

See also Ninth Report: Implementation of Section 6002(b) of the Omnibus Budget

Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions

With Respect to Commercial Mobile Services, 19 FCC Rcd. 20597 (2004) ("Ninth Report ") at ¶197.

The pleadings and procedural posture of the underlying state-court action thus present a simple and readily-defined factual situation in stark relief, which can easily be addressed in the sort of Declaratory opinion which the trial court appears to request that the parties obtain from this Commission:

A cellular telephone service provider enters contracts with customers that may be found by the trier of fact in the state-court litigation to involve a cancellation fee or early-termination fee applicable only to the first 12 months of service, but the company persists in imposing the charge upon customers who continue with the service provider beyond the initial period and into a second or subsequent year and then elect to terminate the service or change providers. The consumers bring solely state-law claims for return of early-termination charges imposed after the early-termination period, which charges were not proper under the contract's own terms.

This practice is expressly pled in the underlying actions, and the named plaintiff therein exemplifies the allegations. These are, in short, real and ripe claims. And the Commission is aware from the thousands of consumer complaints that have been lodged in the last several years about industry practices in connection with termination fees that the likelihood plaintiffs will ultimately be able to demonstrate to the court that *a great number of consumers* were affected by the alleged conduct is very real.⁹

⁹ In the last three years alone, the number of early-termination complaints received by the Commission exceeds approximately 7,000. In 2002 the total was 1,860, in 2003 the total was 2,386, and in 2004 such early-termination disputes were running at approximately 950 per quarter for an estimated 3,800 for the year. See Quarterly Reports of Consumer Complaints released May 7, 2002, October 15, 2002, March 20, 2003, March 27, 2003, May 30, 2003,

Because no evidence has yet been taken and no ruling rendered in the pending litigation, it must be assumed at this juncture that the state law claims for breach of contract and unjust enrichment pled in the present pleadings are viable as a matter of South Carolina law. The question presented here is whether adjudication of these claims under state contract law principles would conflict with federal communications law sufficiently to bar even consideration of them in a state court. Thus the Commission is not asked to construe the contract, but to provide analysis relevant when the State court ultimately decides the question whether state-law contract and unjust enrichment claims concerning an early-termination fee as set forth in a written contract are foreclosed as a matter of the Communications Act.

Finally, the nature of the “unjust enrichment” claim in the pending state case deserves comment. Because the state claims in the present dispute concern only situations where the minimum contract period has already been completed, the context is not like a typical unjust enrichment claim that asserts that a fee is not justified by the services or discounted rates that were set in consideration of the termination fee. See Petition at p. 15. Thus the pending case was pled initially solely as a breach of contract case for collecting a fee not provided for on the face of the service contract. The amended complaint adds the unjust enrichment theory limited to the post-contract period claim context, and thus – fairly read – the claim is not seeking a determination that \$200 is an “unjust amount” (Petition p. 15) but that recovery of a fee (any fee) after the set period has expired is wrongful as a matter of contract rights under South Carolina state law principles and subject to recovery under the unjust enrichment theory, as illustrated in Moore v. North American Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995)(recovery of payments a party previously made, which should not have been required, is proper under the

unjust enrichment cause of action). See also Harper v. McCoy, 276 S.C. 170, 172, 276 S.E.2d 782, 784 (1981)(recovery of amounts credited to one party under a contract where the contract did not warrant that payment or credit is a cause of action for unjust enrichment in South Carolina law).

Thus the pending case, unlike many imaginable contexts for unjust enrichment claims, does not require assessment of the adequacy or value of services, or the reasonableness of a particular amount of fee. See the Amended Complaint, Appendix A to this Opposition and Cross-Petition, at ¶¶s 25-34 (no allegation that the fee is unreasonable, that its amount was improper, that the value of the services was inadequate). It is a way of expressing the impropriety of collecting, in a contract-based relationship, a fee when the terms of the agreement do not authorize that charge. See Id. at ¶¶s 29-32.

The Commission's Declaratory Ruling in Sprint PCS and AT&T Corp., 17 FCC Rcd 13192 (2002), on which SunCom relies in connection with the unjust enrichment count of the Edwards state-law complaint, makes the plaintiffs' point. In that proceeding Sprint PCS had argued that it had provided a service to AT&T and the parties' contractual relationship did not deal with any right to recover a fee for the service. The Commission noted that in such a context, a claim for recovery under an unjust enrichment theory would could require "require the court to establish a value (i.e., set a rate) for the service provided in the past." Id. at 13198, n. 40. The posture of that proceeding, therefore was diametrically opposed to the present context. A claim was made in Sprint PCS by the supplier of a service for previously unfixed form of compensation, based on usage (a rate). Here, by contrast, the early-termination fee is fixed under the SunCom contract, and it is applicable to a defined period of service. Here it is the customer who has been charged a fixed amount that is specified in the express contract provision which

addresses early-termination fees – a provision which limits the period during which the fee may be imposed. Hence all unjust enrichment claims do not necessarily involve fixing a rate, and the present case is a clear example of a context which would not involve the South Carolina courts in setting a rate.

The Commission said several times in the Sprint PCS and AT&T declaratory ruling that whether there is a contractual obligation is a matter for the state courts. “Turning to the question whether there was such an agreement here, we believe that it is an issue that should be resolved by the Court.” Id. at 13198, ¶ 13. The Commission continued, citing Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014, 15057, ¶ 77 (1997): “We note that the [Communications Act] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract law as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.” Id. at 13198 n. 39. The Commission cited Ting v. AT&T, 182 F. Supp.2d 902, 938 (N.D. Cal. 2002) for the proposition that “state law contract claims [are] not preempted in a detariffed environment.” And, the Commission held, if it were arguable that an unjust enrichment claim would set a rate (as on the facts of Sprint PCS), even then the Commission’s practice in such situations is to “defer to the court to address this state law claim.” Id. at 13198, n. 40. “We believe that the question whether the parties entered into a contract concerning such a payment obligation is not a matter of federal communications law and accordingly appears beyond the scope of the Court’s referral.” Id. at 13192, ¶ 1.

Cross-Petitioners ask that the Commission give advice to aid the South Carolina court in resolving the issue which is that court's to decide, and to address only the context that is actually being litigated in South Carolina, not other, imagined, termination-fee disputes.

B. Declaratory Rulings Sought

At bottom, plaintiffs Debra Edwards et al. in this Opposition and Cross-Petition seek a declaratory ruling, in accord with the Declaratory Ruling in *Wireless Consumers Alliance* and numerous other decisions already rendered by the Commission and the courts, that the pending state law claims over improper collection of an "early termination fee" after the period to which it applies as a matter of state contract law has expired are not claims foreclosed by the Communications Act as a regulation of "rates." However, because substantial discovery and ultimate fact-finding still lie ahead in the state litigation, an opinion from the Commission at only the very highest level of abstraction will not adequately guide the state trial and appellate courts. Thus plaintiffs request that the following component issues be addressed in setting forth the Commission's view of the matter:

[1] that consumers' state-law contract claims are not barred by the Communications Act, by preemption or by any other doctrine interpreting or applying federal law, where they relate to imposition of early-termination fees by cellular telephone service providers after the contract period in which such fees were applicable.

[2] that consumers' state-law unjust enrichment claims are not barred by the Communications Act, by preemption or by any other doctrine interpreting or applying federal law, where they relate to imposition of early-termination fees by cellular telephone service providers after the contract period in which such fees were applicable.

[3] that an early-termination fee which would never be imposed if a cellular telephone customer remained a customer of SunCom in perpetuity is not part of the "rate" for such service.

[4] that an early-termination fee set forth in a service contract between a cellular telephone provider and a customer, in an amount which is not affected by the customer's usage of telephone services, by the minutes of service, or by the monthly charges for such usage, is not a

part of the “rate” for cellular telephone service.

[5] that an early-termination fee, which is not listed on monthly statements to the cellular telephone customers as a charge, is not part of the “rate” for such service.

[6] that Plaintiffs have not challenged in the pending state litigation, either directly or indirectly, the reasonableness of the rate charged by SunCom for cellular telephone service, and plaintiffs do not seek to benefit from a different rate.

[7] that Plaintiffs' contract and unjust enrichment claims do not seek to change the applicable amount charged by SunCom nor do these claims seek to change the service obligations of SunCom under its rates.

[8] that even if the early termination fee were deemed a “rate” for telephone service, the plaintiffs’ state law contract and unjust enrichment claims are not barred by federal law because plaintiffs have not challenged the reasonableness of the amount of the early-termination fee, and because a private action concerning billing and collection practices or imposition of charges inconsistent with the applicable contract provisions concerning early termination fees, if such a cancellation fee were a “rate” under the contract, is not foreclosed by statute or other doctrine.

[9] that the provisions of 47 U.S.C. § 414 prescribing that nothing in the Communications Act shall “in anyway abridge or alter the remedies now existing at common law or by statute,” and assuring that “the provisions of this Act are in addition to such remedies” require that state law claims relating to early-termination fee provisions in cellular telephone service contracts are not precluded.

II

THE PENDING STATE-LAW CLAIMS ARE NOT PROHIBITED RATE REGULATION

Defendant SunCom has asserted to the state courts of South Carolina that a contractual cancellation fee for "early termination" of the contract is a "rate charged" for telephone service, and that state law claims concerning the applicability of the early termination fee under the terms of the contract are preempted by federal law. The Commission should rule – in accord with its own prior dispositions in many different matters – that state court adjudication of state law claims concerning early-termination fees under such contracts do not constitute prohibited rate regulation.

