Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332	)	WT Docket No. 05-194
	)	
Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition For Declaratory Ruling Filed by Debora Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A)	)	WT Docket No. 05-193

To: The Commission

COMMENTS

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SUMMARY

Federal preemption of state regulation of commercial mobile radio service (CMRS) in favor of a uniform, market-based regulatory scheme regulated by this Commission has yielded tremendous results. National wireless penetration rates exceed 50%; coverage by multiple carriers continues to expand; demand is increasing; innovative services are proliferating; and service rates continue to decline, making wireless service accessible to more people. One of the engines of this growth has been the use of a rate structure that lowers the "up-front" and recurring charges for wireless service—the term contract with an early termination fee (ETF). In return for reduced or eliminated handset prices, service activation fees and lowered monthly charges, subscribers agree to pay one of two amounts: either the aggregate monthly charges payable during the entire term of the contract, or, upon early termination, the monthly charges payable until cancellation plus an ETF. ETFs are thus clearly "rates charged" for CMRS within the meaning of Section 332(c)(3)(A). As such, they are not subject to state regulation.

As set forth in the CTIA petition, the plaintiffs' class action bar has filed a number of suits in state court alleging that ETFs violate state laws because they are "unfair," "unreasonable," "unconscionable" or constitute a "penalty." By challenging the reasonableness of the ETFs themselves, these lawsuits amount to back-door attempts to do that which Section 332(c)(3)(A) prohibits—regulation of the rates charged for CMRS. Absent clarification by this Commission that ETFs are in fact "rates" or "rate elements" and that applications of state law that would restrict or prohibit the use of ETFs thus constitute prohibited rate regulation, these class action suits threaten to re-balkanize the CMRS industry and thus thwart the will of Congress. Such lawsuits seek to eliminate the use of ETFs, but the practical effect will be to eliminate, or reduce substantially, the reductions in handset prices, service activation fees, and

monthly charges currently offered by wireless carriers, all to the ultimate detriment of consumers, particularly those of modest means.

Therefore, the CTIA petition should be granted, and the Commission should enter an order confirming that ETFs are "rates charged" for CMRS within the meaning of Section 332(c)(3)(A) and that applications of state law that would restrict or prohibit the use of ETFs are preempted by federal law.

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COMMENTS

Cingular Wireless LLC ("Cingular"), by its attorneys, files these comments in support of the Petition for an Expedited Declaratory Ruling filed by CTIA – the Wireless Association ("CTIA").[1] To the extent that the Petition filed by SunCom Wireless Operating Company, LLC ("SunCom") raises the same issues regarding a commercial wireless radio service ("CMRS") provider's assessment of early termination fees within the context of an unexpired term contract, Cingular likewise supports grant of the SunCom Petition for Declaratory Ruling.[2]

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[1] *See* Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, filed March 15, 2005 ("CTIA petition").

[2] *See* Petition for Declaratory Ruling - SunCom Operating Company, L.L.C., filed February 22, 2005 ("SunCom petition").

I. INTRODUCTION

When Congress amended the Communications Act of 1934 (the "Act") in 1993[3] to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure,"[4] it stripped state and local governments of "any" authority to regulate wireless carriers' rates,[5] confirmed the Commission's authority to regulate intrastate aspects of mobile services,[6] and established the promotion of competition as a fundamental goal for CMRS policy formation and regulation.[7]

In carrying out Congress's mandate, the Commission has wisely encouraged wireless carriers to experiment with pricing and service packages and to compete on that basis. As a result, wireless carriers today offer customers a range of mobile service options priced in a variety of ways – there are, for example, packaged service plans including a handset, nationwide or regional pricing options, pre-paid plans, and plans with multiple features and service components, each of which may feature different rate structures. The variety of service plans and the competitiveness of the wireless market in general ensure that the American public has

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[3] Omnibus Budget Reconciliation Act of 1993. H.R. 2264, Pub. L. No. 103-66, 107 Stat. 312.

[4] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

[5] *Id.*

[6] *See* 47 U.S.C. § 152(b) (2005).

