Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by SunCom Wireless Operating Company, L.L.C. and Opposition and Cross-Petition for Declaratory Ruling Filed by Debra Edwards.	)))))))	WT Docket No. 05-193

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Patrick W. Pearlman
Deputy Consumer Advocate
Jennifer L. Hughes
Staff Attorney
The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by SunCom Wireless Operating Company, L.L.C. and Opposition and Cross-Petition for Declaratory Ruling Filed by Debra Edwards.	))))	WT Docket No. 05-193

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Pursuant to Section 1.4(b)(2) of the Federal Communications Commission's ("FCC" or "Commission") Rules, 47 C.F.R § 1.4(b)(2), the National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these comments in response to SunCom Operating Company L.L.C.'s ("SunCom") February 22, 2005 Petition for Declaratory Ruling preempting state regulation of early termination fees ("ETFs") in wireless service contracts.[2] NASUCA is entirely opposed to SunCom's petition.[3]

[1] NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g., Ohio. Rev. Code* Ch. 4911; 71 *Pa. Cons. Stat. Ann.* § 309-4(a); *Md. Pub. Util. Code Ann.* § 2-205; *Minn. Stat*. § 8.33; *D.C. Code Ann.* § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[2] *See* 70 Fed. Reg. 38926 (July 6, 2005).

[3] NASUCA's comments also respond in support of Ms. Edwards' March 4, 2005 cross-petition for declaratory ruling. Similarly, NASUCA is filing comments opposing a similar petition for declaratory ruling filed by the Cellular Telecommunications & Internet Association ("CTIA") in WT Docket No. 05-194.

I. INTRODUCTION AND SUMMARY.

SunCom's petition is the latest effort to whittle away states' authority to regulate virtually anything that affects commercial mobile services ("CMRS" or "commercial wireless") providers' operating costs or marketing practices. These efforts are contrary to the provisions of the Communications Act of 1934 ("Act"), contrary to the dual federal-state regulatory regime over telecommunications services established in the Act, and contrary to principles of federalism embodied in the Constitution and jurisprudence.

SunCom argues that when state courts review CMRS providers' ETFs, they are engaged in "rate" regulation prohibited under Section 332(c)(3)(A) of the Act.[4] This is wrong: States may review, regulate or even prohibit such fees pursuant to their authority, preserved in the same section of the Act, to regulate "other terms and conditions" of CMRS. Congress' intent that states retain their authority to regulate such terms and conditions of wireless service as ETFs is manifest in the legislative history of Section 332(c)(3)(A). Such authority is also consistent with the actual language of the section, as well as its role within the overall context of the Act.

Moreover, the fact that state courts happen to impact wireless carriers' costs in determining whether to invalidate, prohibit or otherwise restrict wireless carriers' ETFs, does not involve the states in "fixing, setting, or prescribing" CMRS providers' rates. Rather, courts must engage in such inquiries in determining whether, under state common law or statute, particular ETFs constitute unlawful, unreasonable or unconscionable commercial practices. Such court action is not "rate" regulation. Nor does the possibility that state regulation of CMRS providers' ETFs might cause national or regional pricing plans to be less uniform, justify federal preemption.

In addition to denying SunCom's petition, NASUCA urges the Commission to reexamine

[4] 47 U.S.C. § 332(c)(3)(A).

the economic and policy justifications underlying its 1992 decision approving wireless carriers' bundling of service and equipment, of which ETFs are a part, as a means of subsidizing wireless customer premises equipment (*e.g.*, handsets). Evidence shows wireless customers are growing increasingly dissatisfied with wireless carriers' billing and marketing practices, including their widespread use of ETFs. Moreover, the telecommunications industry is widely recognized as a declining cost industry and, while growth in the market has been "unprecedented,"[5] it has become increasingly concentrated in the hands of a few carriers and equipment manufacturers. Thirteen years is a long time in the telecommunications industry. The Commission should take steps to reexamine the assumptions underlying its 1992 decision regarding carriers' subsidization of wireless handsets.[6]