A. The Plain Meaning of the Statute Preserves These State-Law Claims

There is no provision in federal law expressly preempting state law breach of contract or quantum meruit type claims. In seeking to convince the state court that these private civil damage claims are precluded, defendant SunCom attempted to rely upon only part of the statute which governs preemption and continued viability of state law, and SunCom proposes an overreading of the concept of telephone "rates" which is inconsistent with the intent of Congress and the rulings of this Commission.

The Communications Act provision states that :

no 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.*

47 U.S.C. 332(c)(3)(A)(emphasis added).¹⁰ This express provision is binding on the Commission and the courts.¹¹

The Act's plain language saves state law claims and permits states to regulate terms and conditions of wireless service other than rates charged and market entry. In American law, "terms and conditions" refers to arrangements established in the parties' contract. The current edition of BLACK'S LAW DICTIONARY defines "term" as "A CONTRACTUAL STIPULATION" (8th edition, 2004 at p. 1509). "Condition" is likewise defined as a concept arising in contract and in determining liability on a contract theory. See *Id.* at 312. According to the current DICTIONARY OF MODERN LEGAL USAGE (2nd Ed. 1995), Bryan Garner, ed., "Terms and conditions" refers to the "terms" of a contract, and the word "terms" itself is "an elliptical form of the *terms of the contract.*" *Id.* at 872.

The question of whether § 332(c)(3)(A) expressly preempts an award of monetary relief in the underlying state court action turns on the question of whether such an award would constitute rate regulation within the meaning of ¶ 332(c)(3)(A) intended by Congress. It would not: Rate regulation, or to "regulate . . . the rates charged" in the words of § 332(c)(3)(A), clearly refers to an action whose principal purpose and direct effect are to control prices. The term ordinarily refers to direct price controls of the sort that the 1993 amendments authorized the Commission to terminate

¹⁰ Section 332(c)(3)(A) is part of the 1993 amendments to the Communications Act of 1934 (§ 151 et seq.) (Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 6002(b)(2)(A) (Aug. 10, 1993), 107 Stat. 312, 393 (Communications Act)). The 1993 amendments authorized the FCC to exempt wireless telephone service from the tariff filing requirement and the provision allowing the FCC to prescribe just and reasonable charges, classifications, practices, and regulations, provided that the FCC determined that those provisions were not necessary to ensure just and reasonable charges, classifications, practices, and regulations. (Pub.L. No. 103-66, §6002(b)(2)(A) (Aug. 10, 1993) 107 Stat. at 312, 393, codified at § 332(c)(1)(A).) The FCC so determined and ordered the exemption in 1994. In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services (1994) 9 FCC Rcd. 1411; see 47 C.F.R. § 20.15(c).

¹¹ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Chevron*, the Court held that, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43.

for wireless telephone service providers by exempting them.¹² In the context of amendments that allow the Commission to exempt providers from its authority to "determine and prescribe" (§ 205(a)) just and reasonable charges, "regulate . . . the rates charged" (§ 332(c)(3)(A)) refers to the same sort of direct price controls. Thus, § 332(c)(3)(A) allows the Commission to discontinue its direct price controls and prohibits the states from imposing their own.¹³

The expressly permitted sphere of state-law thus includes "matters such as consumer billing information and practices," "billing disputes" and "other consumer protection matters." Russell v. Sprint Corp., 264 F.Supp.2d 955, 961 (D. Kan. 2003).

Congressional legislative history records demonstrate that claims like those of Ms. Edwards and the class of plaintiffs in the present state court litigation are included within the definition of "terms and conditions" left to be litigated under State law:

Such matters as customer billing information and practices and billing disputes and other consumer protections matters, facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions".

H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588. Contrary to SunCom's position, Congress intended 47 U.S.C. § 332 (c) (3) (A) to preserve these sorts of state law causes of action. Accord: Lewis v. Nextel Communications, 281 F. Supp. 2d 1302 (N.D. Ala. 2003).

¹² Spielholz, 86 Cal. App. 4th at 1373, 104 Cal. Rptr. 2d at 203.

¹³ Id., finding that "This meaning is 'clear and manifest'," and citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996); California v. ARC America Corp., 490 U.S. 93, 101 (1988).

**B. The Commission Has Determined that Private Claims
Of this Nature are Not Precluded Under the Act.**

The Commission has found that state rate-regulation barred under § 332 involves such things as the establishment of “rate band guidelines” by public utilities commissions, with features such as rate ceilings, waiting periods for implementation of rate changes, and wholesale/retail rate differentials. See *In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd. 7486 (1995).

In commenting on California’s efforts to regulate charges for cellular telephone service, the Commission described the state’s regime as addressing rates, and it noted that the California PUC’s restrictions did not apply to such things as “termination penalties,” which the Commission noted were part of the “terms and conditions” of service, distinct from the “rate bands” involved in that proceeding. *Id.* at ¶ 45. Thus, since the present statute expressly permits state law to deal with matters of “terms and conditions,” it is apparent that litigation in state courts over early-termination fees is not blocked by the statute.¹⁴

In the 1995 disposition just cited, the Commission deferred further express rulings on whether regulation of contract renewal and termination matters were “precluded under the terms of OBRA as ‘rate regulation,’ or whether such oversight may be retained by the states as ‘terms and conditions’ regulation.” *Id.* at ¶ 109. However, the Commission gave some preliminary

¹⁴ California and other states regularly hear claims concerning misuse of early-termination fees by service providers and determine whether state contract or regulatory law allows collection of such charges in various circumstances. See, e.g., *Investigation on the Commission’s Own Motion (“Cingular”)*, Decision 02-20-061, rejecting a claim that such claims are preempted by § 332 (upheld without further comment, 2004 Cal. PUC LEXIS 453 at * 11); *Goodman v. Sprint Spectrum*, Case No. 03-0628-T-C, 2003 W. Va. PUC LEXIS 4144 (September 12, 2003).

guidelines on the applicable considerations under the Act:

VI. REGULATION OF OTHER TERMS AND CONDITIONS

142. Prior to OBRA, Section 332 prohibited the states from imposing "rate . . . regulation" upon certain wireless telecommunications carriers. This prohibition was construed broadly to preclude almost all state regulatory activity. As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the CPUC is entitled to continue, despite our denial of its Petition.

143. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio service. The Committee stated:¹⁵

By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

144. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the California Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

145. First, although the CPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.¹⁶ In consequence, it is conceivable that matters might arise under complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit the CPUC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

¹⁵ Citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

¹⁶ Citing as an example, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a).

146. Second, under the same logic, we also conclude that several other aspects of California's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the CPUC, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe the CPUC retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of California's existing rate regulation practice at issue.

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, 10 FCC Rcd. 7486 (most footnotes omitted; emphasis added). See also the parallel decision relating to regulation of terms and conditions by the State of New York: Report and Order, In the Matter of Petition of New York State Public Service Commission To Extend Rate Regulation, 10 FCC Rcd. 8187 (1995).

Initially "a particular demarcation point between preempted rate regulation and retained authority over other terms and conditions" by the states was not defined by the Commission.¹⁷ Even during the 1990s, however, it was made clear that "rates" refers to the usage charges a consumer incurs in obtaining cellular telephone service. Thus in considering such rates the Commission focused on flat fees, access charges, per-minute charges and the like:

The basic charges for cellular service usually consist of a flat monthly fee for "access" to the cellular system (sometimes including a number of minutes of "free" usage), per minute charges for usage during "peak" day periods, and per minute charges for "off peak" night and weekend usage. Carriers typically offer a variety of pricing packages. For example, one package might be aimed at people who expect to use their cellular telephone for emergencies only. Such a package would have a relatively low monthly fee and high per minute charges. Another package might be aimed at people who want to use their cellular telephones a substantial amount each month. That package will probably have a high monthly access charge in exchange for a large number of "free" minutes or a low per

¹⁷ See In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 14 FCC Rcd. 1969 (1998) at n. 24.

minute charge. Many packages require customers to sign a contract for one year or more.

First Report, In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd. 8844 (1995).

In 1999, the Commission decided *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd 19898 (1999) ("*Southwestern Bell Petition*"), in which it held that while under § 332(c)(3) state or local governments may not, with very limited exceptions, regulate the entry of or the rates charged by CMRS providers, states may, however, regulate other terms and conditions of CMRS, such as customer billing practices and consumer protection requirements. *Id.* at 19901 ¶ 7. In *Southwestern Bell Petition* the Commission drew a clear distinction between "the rates and rate structures themselves" and the "other contractual, service and marketing practices of the CMRS provider." *Id.* at 19904-05 ¶ 15. In granting a Declaratory Ruling, the Commission warned the service providers involved that, under § 332(c)(3)(A) of the Act, the Commission and the courts are agreed that outside of direct regulation of rates, states "are free to regulate all other terms and conditions for CMRS providers." *Id.* at 19901 ¶ 6.

The Commission went on, in its *Southwestern Bell Petition* decision, to note that the statute leaves contract and other remedies under state law available to consumers:

7. Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness per se of the rates or rate structures of CMRS providers. On the other hand, Section 332(c)(3)(A) provides an exception for state regulation of "the other terms and conditions of commercial mobile service." The House Report on the Omnibus Budget Reconciliation Act of 1993, in which the amended language in Section 332 was enacted, states that, "[by] 'terms and conditions,' the Committee intends to include such matters as customer billing information

and practices and billing disputes and other consumer protection matters" Courts considering the issue so far have held that Section 332(c)(3)(A) does not preempt complaints that do not allege that billing practices of CMRS providers are unlawful per se, but challenge the implementation of these practices on grounds of breach of contract, consumer fraud, or false advertising.