[7] *See 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*, Seventh Report, 17 F.C.C.R. 12985, 12987 (2002) ("*Seventh CMRS Market Conditions Report*").

viable choices not only of service providers, but also of a range of service plans that address particular consumer and business needs. As the Commission has observed, the public has benefited tremendously from these policies.[8]

One of the benefits of these competitive pricing plans is the offering of more affordable options for purchasing handsets and wireless service. Providers have discounted handset prices, service activation fees, and monthly rates through the use of term contracts. In return for lower up-front and monthly charges, subscribers agree that they will either maintain their subscriptions for 12 or 24 months or, should they cancel service before the expiration of the contract term, pay an early termination fee ("ETF"). Carriers offer the reduced up-front and monthly prices because the term commitment and ETF together assure a minimum amount of revenue per contract, either through monthly payments during the contract term or through payment of the ETF upon early termination. While some consumers may prefer to purchase a handset separately and subscribe to plans with a "pay-as-you-go" or month-to-month arrangement, with no continuing obligation, most prefer the reduction in up-front costs and other savings offered by term contract plans with ETFs. The ETF is thus an essential and integral part of the predominant CMRS rate structure in the marketplace. As such, it is expressly exempt from state regulation by Section 332(c)(3)(A) and clear Commission precedent.

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[8] "The continued rollout of differentiated pricing plans also indicates a competitive marketplace. In the mobile telephone sector, we observe independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various available handsets and policies on handset pricing." *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,* WT Docket No. 04-111, Ninth Report, 19 F.C.C.R. 20597, 20644, ¶ 113 (2004) (*Ninth CMRS Market Conditions Report*).

As set forth in the CTIA petition, the plaintiffs' class action bar has filed multiple state-court actions against wireless carriers, including Cingular, asserting that their ETFs are "excessive," "unfair," "unreasonable," "unconscionable," or otherwise impermissible under state law. Lacking familiarity with the national wireless marketplace, the development of CMRS carriers' rate structures, and the unique characteristics of the federal regulatory scheme governing wireless services, a number of state courts have mistakenly asserted jurisdiction and permitted these suits to proceed, either finding that ETFs are not part of the "rates charged" for CMRS within the meaning of Section 332(c)(3)(A) or deciding that the jurisdictional nature of ETFs is a "fact issue" to be litigated with the rest of the case. These actions challenge the reasonableness of the amount of the ETF – and sometimes even the right of a wireless carrier to include *any* ETF in its rate structure – under various state consumer protection statutes and equitable doctrines. By challenging the reasonableness and legality of ETFs under state law and demanding adjustment or elimination of the charge on a class-wide basis, these putative class actions invite state courts to do precisely that which Section 332(c)(3)(A) forbids — regulate the rates charged for CMRS.

Despite the fact that ETFs are a widespread and commonly accepted component of wireless carriers' rate structures, courts confronted with challenges to ETFs under state law continue to struggle with this concept and its jurisdictional implications. Some have drawn appropriate lines between prohibited substantive regulation of wireless rates and general state police power, thus recognizing the circumscribed nature of their authority in this uniquely federal sphere. Others have misapprehended the nature of wireless carriers' rate structures and opined that ETFs are not rates or elements of CMRS rate structures, but instead "other terms and conditions" of wireless service that are not subject to preemption by Section 332(c)(3)(A).

However, these quasi-regulatory class actions do not challenge the adequacy of the carriers' disclosure of their ETFs, nor do they allege simple breaches of contract – applications of state law that might properly regulate "other terms and conditions" of wireless service. To the contrary, they challenge the reasonableness or lawfulness *per se* of the ETFs under state law and ask the courts to enjoin their enforcement – precisely the "regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services" that the Commission has made clear Section 332(c)(3)(A) prohibits.[9]

Cingular is the largest provider of CMRS in the United States, serving over fifty million customers nationwide, the majority pursuant to term contracts that include ETFs. The CTIA Consumer Code, to which Cingular is a signatory,[10] requires that participating wireless carriers disclose the salient features of the service and its limitations, including any applicable ETF and other rate components of service at the time a consumer signs up for wireless service. Cingular's practices with respect to rate and term disclosures at the point of sale are consistent with and exceed the requirements of the CTIA Consumer Code. As the Commission is also aware, Cingular is a party to an Assurance of Voluntary Compliance ("Cingular AVC") with Attorneys General in 33 states that addresses aspects of Cingular's marketing, sales and billing

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[9] *In re Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve 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,* WT Docket No. 99-263, Memorandum Opinion and Order, 15 F.C.C.R. 17021, 17041, ¶ 39 (2000) ("*Wireless Consumers Alliance Order*").

