] or an implied invitation to the Commission to address other situations not presented here, which are not necessary to address in order to resolve the present parties' dispute, and far beyond the guidance the state court has asked for. Indeed, it is a fundamental distortion to characterize the pending state case as seeking "a means of altering or avoiding payment of a contractually imposed CMRS early termination fee," (Petition at n.4)

[4] The Declaration, which under 47 C.F.R. § 1.16 is supposed to be substantially in the form "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct" is – in SunCom's Petition -- limited to "the facts contained herein" (without specifying what the facts covered by this representation are) and is qualified by the disclaimer that those portions of the foregoing are true and correct "to the best of my knowledge, information and belief," based on "reasonable inquiry". This recitation is followed by other "Rule 11" style language about being well grounded and an argument for extension of present law. See Kallenbach Dec. at unnumbered p. 5.

[5] See Petition p. ii characterizing the issues as though the underlying litigation involved a "claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees".

[6] See Petition at p. 1, addressing state law claims to "nullify, modify [or] condition" early-termination fees, and Id. at p. 2, speaking of claims to "retroactively set the appropriate rates for service." It is simply false for SunCom to represent that "the chief aim of the suit is to preclude SunCom from charging its contractual early-termination fee." Petition at p. 9.

when the clear thrust of the state litigation is to seek enforcement of the contract as written. It is also misleading to assert (Petition at p. 3) that the issue involves – in any way – problems of "revenue lost when customers prematurely terminate long-term contracts." The named plaintiff, and the class represented in the state courts, assert claims only about instances where the carrier has imposed the termination fee after the expiration of the stated term, in violation of the contract's express provisions and without basis in state contract law. That's how the putative class membership in the pending case is defined and expressly pled. See Appendix A hereto, ¶19. Finally, there is no claim or form of relief asserted or sought in the pending state case under which "the early termination fees are eliminated or modified by operation of state law." (as asserted in the Petition p. 4). Rather, the state suit seeks application of the parties' contracts as written. Hence, fairly read, the plaintiffs' claims do not invite or support a foray into matters raised in SunCom's Petition, nor is it necessary or appropriate for any Declaratory Ruling by the Commission to address categories of claims not raised in the present litigation.

SunCom's own Petition represents that it only "charges early termination fees to subscribers who do not fulfill the terms of their long-term service contracts" and that the fees help SunCom recover costs and planned earnings "from customers who terminate their long-term contracts early." Petition p. 6. The charges are supposed to be collected, SunCom's Petition tells us, "if they [the customers] terminate service early." Petition at p. 7. This case, however, is limited by the express language of the pleadings and class-definition to claims about SunCom collecting the early-termination fee from customers who have completed the stated term of the contract, without any basis in the contract for SunCom to do so. Thus the factual submissions of SunCom on this Petition should be rejected as inapposite, and ignored.

No trial has yet been held in the state court litigation, and only limited discovery yet been undertaken. Even at this stage in the pretrial investigation, however, SunCom has admitted that throughout South Carolina persons have been charged an early-cancellation fee after the expiration of the stated contract term. Rather than permitting completion of preparations in the pending civil suit, the state trial court – at SunCom's request – has stayed the action in response to SunCom's assertion, made in a pre-discovery motion for "Judgment on the Pleadings," that the early-termination fee is a "rate" as to which state-law causes of action are unavailable because of the provisions of Communications Act.[7]

The South Carolina court's order, dated January 18, 2005 (annexed as Appendix C), makes no factual findings. (Because of the early stage of the state-court litigation, that court will take the allegations in the plaintiffs' complaint as true for present purposes.[8]) Instead, the Order recites in pertinent part:

> *WHEREAS this case involves a challenge to an early termination fee charged to a cellular telephone customer and a purported class; and*
>
> *WHEREAS the Court's jurisdiction may depend on whether the early termination fee at issue in this case is or is not a "rate[] charged" within the meaning of 47 U.S.C. § 332(c)(3)(A), which section federally preempts state regulation of such a "rate[] charged.*

(Brackets in the original Order, Appendix C hereto). The Order then directs commencement of proceedings to seek Declaratory Rulings from the Commission and the Order provides that the state-court action is stayed "until a final ruling has been rendered by the FCC on the Petition for Declaratory Ruling on whether the early termination fee at issue in this case is such a 'rate[] charged'." Id., p. 1-2.

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[7] This claim is made, inter alia, in the Defendant's June 30, 2004 Motion for Judgment on the Pleadings and its June 29, 2004 Memorandum in support thereof, and is the subject of SunCom's Petition before this Commission, filed February 22, 2005.

[8] See, e.g., Falk v. Sadler, 533 S.E.2d 350, 353 (S.C. App. 2000); Hous. Auth. of Columbia v. Cornerstone Hous.,

Plaintiff Edwards has repeatedly argued to the South Carolina state court that the initial responsibility for ruling on whether adjudication of the state-law remedies in the pending lawsuit is permissible under § 332 of the Act rests with that court. The Commission has so held: "the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by the state trial court based on the specific claims before it." *Wireless Consumers Alliance*, 15 FCC Rcd. at 17036. Plaintiffs have preserved this argument, and maintain before this Commission as they do before the courts of South Carolina that it is the State Courts which have the responsibility and authority to rule, in the specific case, on the issues presented. However, since the Commission has noted in the past that it can sometimes provide "legal guidance on this issue" (Id.), the Plaintiffs/Cross-Petitioners request that the issues raised in the present Cross-Petition be addressed in any Declaratory Ruling by the Commission.

Abuse of early-termination fees, in an effort to depress a company's "churn rate" of customers switching service providers, is a restraint of competition – raising a steep barrier to deter customers from making an informed choice among competing providers of services in a competitive marketplace (the SunCom fee, for example, is $200). Imposition of contract termination fees generates more consumer complaints in the industry than almost any other form of conduct by cellular telephone service providers. See Quarterly Report on Informal Consumer Inquiries and Complaints Released, Federal Communications Commission, News Release, February 11, 2005. In a recent period, for example, there were several hundred complaints over contract--early termination issues, which was the among the largest categories of all complaints received by the Commission, and exceeded the volume of consumer complaints lodged with respect to service quality issues, carrier marketing, advertising and equipment issues. Id. at p. 9.

L.L.C., 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003).