Id. at 19901-02 ¶ 7.

In the *Southwestern Bell Petition* decision, the Commission thus held that state law claims stemming from state contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted under § 332. 14 FCC Rcd. at 19908 ¶23. The Commission held that billing information, practices and disputes which may be regulated by state contract or consumer fraud laws fall within the "other terms and conditions" which states are allowed to regulate. Id. at 19901 ¶7.

In *Southwestern Bell Petition* the Commission cited and approved (Id. at 19901 n. 13) the following prior state and federal civil litigation decisions as examples of some of the private rights of action properly maintained under § 332: *Tenore v. AT&T Wireless*, 136 Wash.2d 322, 335-45, 962 P.2d 104, 110-115 (1998)(in a suit where plaintiffs contended that the papers on which the service provider invited customers to subscribe for service did not disclose a billing practice, the court concluded that "the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to 'substitute its judgment for the agency's on the reasonableness of a rate.'¹⁸ Any court is competent to determine an award of damages"); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997)(claims that are not based on duties imposed by federal law are not barred; "breach of contract claims do not challenge the reasonableness of a billing

¹⁸ Citing *Nader*, 426 U.S. at 299, and *Bennett v. Alltel Mobile Comm's. of Ala., Inc.*, No. 96-D-232-N, slip op. at 6

practice"); DeCastro. v. AWACS, Inc., 935 F. Supp. 541, 554-55 (D. N.J. 1996)("Count II

contains a breach of contract claim," alleging imposition of charges "inconsistent with a reasonable interpretation of the fee schedule incorporated in Comcast's contracts with its customers." "Count IV raises a claim for unjust enrichment"). The Court in DeCastro found the contract claim obviously not barred, and after more extended discussion concluded that the unjust enrichment claim was also not preempted. Id. at 550 (private cause of action on contract claim was not barred under the Act), and Id. at 551-555 (unjust enrichment claim was not preempted).

In Sanderson, the counts pled by the private plaintiffs also included "breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment." 958 F. Supp. at 952. The court concluded: "The Court therefore holds that none of Sanderson's claims present a challenge to the reasonableness of Comcast's billing practices." Id. at 956. As noted, the Commission cited these outcomes in the *Southwestern Bell Petition* decision with approval, as examples of disputes appropriate for litigation in state courts. 14 FCC Rcd. at 19908 & n. 13.¹⁹

Finally, in *Southwestern Bell Petition*, the Commission expressly warned the cellular providers that "Congress has explicitly permitted regulation of 'the other terms and conditions of commercial mobile service' by the states. We therefore do not agree with the arguments of Southwestern or CMRS provider commenters to the extent that they imply that such preference for competition over regulation results in a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws."²⁰ Id. at ¶ 10 (emphasis added).

(1996).

¹⁹ Accord: *Fax Telecomunicaciones v. AT&T*, 952 F. Supp. 946 (E.D. N.Y. 1996) (enforcement of contract would neither require court to assess reasonableness of rates nor discriminate in pricing).

²⁰ See also Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket No. 94-106, Report and Order, 10

While SunCom reads *Southwestern Bell Petition* to immunize contract disputes from state law anytime giving discounts on handsets or other incentives are offered (See Petition, pp. 10-11), the Commission's ruling as noted above does not so hold. Particularly in a context such as the present South Carolina litigation, where the dispute concerns collection of an early-termination fee after the minimum contract period has been completed, the argument that the "initial period" involves a "rate structure" is unavailing to SunCom: it is simply not applicable and not relevant to the pending claims. Plaintiffs/Cross-Petitioners seek only to have the state courts of South Carolina adjudicate the "neutral application of state contractual . . . laws." *Id.* at ¶10.

Thus by 1999 it was clear in the Commission's published decisions that state contract claims are not foreclosed under the Act.²¹ Accord: In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service, 17 FCC Rcd. 14802 ¶ 6 (2002).

The Wireless Consumers Alliance Synthesis. In 2000, the Commission returned to pertinent aspects of these issues, and directly ruled that state courts have authority to decide consumer fraud and breach of contract claims – including those challenging a wireless service provider's statements and promises concerning rates. *Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling Concerning Whether the Provision of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve*

FCC Rcd. 7025, 7060-61, ¶¶ 79-82 (1995) (concluding that states may regulate terms and conditions of CMRS offerings), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

²¹ See also *Financial Planning Institute, Inc. v. American Tel. and Tel. Co.*, 788 F. Supp. 75, 77 (D. Mass. 1992) (holding breach of contract claim, based on AT&T's failure to accurately record length of "800" calls, not preempted by Communications Act).

to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, Memorandum Opinion and Order, 15 FCC Rcd. 17021 (2000) ("*Wireless Consumer Alliance*").²²

In *Wireless Consumers Alliance* the Commission considered the issue of whether § 332 generally preempts state courts from awarding monetary relief. The Commission noted its prior finding that the language and legislative history of §332 did not support "the preemption of state contract or consumer fraud laws relating to the disclosure of rates and rate practices." 15 FCC Rcd. at 17028 ¶ 14. The Commission went a step further, finding that the same statutory language and

²² The Commission ruled that:

the legislative history of Section 332 clarifies that billing information, practices, and disputes – all of which might be regulated by state contract or consumer fraud laws – fall within 'other terms and conditions' which states are entitled to regulate. ... [S]tate law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.

Wireless Consumer Alliance 15 FCC Rcd. at 17028-29 ¶ 14. The Commission further found that:

a case may present a question of whether a CMRS [*i.e.*, wireless] service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier's advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. ... [A] court need not rule on the reasonableness of the CMRS carrier's charges in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. ... [T]he court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance. ... In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a 'reasonable rate' for its service may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing.

Id. at 17035 ¶ 26 (citations omitted).

legislative history did not, as a general matter, prevent state courts from awarding damages to customers of commercial mobile radio service providers based on violations of state contract or consumer fraud laws. *Id.* at 17029 ¶ 14.

In *Wireless Consumers Alliance* the Commission concluded that §332(c)(3)(A) generally does not preempt an award of monetary relief by state courts based on state tort or contract claims, unless a court "purports to determine the reasonableness of a prior rate or it sets a prospective charge for services." *Id.* at 17026 ¶ 9, 17040 ¶¶ 38, 39. The Commission distinguished between "an outright determination of whether a price charged . . . was unreasonable," which would be preempted, and the determination of "whether . . . there was a difference between promise and performance" in the context of false advertising or breach of contract, which would not be preempted. *Id.* at 17035 ¶¶ 25-26.²³ In the pending South Carolina litigation, it is alleged that SunCom has failed to perform under the parties' contract by charging a fee that was not provided for.

The Commission specifically rejected the argument of the carriers that consumer claims, including claims for return of improper charges collected, were in fact disguised attacks on the reasonableness of the rate charged for the service, stating:

A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other reasonable terms, conditions, or limitations on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or

²³ This holding of the Commission has been recognized and applied in subsequent court decisions across the country. See, e.g., *Naevus Int'l, Inc. v. AT&T Corp.*, 283 A.D.2d 171, 173, 724 N.Y.S.2d 721, 723 (N.Y. App. Div. 2001) (citing the Commission's decision in *Wireless Consumers Alliance*, the New York court held: " However, to the extent the breach of contract, breach of warranty and unjust enrichment claims are based on AT&T's alleged failure to credit subscribers properly for making repeat telephone calls necessitated by involuntary disconnections, as was allegedly promised and contracted for, those claims are not preempted, since their review will not require an inquiry into the reasonableness of the rates charged or AT&T's entry into the market").

rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

Wireless Consumers Alliance, 15 FCC Rcd. at 17035-36 ¶ 27 (emphasis added). Accord: Moriconi, 280 F. Supp. 2d at 867.

The holding of *Wireless Consumers Alliance* is simple: It is that “section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims”. This is how the Commission itself summarized the holding of *Wireless Consumers Alliance* in its more recent ruling, *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd. 14802, 14819 & n. 119 (2002).

A federal court expressly noted that in *Wireless Consumers Alliance* “the FCC was considering the preemption issue in the defensive posture, that is, the argument of mobile service providers that an award of damages to plaintiffs who prevailed in their state consumer protection, tort, or contract laws was preempted by § 332.” Moriconi, 280 F. Supp. 2d at 877 & n. 3. That, of course, is what defendant SunCom is pursuing in the present case.