[10] Cingular was in compliance with the CTIA Consumer Code on the day it was announced. Cingular was the first carrier to be awarded the right to use the CTIA Seal of Wireless Quality, and Cingular in fact exceeds the consumer disclosure and service trial requirements contained in the CTIA Consumer Code.

practices. The commitments made in the Cingular AVC are a composite of those actions that the 33 state Attorneys General signatories to the document believed were consistent with the various consumer protection, deceptive trade practices, consumer fraud, and similar statutes and regulations over which the Attorneys General have prosecutorial authority.

Cingular has chosen to apply the terms of the 33-state Cingular AVC on the same nationwide basis as the CTIA Consumer Code, because consistent, nationwide implementation is the best and most practical outcome for both Cingular and its subscribers. Both the Cingular AVC and the CTIA Consumer Code provide Cingular customers and prospective Cingular customers with strong disclosures about the relevant rates and terms of service for the particular service the individual customer selects at the point of sale, including ETFs.

As a rate structure, the ETF-supported term rate plan provides benefits both to the wireless customer and the carrier – it permits the offering of service to customers at a lower "up-front" rate because carriers can recoup the expenses associated with customer acquisition and reduced handset prices over the course of a one- or two-year contract. The Commission is well aware that ETFs are a common element of many wireless carriers' rate plans. Commission consumer bulletins designed to alert consumers expressly confirm that ETFs are part of the landscape of wireless service contracts and that consumers need to understand the financial consequences of their choices in selecting and changing their wireless service providers, so that they can make informed decisions.[11]

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[11] *See, e.g.*, "What You Should Know About Wireless Phone Service," http://www.fcc.gov/cgb/wirelessphone.pdf, at 6 (visited Aug. 4, 2005) ("Most carriers require new subscribers to sign one-year contracts or service agreements when they sign up for a new service plan. Most charge an 'early termination fee' to users who cancel their service plans prior to the end of that year. . . . Consumers should carefully read any potential service contract prior to signing up for service."); "Your Phone Number, You Can Take It With You!," http://www.fcc.gov/cgb/NumberPortability/checklist.html (visited Jul. 18, 2005) (explaining that

Despite the fact that ETFs are disclosed clearly at the point of sale, Cingular is a defendant in a number of the putative class actions that question the reasonableness and fairness of ETFs pursuant to state law. The continued litigation of these quasi-regulatory lawsuits not only flouts Congress's clear, preemptive command but also threatens to thwart fundamental federal wireless policy objectives. Absent an ETF, there is no practical difference between a term contract and a month-to-month, pay-as-you-go service arrangement. Thus, a judgment prohibiting the use of ETFs pursuant to state law would effectively eliminate the use of term contracts as a means of offering significantly discounted prices for handsets and other reduced up-front and monthly charges for CMRS subscribers in that particular state. One or more such judgments will destroy the regulatory uniformity mandated by the 1993 amendments to the Act and, by requiring carriers to tailor their service offerings according to each state's ETF rules, reintroduce the inefficiency, burden and costs associated with state-specific rate regulation. Inevitably, these restrictions and added costs will operate to increase the prices paid by consumers for wireless service and devices. Therefore, the Commission should grant the CTIA petition and enter an order confirming that ETFs are "rates charged" for CMRS within the meaning of Section 332(c)(3)(A) and that applications of state law that would restrict or prohibit the use of ETFs are preempted by federal law.

"your contract may contain early termination fees that you are obligated to pay."); FCC Provides Information for Consumers on Wireless Local Number Portability, *News*, 2003 FCC LEXIS 6109 (2003) ("Be aware that you are obligated to pay any early termination fees that you may have under your existing contract . . . .").

II. THE COMMUNICATIONS ACT PREEMPTS STATE REGULATION OF WIRELESS CARRIERS' EARLY TERMINATION FEES.

A. Section 332 Broadly Preempts State Regulation of Wireless Rates and Rate Structures.

Section 332 of the Act prohibits state regulation of the "rates charged" by wireless carriers. This prohibition is explicit and complete, providing that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ."[12] As the Commission has observed, Section 332 evidences "an unambiguous congressional intent to foreclose state regulation in the first instance,"[13] and Congress intended that provision, together with the other 1993 Act amendments, "to establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[14] Cognizant of this intent, the Commission has consistently interpreted the prohibition on state regulation of CMRS rates as being broad in scope.

In its *Southwestern Bell Mobile Systems* order, the Commission made clear that the prohibition on state regulation of "rates charged by" wireless service providers includes "both

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[12] 47 U.S.C. § 332(c)(3)(A) (2005). If this rescission of state substantive jurisdiction over CMRS rates were not already plain, Congress removed all doubt by amending both Sections 2(b) and 332 (c)(3)(A), each cross-referencing the other, to provide that states no longer had any form of "intrastate common carrier" regulatory authority over CMRS carriers or their rates.

[13] *In re 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 F.C.C.R. 7486, 7496, ¶ 18 (footnote omitted; emphasis added) ("*CPUC Preemption Order*").

[14] *Id.* at 7499, ¶ 24 (footnote omitted). "[B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-à-vis telephone exchange service carriers and State regulations can be a barrier to the development of competition in this market, ***uniform national policy is necessary and in the public interest***." *Id.* at 7499 n.70 (citation omitted) (emphasis added).

rate levels and rate structures for CMRS" and that "the states are precluded from regulating either of these."[15] "Accordingly, states not only may not prescribe how much may be charged for [CMRS] services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."[16] The following year, in *Wireless Consumers Alliance*, the Commission confirmed that "a court will overstep its authority under Section 332" if it attempts to use state law to adjudicate the reasonableness of a rate in relation to the service offered.[17]

The Commission further clarified the scope of Section 332(c)(3)(A) in its recent *Truth-in-Billing* order, which confirmed that the statute preempts state laws prohibiting or requiring the use of separate line item charges by wireless carriers.[18] The Commission focused on the effect that the regulation would have not only on the line item in question but also on "the manner in which the CMRS carrier structures its rates."[19] Thus, the Commission found, "state regulations that prohibit a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates," and, therefore, are

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15 *In the Matter of 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 F.C.C.R. 19898, 19907, ¶ 20 (1999).

16 *Id.*

17 *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17041, ¶ 39.

18 *In the Matter of Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* CC Docket No. 98-170; CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448 (2005) (*"Second Truth-in-Billing Order"*).

19 *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6463, ¶ 31.

preempted.[20] This conclusion was reinforced by consideration of the effect of individual regulation of line items on carriers that market and price their services on a national basis:

> That this type of line item regulation would affect a CMRS carrier's rates and rate structure is particularly evident when considering that most CMRS carriers...market and price their services on a national basis. A CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction.[21]

As set forth in the CTIA petition and as shown below, applications of state law that would restrict or prohibit a CMRS carrier from charging ETFs would "clearly and directly affect the manner in which the CMRS carrier structures its rates." Therefore, just as state rules dictating "whether and how" wireless carriers can recover line item charges are preempted, so too applications of state law to dictate whether and how a CMRS provider may charge an ETF are preempted under Section 332(c)(3)(A).

B. ETFs Are "Rates Charged" for CMRS Within the Meaning of Section 332(c)(3)(A).

As the Commission has recognized, ETFs are one of several different rate elements employed by CMRS carriers in setting prices.[22] ETFs are "rates charged" for CMRS within the

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20 *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6463-64, ¶ 31.

21 *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6464, ¶ 31.