The correct disposition of the present dispute is therefore clear, and is *a fortiori*. Claims concerning private contracts involving “early termination” provisions are even farther removed from rate regulation than the issues involving “promises” about the rates themselves as reviewed in *Wireless Consumer Alliance!*

Major court decisions have recognized the significance of the *Wireless Consumer Alliance* decision. Thus in Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1072-74 (7th Cir. 2004), the Seventh Circuit court of appeals recognized that the Commission gave an important “negative” answer in addressing whether damage awards against commercial mobile service providers based on

state court tort or contract claims are preempted by § 332 as equivalent to rate regulation. 15 FCC Rcd. at 17021. Not only did the Commission conclude that such claims are generally preempted only where they involve the court in ratemaking, (*Id.* at 17034, ¶¶ 23, 24), but it expressly rejected the argument that any determination of monetary liability is equivalent to a finding that the service was inadequate for the charge, and therefore necessarily a finding that the rates charged were unreasonable. *Id.* at 17035 ¶25. Thus the Commission recognized that state law claims are preempted only where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service.²⁴

Thus, under the Commission's prior opinions and dispositions, for a wide variety of purposes, it is clear that contract provisions relating to early termination fees are not matters on which state-court proceedings are foreclosed under the Act. See generally the Commission's current electronic booklet, WHAT YOU SHOULD KNOW ABOUT WIRELESS PHONE SERVICE (FCC WebSite http://www.fcc.gov/cgb/information_directory.html) (describing pricing and "charges" as normally being "by the minute" and including "bucket" and "basket" pricing, peak and off-peak rates, limited numbers of minutes, different rates for excess minutes, roaming surcharges and similar charges based on usage per month – early-termination fees are not treated by the Commission as part of the charges or rates in this analysis.). Accord: Ninth Report, 19 FCC Rcd. 20597 (2004) ¶¶ 113-14.

This distinction between charges for service, on one hand, and other terms is embedded in myriad other dispositions by the Commission. In other contexts, such as disputes between telephone companies, the Commission has found that “early termination fees” are distinct from “rates” and other matters. See, e.g., Telephone Number Portability – Carrier Requests for Clarification of

²⁴ Fedor, 355 F.3d at 1073, citing *Wireless Consumers Alliance* at p. 17035 ¶ 25.

Wireless-Wireless Porting Issues, 18 FCC Rcd. 20971 (2003) at ¶ 14 (in ruling on the portability of telephone numbers, the Commission expressly distinguished “provisions concerning minimum contract terms, early termination fees, credit requirements, or similar provisions,” which are matters of contract, and the Commission stated that redress for violations of such terms would be by seeking “compensation for any breach of contractual agreements.”) Id.

And for many different purposes the Commission has demonstrated the common-sense interpretation that “rates” for consumer telephone service are the per-minute charges and other charges that show up on monthly statements. See In the Matter of Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and other Long-Distance Services to Consumers, 15 FCC Rcd. 86547 (2000) (“What matters to consumers is not just the per-minute rate, but rather how that rate, along with all additional fees and charges, will ultimately be reflected in the charges they see on their monthly phone bills.”) See also Id. at ¶ 16 (“basic rates” means, to a “telecommunications professional” a class of service, and to a consumer this term refers to charges normally imposed for specific service usage). See Id. at Example 8 (per-minute rates and \$0.99 directory assistance charges based on usage). See also In the Matter of Truth-in-Billing and Billing Format, 14 FCC Rcd. 7492 (1999) at ¶ 55 (discussing requirements for separate statement of recovery of regulatory fees along with per-minute usage charges).

A “rate plan” has been referred to by the Commission as a “package of local and toll calling at rates ranging from approximately 11 to 15 cents per minute for . . . voice communications up to prescribed calling volume limits.” Rate plans deal with such things as roaming charges when users are out of service areas, unlimited local calling for a flat rate per month, tiered rates with different levels of minutes per month, extra charges per minute for usage above the allotted minutes per month, and the like. See In the Matter of Application of BellSouth Corporation for Provision of In-

Region, Interlata Services in Louisiana, 13 FCC Rcd. 20599 (1998) at ¶ 43. The Commission has noted in such discussions that early termination fees are separate from the provisions of a "rate plan." See *Id.* (observing that subscribers wishing to obtain a particular "rate plan" were required by one company to enter into "an annual contract (with a cancellation fee of \$ 10 per month remaining on the contract) and purchase a digital multinet network phone" from that company.") The rates and the minimum contract period provision are thus separate.

C. The Courts Have Recognized and Applied the Exemption from Preemption Set forth in § 332(c)(3)(A) to Allow Such State Law Claims to Proceed.

One federal court recently summarized the clear conclusion that disputes such as those in the present case are left to the state courts under the Act:

That Congress intended for States to retain some authority to regulate and hear claims concerning commercial mobile service providers is clear from § 332's statutory language and legislative history. The statutory preemption portion of § 332 prohibits states from regulating "the entry of or the rate charged" by commercial mobile service providers, but limits the restriction to the topics noted, pointing out that the paragraph "shall not prohibit a State from regulating the other terms and conditions of mobile service." § 332(c)(3)(A). The statute even contemplates that states may be granted permission to regulate rates. And the legislative history supports the finding that Congress specifically intended to reserve for states the right to regulate and resolve such matters as customer billing information and practices and billing disputes and other consumer protection matters.

Moriconi v. AT&T Wireless PCS, LLC, 280 F. Supp. 2d 867, 874 (E.D. Ark. 2003). As another court recently said, "The intent of Congress regarding the particular issues before us has been stated with sufficient clarity to command the almost uniform recognition of the administrative bodies and courts that have touched the issues. It is that the Communications Act should not supplant state law regarding claims that do not bear directly on rates or entry into the field of mobile telecommunication. Those rules of law that, generally, govern the relationships between

parties to consumer transactions are singled out for particular preservation." Union Ink v. AT&T Wireless, Inc., 801 A.2d 361 (N.J. Super. Ct. App. Div. 2002).

This reading of the Act's plain terms has been applied to early-termination fees. "The FCA does not preempt all state law claims relating to telephone charges, and plaintiffs' claims in this case do not present any conflict with any filed tariffs." Indiana Bell Telephone v. Ward, 2002 U.S. Dist. LEXIS 26013 (S.D. Ind. 2002)(litigation over "termination fees" not preempted).

Better-Reasoned Court Decisions? SunCom's Petition asserts that "the better-reasoned federal cases" have held that early-termination fees are rates charged. Petition at p. ii. Cited are three cases taking this minority view. See Petition at 11-12. Two of these decisions construing the compatibility of state-law adjudications concerning the specific topic of early-termination fees are superficial one or two-paragraph orders with little or no reasoning, and no exploration of the legislative history of Commission rulings on the subject.²⁵ The third case on which SunCom relies is Gilmore v. Southwestern Bell, 156 F.Supp.2d 916 (N.D. Ill. 2001). But the pleading in Gilmore alleged that the defendant changed the per-minute rates for service: "Plaintiff alleges that he has been a cellular telephone customer of defendant since before 1995. He further alleges that he has a contract under which he agrees to pay certain rates for his cellular telephone service. Nowhere in the Contract or elsewhere did Plaintiff agree to pay higher rates for cellular service or to pay additional fees for which no significant additional goods or services were rendered." Id. at 919. The court summarized the claim "in effect" as alleging that the plaintiffs had been deceived "into paying for cellular service at rates higher than the rates for which they contracted." Id. That trial-court decision in Gilmore is (1) invalid under the Commission's decisions, and (2) factually inapplicable with respect to the pending South Carolina "early-termination fee" context.

²⁵ Redfern v. AT&T Wireless Services, Inc., 2003 U.S. Dist. Lexis 25745 (S.D. Ill. 2003); Chandler v. AT&T Wireless

It has been rejected by other case law. Gilmore is also effectively overruled by Fedor, the 2004 Seventh Circuit decision discussed above, and further discussed in Point IV below.

Other courts have carefully considered the statute and the Commission's rulings interpreting its provisions, and have found that adjudication of state law contract claims relating to early-termination fees is not rate regulation foreclosed by federal law – expressly rejecting the outlying views of the three cursory decisions on which SunCom now relies. Perhaps the most recent and thorough of these surveys is that conducted by Judge Gritzner in Phillips v. AT&T Wireless, 2004 U.S. Dist. LEXIS 14544 (July 29, 2004) ("Phillips"). In discussing "[t]he meaning of 'rates' under the FCA" the court in Phillips noted the prevailing understanding that "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." Id., citing Brown v. Washington/Baltimore Cellular, Inc., 109 F. Supp. 2d 421, 423 (D. Md. 2000).

While the Commission has noted that the term "rates charged" in § 332 "may include both rate levels and rate structures,"²⁶ the court in Phillips noted that the Commission has been careful to rule that that not all matters affecting wireless providers' rates are preempted rate regulation under the Act. For example, the Commission has observed that state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332."²⁷ Thus the court in Phillips, in accord with other decisions, rejected the arguments that "anything that might touch upon [a wireless provider's] business" is a challenge to rates in the sense that an adverse ruling would increase "business expenses" that "would likely be passed on to customers as rate

Services, 2004 U.S. Dist. Lexis 14884 (S.D. Ill. 2004).

²⁶ See In re Southwestern Bell Mobile Sys., Inc., 14 FCC Rcd. 19898, 1 at 7, 20 (FCC November 18, 1999)(billing in minute increments as a rate structure issue).

²⁷ Phillips, citing Southwestern Bell at ¶ 23.

increases."²⁸

Adopting the view of several other courts, the judge in Phillips quoted the following observation about the overly broad reading of the term "rates" sought by the cellular service company:

US Cellular would have this Court construe "rates" so broadly as to incorporate anything that might touch upon U.S. Cellular's business. US Cellular's interpretation requires numerous degrees of separation in order for a state claim to escape preemption by the Communications Act. This is problematic. Inherently, any interference with U.S. Cellular's business practices will increase its business expenses. These increased business expenses would likely be passed on to customers as rate increases. If "rate" included any action that indirectly induced rate increases, the exception would be swallowed by the rule. This could not have been Congress' intent. US Cellular's interpretation would destroy the Act's savings clause, making all actions affecting the company

Phillips, 2004 U.S. Dist. LEXIS 14544, *31, quoting U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5.