22 "[C]ellular prices have at least three main elements. These are monthly access, per minute peak-use period, and per minute off-peak-use period charges. In addition, there may be fees for activation, ***termination***, and roaming." *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 F.C.C.R. 8844, 8868, ¶ 70 (1995) (emphasis added).

meaning of Section 332(c)(3)(A) both because they are themselves "rates" and because they are essential elements of CMRS rate structures.[23]

An ETF is a "rate" because it is an amount of money that a term-contract subscriber agrees to pay for CMRS service and equipment if he or she does not complete the term of the contract. It is of no moment that the ETF is charged only upon early termination of the contract and thus may never be charged: when a subscriber enters into a term contract for wireless service, he or she agrees ***either*** to pay the monthly charges for the duration of the term ***or*** to pay the ETF upon early termination. In other words, a term contract offers the subscriber alternative rates for alternative service commitments: the aggregate standard monthly charges over the term of the contract, or the monthly charges incurred until termination plus the ETF. In the latter case, the ETF is no less a "rate charged" for CMRS under the contract than are the monthly charges.[24]

ETFs also function as elements of CMRS providers' "rate structures." As explained above and in the CTIA petition, ETFs are essential to the term contract rate structure preferred by the majority of CMRS subscribers today. By using the ETF to ensure a minimum return from a service contract, carriers can offer subscribers reduced or eliminated handset prices and service activation fees and lower monthly service charges in exchange for their commitment either to maintain service over the term of the contract or to pay the ETF. Conversely, elimination of ETFs would result in increased handset prices, increased service activation charges, increased monthly service charges, or some combination thereof.[25]

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[23] CTIA petition at 11-15.

[24] As noted in the CTIA petition, a number of state and federal courts have correctly held that ETFs are "rates charged" for CMRS and that Section 332(c)(3)(A) thus preempts the use of state law to invalidate ETFs. *See* CTIA petition at 13-14 & n.46 (citing and discussing cases).

[25] As one economist has reported to the Commission, "limiting the use of early termination fees would—in terms of its economic effects—amount to backdoor price regulation that would

In the wireline context, the Commission and the courts have long acknowledged that ETFs or their functional equivalent are an essential "rate" element of service arrangements pursuant to which subscribers can secure rate reductions in exchange for volume or term commitments:

> The Commission has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments. . . . In approving these provisions, the Commission recognized implicitly that they were a valid quid pro quo for the rate reductions included in the long-term plans.[26]

As the D.C. Circuit has explained:

> Public utility rates are a means by which the carrier recovers its costs of service from its customers. Part of AT&T's cost of providing private-line service is the cost incurred from last-minute cancellation of orders and early termination of service. These acts result in customers' not paying rates sufficient to cover the cost of filling the orders and often subject AT&T to additional costs while facilities lie idle. In the past, AT&T recovered these costs by raising its general rates for private-line service, thereby spreading

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limit the workings of competition itself and would undermine long-term contracting. . . . One likely consequence of undermining long-term contracts is that carriers would no longer subsidize handsets and might charge their customers relatively large set-up fees to cover account start-up costs." M. Katz, "Measuring Competition Effectively," ¶ 45 & n.20 (May 10, 2004), submitted with Reply Comments of the Cellular Telecommunications & Internet Association in *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*, WT Docket No. 04-111 (filed May 10, 2004).

[26] *In re Ryder Communications, Inc v. AT&T Corp.*, 18 F.C.C.R. 13,603, 13,617, ¶ 32 (2003) (footnotes omitted); *see also In re Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), American Tel. & Tel. Co. Request for Approval to Supplement the Capitalization of AT&T Information Systems in Connection with the Transfer of Embedded Customer Premises Equipment*, 100 F.C.C. 2d 1298, 1324-25, ¶ 39 (1985) (declining to eliminate or reduce termination charges in CPE lease contracts, stating that revenue produced for AT&T by termination charge "is exactly what the CPE lease customers agreed to when they made their decision to enter into a contract with AT&T rather than going with a month-to-month arrangement or buying from an AT&T competitor.").

> the costs among all ratepayers. The [cancellation and discontinuance] charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs. This adjustment in billing does not mean that these cost items are not part of the charge to the customers to receive interconnection service. We therefore conclude that the Commission reasonably found that the . . . charges are "rates" within the meaning of the Agreement.[27]

ETFs perform the same function in the wireless context.[28] They thus clearly constitute "rates charged" for CMRS within the meaning of Section 332(c)(3)(A).