The court concluded that "early termination fees are not rates but rather are other terms and conditions, and Congress demonstrated a specific intent to exclude "other terms and conditions" from preemption under section 332." Phillips at *36-*37:

[T]he Court finds the AT&T early termination fee is not a "rate". Both Judge Pratt and Judge Melloy have rejected this same argument, finding that such a broad interpretation of "rates" is contrary to the intent of Congress. This Court agrees that "rate" must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment. Judge Pratt gave a reasoned analysis in determining an early termination fee was not a "rate" under the FCA, and Defendant has not persuaded the Court to find otherwise. Accordingly, Plaintiff's claims are not completely preempted by section 332 of the FCA because neither constitute direct challenges to "rates" as defined herein.

²⁸ Phillips, citing: U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5; Cedar Rapids Cellular, 2000 U.S. Dist. LEXIS 22624, 2000 WL 34030836, at *7; see also In re Wireless Consumers Alliance, Inc., 15 FCC Rcd. 17021, at 9, 14-15 (rejecting notion that any determination of money damages against a wireless provider is necessarily equivalent to rate regulation). Indeed, "if 'rate' included any action that indirectly induced rate increases, the exception would be swallowed by the rule." U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5; see also Brown, 109 F. Supp. 2d at 423 ("Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.").

~~See also: Iowa v. United States Cellular Corp., 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909 (S.D. Iowa Aug. 7, 2000); Cedar Rapids Cellular Tel., L.P. v. Miller, 2000 U.S. Dist. LEXIS 22624("like the Southern District, this Court declines to read 'rates' in section 332 so broadly as to necessarily preclude a state's judicial challenge based on a statute to protect consumers against fraudulent or deceptive business practice."); Cellco P'ship v. Hatch, 2004 U.S. Dist. LEXIS 18464 (D. Minn. 2004).~~

Accord: Esquivel v. Southwestern Bell Mobile Sys., Inc., 920 F.Supp. 713, 715-16 (S.D. Tex. 1996)(a state law challenge to cancellation fees such as those charged by SunCom is not barred by federal law).²⁹ See also Bryceland v. AT&T Corp., 122 F. Supp. 2d 703, 707 n. 3 (N.D.Tex.2000); Lewis v. Nextel Communications, 281 F. Supp. 2d 1302 (S.D. Ala. 2003); Iberia Credit Bureau Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004)(arbitration clause is a "term or condition" of the contract, subject to enforcement and adjudication by the courts in a civil action). See generally Brown v. MCI Worldcom Network Services, 277 F.3d 1166 (9th Cir. 2004)(validity of the imposition of a \$10 "fee" was not a contest over rates, and thus private civil action could go forward).

Bastien, also cited by defendant SunCom (Petition p. 10 n. 23) in arguing that the present actions are barred, preceded the Commission's *Wireless Consumers Alliance* decision, clarifying that the States retain the ability to regulate wireless' carriers' billing practices, even those related to rates.³⁰ Moreover, *Bastien*, unlike the South Carolina litigations which underlie this Cross-Petition

²⁹ Compare GTE Mobilenet of Ohio v. Johnson, 111 F.3d 469, 478 (6th Cir 1997)(the limitation on state regulation is clearly intended to prohibit setting of rates, regulation of rates and adjustment of rates by the state).

³⁰ *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 986-87 (7th Cir.2000). Other courts have noted that the claims in *Bastien* related to the cellular company's right to enter a particular geographic service market, a subject arguably more squarely in the purview of the FCC – and matters not involved in the present litigation. *State v. Nextel West Corp.*, 248 F. Supp.2d 885 (E.D. Mo. 2003).

for Declaratory Rulings, involved direct challenge to AT&T's right to enter the Chicago-area wireless service market and the propriety of its rates in light of the poor service it provided. *Bastien*, 205 F.3d at 989. The Seventh Circuit found preemption because the plaintiff's claims would "directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service." The Seventh Circuit distinguished the claims in *Bastien* from challenges to a wireless carriers' fraudulent and deceitful billing and other practices, which clearly are not preempted by the FCA. *Id.* at 988-89 (citing *In re Long Distance Telecommunications Litig.*, 831 F.2d at 633-34).³¹

Within this past year the Seventh Circuit revisited *Bastien* and the preemption of contract claims against cellular telephone providers. Recognizing that several other federal courts had carefully distinguished between cases where the state law lawsuit challenged market entry or time charges from other contract or tort actions, the court held in *Fedor*, 355 F.3d at 1072-74, that state law contract actions for failure of the company to impose the proper charges are not preempted.

In other words, these claims address not the rates themselves, but the conduct of Cingular in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the "terms and conditions" of commercial mobile services.

To any extent that *Bastien* or survives *Fedor*, it is clearly inapplicable or superseded where the lawsuit involves early-termination fees. And *Gilmore*, a trial-level decision in the Seventh Circuit, is displaced entirely by *Fedor*. See *Phillips*, at n. 10 citing other authority for the same

³¹ This distinction was also discussed in *Rosenberg*, a post-*Bastien* decision in which the district court remanded plaintiff's ICFA and breach of warranty claims against Nextel arising from Nextel's providing customers with "faulty information regarding monthly phone usage," in particular, the number of minutes used in a given month. *Id.*, 2001 WL 1491501 (Ex. H) at *2. The district court held that the case "would not require a court to determine whether the rate was unreasonable, unjustly applied or inappropriate," but rather was a case involving "simple fraud which would not affect the federal regulation of wireless carriers," and hence the FCA is not preemptive and no federal jurisdiction exists." *Id.* (Ex. H) at *2. (citing *Long Distance Telecommunications Litig.*, 831 F. 2d at 633; *Bastien*, 205 F.3d at 988-89). See also *State ex rel. Nixon*, 248 F. Supp. 2d at 891-93 (distinguishing rate regulation from challenges to deceptive misconduct).

proposition.

These cases demonstrate that regulation of early-cancellation fees under contract-law principles pursuant to state law remains appropriate. These claims do not invalidate or alter the charge computations for services, or result in price discrimination between classes of customers.³² Instead, they are analogous to the types of state law claims that courts have uniformly found are not preempted,³³ in accord with the general canon that state consumer protection remedies should not be preempted.³⁴

³² See, e.g., *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (state law challenges to the validity of arbitration provisions contained in long-distance service contracts were preempted by FCA where resolution of the state claims would result in the indirect price discrimination Congress sought to prevent in passing Act); *Bastien*, 205 F.3d at 989 (finding state law claims preempted where resolution of claims "would directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service"); *Cahnmann*, 133 F.3d at 490-91 (finding state law claims preempted where claims directly challenged the legitimacy of an FCC-approved tariff).

³³ See, e.g., *Marcus v. AT&T*, 138 F.3d 46, 54 (2nd Cir. 1998) (state law claims for fraud and negligent misrepresentation based on deceptive advertisement and billing not preempted); *In re Long Distance Litigation*, 831 F.2d 627, 633-34 (6th Cir. 1987) (state law claims for fraud and deceit based on defendants' failure to tell customers of their practice of charging for uncompleted calls not preempted); *Braco v. MCI Worldcom*, 138 F. Supp.2d 1260, 1269 (C.D. Cal. 2001) (claims that defendant's advertising of pre-paid calling cards was false and unfair under state unfair competition act not preempted); *Crump v. Worldcom*, 128 F. Supp.2d 549, 554 (W.D. Tenn. 2001) (claims for violation of state consumer protection act, misrepresentation and unjust enrichment based on false advertising of defendant's long-distance calling plan not preempted); *State of Minnesota v. Worldcom*, 125 F.Supp.2d 365, 370 (D. Minn. 2000) (claims that defendant's advertising of long-distance calling plan violated state consumer protection statutes not preempted); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 955-57 (D. Del. 1997) (claims that defendant violated consumer fraud statute and breached contract based on failure to disclose its billing practice of charging for non-communication period beginning with initiation of call not preempted); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 435-36 (D. N.J. 1996) (fraud and negligent misrepresentation claims asserting defendant engaged in deceptive and misleading advertising by failing to disclose that it rounded up phone calls to the next minute in computing its charges not preempted). See also *Gilmore*, 156 F.Supp.2d at 924-25 (fraud claims, that defendant added a fee to its cellular telephone rates while attempting to hide the increase in charges, were nondisclosure claims and were not preempted); *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193, 1199-1201 (E.D. Pa. 1996)(claims under state consumer protection law alleging unfair and deceptive practice for failure to disclose that defendant billed for non-communication time were not preempted). See generally *Nixon v. Nextel West Corp.*, 248 F. Supp. 2d 885, 893 (E.D. Mo. 2003)(state law challenge to marketing practices not preempted).

³⁴ There is a strong presumption against preemption of state law, especially in the area of local telephone service where, until the passage of the Telecommunications Act of 1996 the states had historically exercised an exclusive jurisdiction. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986). Moreover, consumer remedies traditionally represent a field regulated by the states. *Cliff v. Payco General American Credits*, 363 F.3d 1113, 1125 (11th Cir. 2004); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 135 (1963). The Supreme Court "has recently reaffirmed that there is a presumption against finding

III

THE SAVINGS PROVISION OF 47 U.S.C. § 414 PRESERVES STATE LAW CLAIMS SUCH AS THOSE INVOLVING CONTRACT EARLY-TERMINATION FEES

The Act contains a savings clause that states:

Nothing in this Act contained shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

47 U.S.C. § 414. As one federal court held, "[defendant] asserts that the Federal Communications Act preempts the state law claims alleged in this case [and] argues first that case law interpreting the FCA 'demonstrates that federal law completely occupies the field of interstate communications, thereby preempting state law.' The court disagrees." Indiana Bell Tel. Co. v. Ward, 2002 U.S. Dist. LEXIS 26013 (S.D. Ind. 2002) (relying on the "savings clause" quoted above). Another court observed: "This 'savings clause' expressly preserves causes of action for breaches of duties that do not exist under the Act Further, the inclusion of such a clause appears to be inconsistent with a Congressional intent to completely preempt state law claims not addressed through the Act Inclusion of the savings clause 'clearly indicates Congress' intent that independent state law causes of action . . . not be subsumed by the Act, but remain as separate causes of action" Weinberg, 165 F.R.D. at 439 (internal citations omitted).³⁵

implied preemption of state law in these fields. Payco, 363 F.3d at 1125-26, citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone, 505 U.S. at 518 (referring to the "presumption against the preemption of state police power regulations"); see also Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1328 (11th Cir. 2001).

³⁵ See Richman Bros. Records Inc. v. U.S. Sprint Communications Co., Inc. Primary Jurisdiction Referral from the United States District Court for the District of New Jersey, 10 FCC Rcd 13639, 13640 at ¶ 5 (1995); Operator Services Providers of America Petition for Expedited Declaratory Ruling, 6 FCC Rcd 4475, 4477 at ¶ 11 (1991); Kellerman v. MCI Telecommunications Corp., 493 N.E.2d 1045, 1051-2 (Ill. 1986); Bauchelle v. AT&T Corp., 989 F. Supp. 636, 649 (D.N.J. 1997); DeCastro v. AWACS, Inc., 935 F. Supp. 541, 551-2 (D.N.J. 1996); Castellanos v. U.S. Long Distance Corp., 928 F. Supp. 753, 756 (N.D. Ill. 1996); In re Long Distance Telecommunications Litigation, 831

The Commission itself has stated that the savings clause: "Preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." In re Operator Servs. Providers of Am., 6 FCC Rcd. 4475, 4477 ¶ 11 (1991); see also In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., 10 FCC Rcd. 13639, 13641 ¶ 15 (1995) (§ 414 preserves claims against carriers as against other corporations, such as liability for misleading advertising).

Even before deregulation reached current levels, in American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 227 (1998), the Supreme Court noted that the Communication Act's savings clause copies the savings clause of the Interstate Commerce Act, and that the Court has "long held" that the latter preserves "those rights that are not inconsistent with the statutory filed-tariff requirements." Under deregulation, cellular telephone companies like defendant SunCom no longer have to file the tariffs previously required. See also Nader v. Allegheny Airlines, 426 U.S. 290, 298-300 (1975) (determining that identical "savings clause" language in Federal Aviation Act did not preclude a fraudulent misrepresentation claim at common law because there was no conflict between the court's common law authority and the agency's rate making power). The Communications Act does not preempt all state law claims relating to telephone charges, and plaintiffs' claims in this case do not present any conflict with any requirements imposed by the Commission.

In Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001), the Eleventh Circuit noted that the Act's savings clause, 47 U.S.C. § 414, contemplates the application of state law and the

F.2d 627, 634 (6th Cir. 1987); Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 958 (D. Del. 1997); Ashley v. Southwestern Bell Telephone Co., 410 F. Supp. 1389, 1393 (W.D. Tex. 1976); Corporate Housing Systems, Inc. v. Cable & Wireless, Inc., 12 F. Supp. 2d 688, 692 n3 (N.D. Ohio 1998).

exercise of state-court jurisdiction. Id. at 1313. If there is state-court jurisdiction the jurisdiction cannot be exclusively federal. The court held that the existence of the savings clause "counsels against a conclusion that the purpose behind the [Act] was to replicate the 'unique preemptive force' of the LMRA and ERISA." Id. The savings clause also applies to § 332. The Eleventh Circuit's analysis was that the savings clause evidences Congress's intent to save state-law actions, thus precluding federal preemption. SunCom's contract itself provides, in part, that it shall be governed by the laws of South Carolina. See Appendix B at ¶ 8.

SunCom is not able to point to any arguable conflict between the maintenance of state law causes of action and federal cellular telephone regulation in the current era. In the context of the present case, an actual conflict would be some federal regulation that required termination fees, or required that every private contract between a service provider and a customer be deemed to have a cancellation fee provision after the initial year. There is no such law.

In sum, the resolution of this case under South Carolina law would have no material effect on federal regulation of the telecommunications industry or SunCom. A judgment in favor of plaintiffs would require the defendant to do what it is already legally required to do under the law, and the judgment will not impose inconsistent obligations upon defendant. As one federal court commented with respect to the non-preemption of litigation concerning termination fees, "To the extent that resolution of this case would affect federal regulation of the telecommunications industry or tariff rates, such an effect would be merely incidental." Indiana Bell Telephone Co. v. Ward, 2002 U.S. Dist. LEXIS 26013 (S.D. Ind. 2002), citing Nader, 426 U.S. at 300 (finding that any impact on rates resulting from tort liability or from practices adopted to avoid such liability would be incidental). Because resolution of the claims before the court will not affect federal regulation of telecommunication carriers, plaintiffs' claims are not

preempted by the Act. And another state's court has determined that § 332 did not preempt comparable state claims. See Union Ink Co. v. AT & T Wireless, Inc., 801 A.2d 361 (N.J. Super. Ct. App. Div. 2002).

In Nader v. Allegheny Airlines, the Supreme Court made it clear that state-law claims are only to be foreclosed where they are "absolutely inconsistent" with federal requirements³⁶ and that irreconcilable conflict is exemplified where an "the agency and a court disagreed on the reasonableness of a rate. The carrier could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive." 426 U.S. at 299. The Court concluded: **"The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case."**³⁷ In the instant case, the state law claims for breach of contract and unjust enrichment do not require agency expertise for their treatment and are "within the conventional experience of judges."³⁸

³⁶ On the basis of Section 414 and Nader, courts have repeatedly held that common law claims against carriers are not preempted by the Communications Act. See, e.g., In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-34 (6th Cir. 1987)(holding state law claims for fraud and deceit, based on carrier's failure to notify customers of practice of charging for uncompleted calls, not preempted by Communications Act); Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 386 (9th Cir. 1995) ("obligations imposed under state law causes of action for unfair competition, interference with contract, and interference with prospective economic advantage are in addition to [Communications Act] obligations"); Cooperative Communications, Inc. v. AT&T Corp., 867 F. Supp. 1511, 1516 (D. Utah 1994) ("inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action"); Financial Planning Institute, Inc. v. American Tel. and Tel. Co., 788 F. Supp. 75, 77 (D. Mass. 1992). See also Kellerman v. MCI Telecommunications Corp., 493 N.E.2d 1045, 1053 (Ill. 1986); In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633 (6th Cir. 1987); American Inmate Phone Systems, Inc. v. US Sprint Communications, 787 F. Supp. 852, 856 n4 (N.D. Ill. 1992); Tenore v. AT&T Serv., 962 P.2d 104, 115 (Wash. 1998).

³⁷ Id. at 305-06 (emphasis added, footnote omitted).

³⁸ Far East Conference v. United States, 342 U.S. 570, 574 (1952). See In re Long Distance Telecommunications Litigations, 831 F.2d 627, 633 (6th Cir. 1987).

Nader also emphasizes the importance of the Communications Act's savings clause.

"The language in 47 U.S.C. § 414 is almost identical to that of 49 U.S.C. § 1506, the savings clause of the Aviation Act."³⁹ The Supreme Court in *Nader* found that the common-law action for fraudulent misrepresentation and the Aviation Act, not being "absolutely inconsistent," could coexist, "as contemplated by [§ 1506]."⁴⁰ The same reasoning applies in the present case and "the savings clause of the Communications Act does give the plaintiffs the option of pursuing their remedy at common law."⁴¹

Various courts have held that the saving clause preserves state law remedies for breaches of duties that are distinguishable from duties created under the Act.⁴² Similarly here, the Communications Act does not address the issue of early-termination fees and there is no FCC requirement that a service provider impose such charges. Thus the plaintiffs' claims do not challenge the reasonableness of an FCC requirement or practice, particularly since there is no filed tariff for wireless telephone service providers, and monetary relief would pose no irreconcilable conflict with federal law. Hence the state law claims should be allowed to proceed.

³⁹ *In re Long Distance Telecommunications Litigations*, 831 F.2d 627, 634 (6th Cir. 1987).

⁴⁰ *Nader*, 426 U.S. at 300.

⁴¹ *Long Distance Telecommunications Litigations*, 831 F.2d at 634.

⁴² See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045, 1051 (Ill. 1986) [false advertising]; *Cooperative Communications, Inc. v. AT& T Corp.*, 867 F. Supp. 1511, 1516 p. (D. Utah 1994) [unfair competition]; see generally *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227 (1998)(the savings clause preserves those rights that are not inconsistent with federal statutory requirements).