C. Any Application of State Law that Regulates the Use or Amount of ETFs Based Upon An Assessment of Their Reasonableness Is Preempted by Section 332(c)(3)(A).

The Commission has established that "[i]f a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332."[29] Any state law or regulation purporting to invalidate or modify the application or enforcement of wireless carrier ETFs based upon any assessment of the reasonableness of the ETF thus constitutes prohibited rate regulation. Federal courts considering the matter have also confirmed that a state court oversteps its authority if it considers the reasonableness of a wireless rate.[30] "[C]laims that would enmesh the

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27 *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987); *see also Equipment Distributors' Coalition, Inc. v. FCC,* 824 F.2d 1197, 1199 (D.C. Cir. 1987) (upholding FCC determination that ETFs were not anticompetitive, and observing that "[t]he charges were imposed because premature termination, by cutting short the revenue stream contemplated by the contract, would otherwise result in a cost recovery below that assumed in the calculated monthly charges.").

28 *See, e.g.,* CTIA petition at 12-13 & n.46.

29 *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17035, ¶ 25.

30 *AT&T Corp. v. FCC,* 349 F.3d 692, 702 (D.C. Cir. 2003) (citing *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17041, ¶ 39.

courts in a determination of the reasonableness of a rate charged" are preempted by section 332.[31] Where "the nature of [plaintiff's] claims would necessarily require an examination of the reasonableness of the rates charged by [a wireless carrier], such claims are preempted under the [Act]."[32]

The overriding thrust of the state court actions challenging carriers' ETFs is that the charges are intrinsically "unfair," and therefore unenforceable, under state law. As exhaustively shown in the CTIA petition, although the complaints plead a variety of statutory, equitable, and quasi-contractual claims (*e.g.,* unconscionability, illegal penalties, *quantum meruit*, unjust enrichment, unfair competition, and consumer protection), each of them depends upon a determination of the "reasonableness" of the ETF.[33] This of course is the essence of rate regulation, and as such is prohibited to state courts by Section 332(c)(3)(A) and the decisions of this Commission.

D. Section 332's Exception for State Regulation of "Other Terms and Conditions" Does Not Save State Regulation of ETFs from Preemption.

Section 332(c)(3)(A) provides that its preemption of state rate regulation of wireless rates does not "prohibit a State from regulating the other terms and conditions of commercial mobile services."[34] Thus, as the Commission has recognized, lawsuits applying state consumer protection laws of general applicability to the "disclosure" of rates or the formation of wireless

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31 *Fedor v. Cingular Wireless Corp.,* 355 F.3d 1069, 1073 (7th Cir. 2004).

32 *Chandler v. AT&T Wireless Servs., Inc.*, No. 04-180-GPM, 2004 U.S. Dist. LEXIS 14884 at * 5 (S.D. Ill. July 21, 2004); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) ("This clause completely preempted the regulation of rates . . . .").

33 CTIA petition at 22-27.

34 47 U.S.C. § 332(c)(3)(A).

contracts are not preempted merely because they concern rates or because a damages award might increase a carrier's costs and thus indirectly affect its rates.[35] However, as shown above and in the CTIA petition, the complaints at issue here seek to use state laws to regulate ETFs both as rates and as elements of carrier rate structures, and there is no reasonable basis on which to conclude that these applications of state law could be spared from preemption as regulating "other terms and conditions" of wireless service.

Parties who oppose the CTIA petition will undoubtedly argue that the "other terms and conditions" language of Section 332(c)(3)(A) preserves from preemption the state consumer protection, contract and tort laws that form the basis of the state lawsuits challenging the carriers' ETFs. Thus, they will argue, the lawsuits escape preemption by simple dint of the state law labels attached to the claims in the complaints. This argument must be rejected. While it is true that state consumer protection laws of general applicability are not *categorically* preempted by Section 332, their non-preempted applications do not insulate them from preemption when they are used to regulate CMRS rates. As the Commission has repeatedly observed, "it is the substance, not merely the form" of the claim at issue that determines whether the state is engaging in rate regulation proscribed by section 332(c)(3)(A)."[36] The plaintiffs class action bar has packaged and repackaged their challenges to the reasonableness and lawfulness of ETFs in a variety of state-law wrappers, but the contents of those packages remain challenges to the inherent fairness and reasonableness of "rates charged" for CMRS.