IV

THE PENDING STATE-LAW CLAIMS ARE PROPERLY LITIGATED IN STATE COURT EVEN IF THE “EARLY-TERMINATION FEE” WERE A “RATE”

Even if early termination fees were “rates” under federal law, the claims in the underlying state-court litigation would go forward because consumers remain free to challenge billing and account practices as to rates. Rulings numbered 8 and 9 sought in this Cross-Petition address this fact.

The Commission has already ruled that state courts have authority to decide consumer fraud and breach of contract claims challenging a wireless carriers’ statements and promises concerning rates. *Wireless Consumer Alliance*, 15 FCC Rcd. 17021 (2000). The Commission proceeded, moreover, to delineate a number of circumstances in which inquiries related to rates or billing practices would not be preempted. One key passage recognized in subsequent court decisions is this:

On the other hand, a case may present a question of whether a CMRS [commercial mobile radio service] service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier’s advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. In such a situation, a court need not rule on the reasonableness of the CMRS carrier’s charge in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. In our view, the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance.

Id. at 17035 ¶26 [footnotes omitted; emphasis added].

Therefore, *Wireless Consumers Alliance* sets forth a fundamental distinction “between claims that would enmesh the courts in a determination of the reasonableness of a rate charged and those that would require examination of rates in the context of assessing damages, but would not involve

the court in such a reasonableness inquiry.”⁴³ Courts have applied *Wireless Consumers Alliance* in situations such as where the claims in a civil case address not the rates themselves, but the conduct of a service provider in failing to adhere to those rates, finding that: “That is precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the ‘terms and conditions’ of commercial mobile services.” Fedor, 355 F.3d at 1074.

See also Spielholz v. The Superior Court of Los Angeles County, 86 Cal. App. 4th 1366, 1370; 104 Cal. Rptr. 2d 197, 201 (Cal. App. 2001) (“The FCC concluded [in *Wireless Consumers Alliance*] that section 332(c)(3)(A) generally does not preempt an award of monetary relief by state courts based on state tort or contract claims, unless a court ‘purports to determine the reasonableness of a prior rate or it sets a prospective charge for services’ [Id. at 17026 ¶ 9, 17040-41 ¶¶ 38, 39] and held that the fundamental distinction is between “an outright determination of whether a price charged . . . was unreasonable,” which would be preempted, and the determination of ‘whether . . . there was a difference between promise and performance’ in the context of false advertising or breach of contract, which would not be preempted.” (Id. at 17035 ¶¶ 25-26)).

Thus, even if the remote sort of claim here, which deals with “early” termination fees imposed after a contractual period where they were authorized has expired, was viewed – contrary to the Commission’s own prior findings – as a “retroactive rate adjustment,” claims about improper billing and disputes about the imposition – even of posted rates – are held permissible under federal law. In short, Edwards claims that SunCom has not performed its end of the bargain, and such claims are appropriately before the State court.

The recent federal appeals court ruling in Fedor demonstrates that state law contract actions for involving improper imposition of charges are not precluded under current law. The Seventh

⁴³ Fedor, 355 F.3d at 1073.

Circuit wrote: "In other words, these claims address not the rates themselves, but the conduct of Cingular in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the "terms and conditions" of commercial mobile services." 355 F.3d at 1072-74.

As one state appellate court noted, "Section 332(c)(3)(A) does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not directly regulate rates. We presume that if Congress had intended to preempt such state law remedies, it would have expressly so stated. Not only does the Communications Act not so state, but it states that it generally does not preclude state law remedies."⁴⁴

A judicial act constitutes rate regulation only if its principal purpose and direct effect are to control rates. For example, an injunction that prevents a wireless telephone service provider from charging specified rates would directly regulate rates.⁴⁵ Similarly, if a cause of action directly challenges a rate as unreasonable, an award of damages or restitution to compensate a customer for the difference between the rate paid and what the court determines to be a reasonable rate would directly regulate rates.⁴⁶ In general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates and therefore is preempted under § 332(c)(3)(A); a claim that directly challenges some other activity and requires a determination of the value of services provided in order to award monetary relief is not rate regulation.⁴⁷

⁴⁴ Spielholz, 86 Cal. App. 4th at 1370, 104 Cal. Rptr. 2d at 201 (Citing § 414 of the Act).

⁴⁵ *Id.*, citing Ball v. GTE Mobilnet of California, 81 Cal. App. 4th 529, 537-538, 96 Cal. Rptr. 2d 801 (2000); In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996).

⁴⁶ *Id.* citing Ball, 81 Cal. App. 4th at 537-38; Comcast, 949 F.Supp. at 1201.

⁴⁷ *Id.*

The principle recognized in case law implementing the Commission's rulings in the courts is that there is a distinction between claims that directly challenge the rate charged and claims that challenge some other practice. "A monetary award based on the latter type of claim would affect the rate charged only incidentally and is not a direct price control or rate regulation."⁴⁸ Thus, "a claim that does not directly challenge the rate but directly challenges some other activity, such as false advertising, and seeks a remedy to limit or control that activity or seeks damages arising from the activity is not an attempt to regulate rates and is not expressly preempted under section 332(c)(3)(A). If the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is merely incidental."⁴⁹ This view has been applied to various state-law claims, including not only contract disputes but specifically the common-law equitable claim for unjust enrichment, or "restitution."⁵⁰ Thus, an award of damages or restitution for improper collection of an early-termination fee does not require the court determine the value of services provided, and is not rate regulation.

Finally, the availability of state law remedies is consistent with the 1993 amendments' objective to achieve maximum benefits for consumers through reliance on the competitive marketplace, in which state law duties and remedies ordinarily are enforceable. See also *Wireless Consumers Alliance*, 15 FCC Rcd. 17021, 17033-34 ¶¶ 22, 24.

Thus, even if early-cancellation fees imposed by a cellular provider after the completion of the initial term of a contract are deemed "rates," the present action nonetheless should proceed, because the essence of the claim is that SunCom did not adhere to the terms of the contract concerning "early" termination fees – and imposed such fees after the initial 12-month period was past. This is a "terms and conditions" issue preserved for state-law resolution.

⁴⁸ *Id.*, citing *Nader v. Allegheny Airlines*, 426 U.S. at 299-300.

⁴⁹ *Id.*

⁵⁰ *Id.*, citing *Tenore v. AT & T Wireless Services, Inc.*, 962 P.2d at 112, 115.

~~This recognition of the validity of state law claims in state courts is consistent with the~~
Congressional purpose in shaping the telecommunications statutes. The House Report accompanying the 1993 Act expressly stated: "Such matters as customer billing information and practices and billing disputes and other consumer protections matters . . . fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588.

As a state court said a few months ago in rejecting a claim that federal law precluded private claims in this area, "[t]he intent of Congress regarding the particular issues before us has been stated with sufficient clarity to command the almost uniform recognition of the administrative bodies and courts that have touched the issues. It is that the Communications Act should not supplant state law regarding claims that do not bear directly on rates or entry into the field of mobile telecommunication. Those rules of law that, generally, govern the relationships between parties to consumer transactions are singled out for particular preservation." Union Ink Co., 801 A.2d at 374.

Hence the Commission should enter a Declaratory Ruling that claims of the nature pending in the state courts of South Carolina in the underlying litigation are not foreclosed by federal law. Whether termination fee disputes involve "rates" for telephone service, or not, the present claims are proper for state-court adjudication.

Role for State Law. The Commission has welcomed the prosecution of state laws in combating carriers' deceptive practices.⁵¹ One key in the Commission's analysis has been whether the requirements to be imposed under state law require conduct different from that required by the Commission, making it impossible for the carrier to comply with both. This approach has been specifically applied in situations where the issue is whether in signing a

⁵¹ State of Wisconsin v. Minimum Rate Pricing, Inc and Thomas N. Salzano, 13 FCC Rcd. 15344, 15345 (1998).

customer up for a contract the service provider has misled the customer concerning what is entailed in the arrangement.⁵²

Thus the Commission should hold that private claims of the sorts advanced in the underlying court litigation here, which also relate to the entry of service contracts and the enforcement or misuse thereof by the carrier, are not superseded in any sense by the Act. The structure of telecommunications regulation and the Congressional intent evidenced by the savings clause of the Federal Communications Act, as well as the presumption that state law claims are not preempted and the Commission's own policy, to allow state remedies which are consistent with and further its goals, all compel a finding that Plaintiffs may proceed with their state law actions in the underlying litigation.

In an analogous context the Commission has ruled that the state law of contracts should be enforced in common law litigation over "access" charges levied upon non-incumbent carriers. See *In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd. 13192, at 13193-95 (2002), reported at 67 Fed. Reg. 49,242 (FCC 2002) ("Access Charges Declaratory Ruling"). In that proceeding the Commission held that where a telephone company is permitted to collect a non-usage or rate-based fee "only to the extent that a contract imposes a payment obligation" (*Id.* at 13198 ¶ 12) the Commission would provide comments on the applicable federal communications law aspects, but the Commission has refused to opine on the contract law issues. The Commission held: "Because the existence of a contract is a matter to be decided under state law, we defer to the court to answer this question." *Id.* at 13198 ¶ 13.

The Commission concluded: "Until the court determines the respective obligations of the parties, in particular whether [one party] has any obligation to pay [the telephone service provider] under a contract, the Commission has no basis on which to assess whether [a party] is

⁵² *Id.*

subject to sections 201(b) or 202(a) in these circumstances and, if so, whether its actions violate those statutory provisions." Id. at 13200 ¶ 18.