The claims against Cingular and other wireless carriers do not seek disclosure of ETFs, nor do they seek to compel the carriers simply to adhere to the terms of their contracts. Rather,

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[35] *See Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17040-41, ¶ 38.

[36] *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6466, ¶ 34 (quoting *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17037, ¶ 28).

they seek an order eliminating ETFs from the carriers' rate structures. In the *Truth-in-Billing Order*, the Commission observed that "[s]tate regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates."[37] Similarly, applications of state law that prohibit a CMRS carrier from charging an ETF, thereby permitting recovery of the costs of providing service only through higher handset prices, service activation fees, and monthly charges, would "clearly and directly affect the manner in which the CMRS carrier structures its rates."

E. Federal CMRS Policy Requires Preemption of State Regulation of ETFs.

Any doubt as to the applicability of Section 332(c)(3)(A) to state regulation of the "reasonableness" of ETFs must be resolved in a manner that promotes federal wireless regulatory policy. Since at least 1993, that policy has been to foster the growth and development of mobile services through the promotion of competition and the removal of unnecessary regulatory burdens.[38] Section 332's preemption of state regulation of CMRS rates was and is integral to that federal objective:

> Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest.[39]

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[37] *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6463, ¶ 31.

[38] *See Seventh CMRS Market Conditions Report,* 17 F.C.C.R. at 12987; *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, 9 F.C.C.R. 1411, 1418, ¶¶ 13-15 (1994) ("*Second Report and Order*").

[39] *Second Report and Order*, 9 F.C.C.R. 1411, at ¶ 250.

In other words, having found that a "uniform national policy is necessary and in the public interest,"[40] Congress intended the 1993 amendments "to establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[41]

The pro-competitive, deregulatory framework prescribed by Congress and implemented by the Commission "has enabled wireless competition to flourish, with substantial benefits to consumers."[42] Indeed, in the decade following enactment of Section 332(c)(3)(A), wireless penetration grew tenfold to 160.6 million subscribers – or more than half the population of the United States.[43] As the Commission observed in the *Truth-in-Billing Order*:

> In this environment, Congress has directed that the rate relationship between CMRS providers and their customers be governed "by the mechanisms of a competitive marketplace," in which prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators. To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans.[44]

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40 *CPUC Preemption Order,* 10 F.C.C.R. at 7499 ¶ 24 n.70 (1995) (citation omitted).

41 *CPUC Preemption Order,* 10 F.C.C.R. at 7499, ¶ 24.

42 *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6466-67, ¶ 35 (citing *Ninth CMRS Market Conditions Report*, 19 F.C.C.R. at 20601, ¶ 4 (2004)).

43 *Compare Ninth CMRS Market Conditions Report* at Appendix A, Table 1 (CTIA estimate of 16 million mobile subscribers as of December 1993) *with id.* ¶ 174 (FCC estimate of 160.6 million mobile subscribers as of December 2003, yielding a nationwide penetration rate of 54%).

44 *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6466-67, ¶ 35 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17032-33, ¶¶ 20-21, and citing *Personal*

These observations are equally applicable to state regulation of ETFs. Restriction of wireless carriers' ability to charge include ETFs in their rate structures is antithetical to the federal wireless policies because it "would—in terms of its economic effects—amount to backdoor price regulation that would limit the workings of competition itself and would undermine long-term contracting."[45] Moreover, in view of the fact that a substantial majority of the nation's 160 million wireless subscribers enjoy the reduced handset prices and wireless rate benefits offered in ETF-supported term contracts, altering this rate structure through restriction or elimination of the use of ETFs would have a substantial effect. Notably, the disruption to CMRS pricing flexibility would disproportionately affect low income subscribers, who are most likely to be discouraged by rate plans with higher "up-front" costs and higher handset prices.

State-by-state regulation of ETFs – whether by statute, administrative rule, or class action lawsuit -- would undoubtedly "lead to a patchwork of inconsistent rules" prohibiting or permitting the use of ETFs in structuring CMRS rate plans. A term contract without an ETF does not provide the revenue predictability carriers rely upon when offering the significant reductions in handset prices and service charges that characterize today's rate plans, and carriers

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Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review—Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers,* GN Docket No. 94-33, *GTE Petition for Reconsideration or Waiver of a Declaratory Ruling,* MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.R. 16857 (1998), and *Ninth CMRS Market Conditions Report,* 19 F.C.C.R. at 20644, ¶ 113; further citations omitted).

[45] M. Katz, *supra* n.25, at ¶ 45.

would therefore have to tailor their rate plans to account for individual states' ETF rules.[46] This, in turn, "would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans."

In its *Truth-and-Billing Order*, the Commission noted the importance of considering conflict preemption principles in a case where state regulation comes into conflict with established federal policies. The Commission noted that, even absent a finding of express statutory preemption, conflict preemption principles would support preemption of state regulation of line item charges.[47] The federal policy at issue there, as here, was the policy of uniform wireless rate deregulation. There, the Commission stated that "[i]t is recognized widely that federal law preempts state law where, as here, the state law would 'stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,' or federal regulations."[48] The *Truth-in-Billing Order* also stressed the pro-competitive, deregulatory framework Congress prescribed for CMRS, affirming that "Congress has directed that the rate

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[46] *See* Katz, *supra* n.25, at ¶ 45 n.20 ("One likely consequence of undermining long-term contracts is that carriers would no longer subsidize handsets and might charge their customers relatively large set-up fees to cover account start-up costs.").

[47] *Second Truth-in-Billing Order,* 20 F.C.C.R. at 6466-67, ¶ 35 ("Even setting aside the preemptive effect of section 332(c)(3), we note that the type of state regulations described above may be subject to preemption because they conflict with established federal policies...Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carrier the flexibility to design national or regional rate plans.") (footnotes omitted).

[48] *Id.* (citing *City of New York v. FCC*, 486 U.S. 57, 64 (1988), and *United States v. Shimer*, 367 U.S. 374, 381-382 (1961)).

relationship between CMRS providers and their customers be governed by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators."[49]

In light of the important and well-established federal policy interests at stake here, and the clear threat to those policies posed by the prospect of state class action judgments in the ETF cases now pending, the Commission should affirm that state regulation of ETFs is preempted, not just expressly by Section 332(c)(3)(A)'s preemption of state regulation of "rates charged," but also by settled principles of conflict preemption.

III. CONCLUSION

The Commission's policies for wireless service competition and deregulation are a resounding success. The results speak for themselves – the wireless industry is the Chairman's self-described "poster child for competition" and competition among providers has yielded for the public a range of innovative service options, packages and rate plans.[50] The Commission's highly successful strategy for deregulation of wireless carrier rates, however, can be endangered. If state courts can engage in searching reviews of the reasonableness of ETFs as a component of the modern wireless rate plan, then state courts would be supplanting the Commission-established and Congress-sanctioned wireless carrier rate deregulation with a patchwork of state-specific rate regulation by judicial fiat. Allowing individual state courts to review, in whole or in

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[49] *Id.*

[50] *See Presentation of Commissioner Kevin J. Martin – Wireless and Broadband: Trends and Challenges* at 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253261A1.pdf (last visited July 19, 2005) ("Today, wireless is the poster child for competition."); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer of Control of Licenses and Authorizations, *Memorandum Opinion and Order, Separate Statement of Commissioner Kevin J. Martin*, 19 F.C.C.R. 21522, 21661 (2004) ("The wireless industry is the poster child for the success of competition.").

part, the reasonableness of an ETF, or to suspend its enforceability, will have serious negative consequences on wireless services and competition.

The Commission's analysis of this point need not be overly labored. The Commission simply needs to do the same careful job that it did in analyzing the nature of CMRS line items in the recent *Truth-in-Billing Order* and discern the true nature of the ETF. Just as the Commission determined that it was a matter of individual wireless carriers' discretion to compose and impose particular regulatory cost recovery line, so too the Commission should conclude here that both the decision to charge an ETF, and the amount of the ETF, are ratemaking decisions the reasonableness of which is subject to review only by the Commission under the uniform standard provided by Section 201 of the Communications Act.

Respectfully submitted,

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