AT&T appealed the Access Charges Declaratory Ruling, arguing that "the Declaratory Ruling is contrary to law, because, in allegedly allowing a state court to determine whether it owes access charges under an implied contract or quantum meruit." The D.C. Circuit refused to disturb the Commission's rulings, and characterized the Commission's ruling as a direct holding that "state courts may determine whether the parties have in place a contract that fixes access charges." AT&T Corp. v. FCC, 349 F.3d 692, 701 (D.C. Cir. 2003).

The propriety of collecting such ancillary charges was held to be a matter of contract, including obligations under implied contractual doctrines.⁵³ 349 F.3d at 701. Dealing with the analogous area of access charges, the Court described the Commission's third holding in the Access Charges Declaratory Ruling as follows: "access charges may be established by an express contract or an implied-in-fact contract in which the price was already fixed (such that the state court would not inquire into the reasonableness of the rate)." Id.

In so ruling the D.C. Circuit relied on the holding of *Wireless Consumers Alliance* that §332 does not generally preempt state courts from awarding monetary damages for breach of contract. Id. at 17040. Rather, the Commission stated that "whether a specific damage award or damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of the case," and noted that "a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry into the reasonableness of the original price and therefore is permissible." Id. at 17041.

⁵³ In footnote 40 the Commission commented that where quantum meruit claims seek fair payment for a service rendered, there is a question whether the quantum meruit claim seeks to impose a "rate." However, the quantum meruit claim in Edwards' case is not of that nature: rather, it seeks a ruling as a matter of state law that the contractually-fixed early-termination fee was imposed where the parties' written agreement does not allow it to be imposed (after completion of the initial term) and hence the amount of a "rate" is not involved in this form of quantum meruit claim.

In the present context, since the early-termination fee is already fixed it -- like the
contractual matters referred to by the Commission and the D.C. Circuit in the Access Charges
Declaratory Ruling -- would not involve the courts in setting a charge, or assessing its
reasonableness. Rather, only adjudicating obligations under pre-existing contract terms would be
required.

DECLARATORY RULINGS ARE MOST APPROPRIATE IN THIS CONTEXT**A. Declaratory Rulings Will Assist the State Court to Decide the Issues**

The South Carolina court is awaiting assessment of these practices by the Commission. It accords with the Commission's prior rulings to conclude that the responsibility for making these decisions rests with the State courts, as the plaintiffs have repeatedly argued. Analysis by the Commission can assist the State court in making its decision. As the Commission has also noted, a party with a pending court litigation that has been stayed pending rulings from the FCC should proceed by way of a petition for declaratory rulings:

We note that when a party files a matter with the Commission as the result of a court referral, and the court retains jurisdiction to determine the final outcome of the proceeding, the filing with the Commission should be in the form of a petition for declaratory ruling, pursuant to section 1.2 of our rules, rather than a formal complaint pursuant to section 208. See 47 C.F.R. § 1.2; 47 U.S.C. §§ 207, 208.⁵⁴

Assessment of myriad consumer claims is, at best, cumbersome for the Commission. Here the facts demonstrate a pattern of behavior that starkly presents important contract and consumer protection legal issues. Just as in certain "apparent liability" situations, it is appropriate at this juncture to assume that plaintiffs will be able to prove the conduct of the defendant when the time comes, but the case will be heard elsewhere and the controlling legal rules need to be authoritatively stated before the labor-intensive process of litigation reaches the decision point.

It is especially appropriate that the Commission facilitate the decision-making which rests with the South Carolina state courts by addressing the issues raised in the Cross-Petition because the issues present one of the largest sources of complaints from consumers received by the Commission each quarter. A recent tabulation released in scorecard form by the Commission shows that while most complaints relate to billing and rate matters, early-termination fee

⁵⁴ Hi-Tech Furnace Systems v. Sprint Communications Co., 14 FCC Rcd. 8040, 8043 n. 24 (1999).

complaints are among the largest of the remaining categories of complaints. With respect to non-billing matters, the recent complaint totals show that early-termination disputes are comparable to number portability as matters of consumer concern, and complaints. These non-rate complaints greatly exceed complaints concerning such matters as carrier marketing practices and even service quality:

TOPIC	COMPLAINTS per QUARTER
Number portability	976
Contract—Early Termination	970
Carrier Marketing & Advertising	791
Service Quality	690

Quarterly Report on Informal Consumer Inquiries and Complaints, February 11, 2005

(www.fcc.gov/cgb) at p. 9 "Summary of Top Consumer Complaint Subjects." We note that the Commission's regular quarterly tabulations of these matters clearly treat disputes concerning "Contract—Early Termination" to be in a *different* category from complaints about rates.

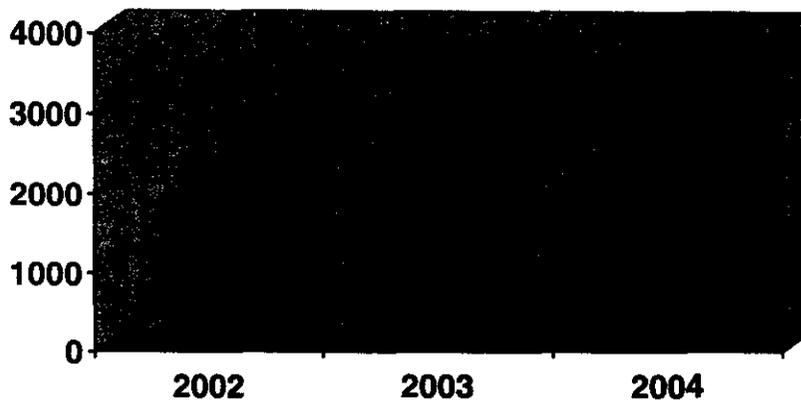
Allowing state law proceedings to address abuses of contractual early-termination charges also would be appropriate given the fact that the number of complaints about carrier practices with respect to early termination charges on contracts has dramatically increased in recent years. Based on the most recent complaint tabulation (Second Quarter 2004 released February of 2005 as cited above) and comparable Second Quarter summaries for 2003 (released September 12, 2003) and 2002 (released October 15, 2002) the following is the number and pattern for consumer complaints about early-termination fees imposed by carriers:

Contract—Early Termination Fee Complaints per Quarter

2004	970
2003	504
2002	370

Thus early-termination fee complaints are up from 1,860 in calendar year 2002, to 2,386 in 2003 and (assuming no increase in number over the two quarters of 2004 already made public, an estimated 3,800 complaints in the year 2004.⁵⁵

Annual Contract--Early Termination Complaints to the Commission



State courts should not be foreclosed from hearing cases relating to this volume of contract-related disputes.

B. The Commission's Policy Goals Make Declaratory Rulings Appropriate

An important goal of the 1996 Telecommunications Act is to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to competition." Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 113 (1996). Early-termination fees are a restraint on competition, overtly created to lower the "churn" rate and deter

⁵⁵ First Qtr. 2004, 939 contract early-termination complaints, Second Qtr. 2004, 970 such complaints.

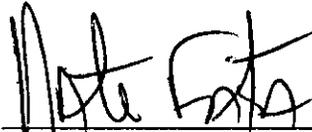
customers from switching to a competing supplier of cellular telephone services. See Ninth Report, 19 FCC Rcd. 20597 (2004) ¶¶ 158, 161 ("Consumer behavior will be more effective in constraining market power when the transaction costs subscribers incur in choosing and switching carriers are low. Transaction costs depend on, among other factors, subscribers' access to and ability to use information, and costs and barriers to switching carriers"). As the Commission concluded recently: "The structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality and greater choice of services. Such consumer outcomes are the ultimate test of effective competition." Id. at ¶ 167.

The Commission should rule that state civil proceedings challenging a service provider's failure to abide by written contractual provisions with respect to early-termination fees, litigated under contract and unjust enrichment theories as described in this Cross-Petition, are not barred by the express terms or the underlying policies of the Act.

CONCLUSION

The well-defined issues in this dispute are ripe for declaratory rulings. We ask that the Commission (1) deny the rulings sought in SunCom's Petition, (2) grant the declaratory rulings sought in this Opposition and Cross-Petition (see Appendix D), and thus allow the parties to proceed with discovery and disposition of the case pending in the courts of South Carolina.¹

Respectfully submitted,



Nate Fata
NATE FATA, P.A.
P.O. Box 16620
The Courtyard, Suite 215
Surfside Beach, SC 29587
(843) 238-2676

Professor Kent Sinclair
School of Law
University of Virginia
580 Massie Road
Charlottesville, VA 22903-1789
(804) 924-4663

COUNSEL FOR PLAINTIFF DEBRA EDWARDS, 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

¹ In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., 10 FCC Rcd. 13639, 13643 (1995) at & 19.

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of March, 2005, the undersigned caused to be served the foregoing Opposition and Cross-Petition by first class United States mail on the following:

Michael D. Hays
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036

Counsel for SunCom Operating Company L.L.C.

Kent Sinclair

COPIES OF THE FOREGOING PROVIDED TO:

John Muleta
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

David Furth
Associate Bureau Chief/Chief Counsel
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Scott D. Delacourt,
Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Nese Guendelsberger
Deputy Chief, Competition Policy
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Christina Clearwater
Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

A P P E N D I C E S

- A. Amended Complaint**
- B. SunCom Service Contract**
- C. Order of the South Carolina Court**
- D. List of Declaratory Rulings Sought**

APPENDIX A.
Amended Complaint in the South Carolina
State Court Proceedings