II. THE COMMISSION'S DECISION REGARDING PREEMPTION MUST COMPLY WITH JUDICIALLY-DEFINED LIMITS ON FEDERAL PREEMPTION.

SunCom does not bother to address the Constitutional and judicial precepts regarding preemption that must guide and constrain the Commission's decision on the petition. All SunCom offers is the self-serving suggestion that the Commission can resolve this petition simply by declaring that ETFs are "rates" and therefore states are prohibited from regulating them in any fashion.[7] SunCom's assertion simplistically assumes that the Commission's preemption authority is limited only by the Commission's own unfettered judgment and creativity in interpreting Section 332(c)(3)(A) in pursuit of its general preference for deregulatory policies. The issue is not so simple.

---

[5] Remarks of K. Dane Snowden to the National Association of Regulatory Utility Commissioners, Consumer Affairs Committee, 2005 Summer Meeting, Austin, Texas (July 24, 2005).

[6] Apart from anything else, this bundling means that a wireless phone used for one CMRS carrier's service cannot be easily converted – if at all – to be used with another CMRS carrier's service. This practice runs counter to the Commission's general preference for interoperability of wireless equipment and facilities.

[7] SunCom Petition at 9.

A. The Commission's Ruling On SunCom's Petition Is Constrained By Long-Standing Jurisprudence Regarding Federal Preemption Of State Laws.

The issue of whether federal law, here Section 332(c)(3)(A), preempts (*i.e.*, displaces or supersedes) state law implicates a host of Constitutional issues and principles established by the courts that govern the Commission's analysis.

Preemption analysis and doctrines emanate from the Supremacy Clause of the United States Constitution, which provides that when state law and federal law conflict, federal law controls.[8] The Supremacy Clause gives Congress the power to preempt state law.[9] State law may be preempted in limited circumstances: (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is, in effect, physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[10] Preemption may result not only from acts of Congress but also from acts of federal agencies acting within the scope of their congressionally delegated authority.[11]

The intent of Congress, whether to preempt state law or to allow it to operate, is the

---

[8] The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

[9] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

[10] *Id*. at 368-69 (citations omitted).

[11] *Id*. at 369.

"ultimate touchstone" in preemption analysis.[12] Because preemption is a limit on states' authority, that is, an exception to the principle of "federalism" – the concept of dual sovereignty where state governments and the federal government each retain and actively exercise the functions and powers of government at the same time[13] – the burden in justifying preemption is high and the presumption is against it.[14] Put another way, the "starting presumption" is that Congress has *not* intended to preempt state law in its enactments.[15] Finally, "any indulgence in [statutory] construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assume full federal authority, completely displacing states."[16]

The presumption against preemption is particularly strong where the affected state law addresses areas that traditionally come within the police power of the states. The analysis of any preemption claim starts "with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[17]

Courts recognize that "the regulation of utilities is one of the most important functions traditionally associated with the police power of the states."[18] Likewise, consumer protection is "an area traditionally regulated by the States."[19] Laws regulating telecommunications carriers'

---

[12] *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

[13] *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[14] *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *N.Y. Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

[15] *N.Y. State Blue Cross*, 514 U.S. at 654.

[16] *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 780-81 (1947).

[17] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996).

[18] *Arkansas Electric Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983).

[19] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); *accord General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2nd Cir. 1990).

services come within the states' police powers since they touch on state citizens' health, safety and well-being.[20] Finally, it is fair to say that the intention to preclude state regulation in areas otherwise within their jurisdiction should not be casually attributed to Congress.[21]

The Commission must adhere to these principles in responding to SunCom's petition.

B. The Commission's Power To Preempt State Law Under Section 332(c)(3)(A) Is Limited.

The Commission cannot preempt state law absent a delegation of such authority from Congress. Under 1934 Act, Congress delegated authority to the Commission to regulate telecommunications carriers' interstate services while authority over carriers' intrastate services was reserved to the states. This basic division of authority is set forth in Sections 1 and 2(b) of the Act.[22]

The courts recognize that, "while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres ... in practice, the realities of technology and economics belie such a clean parceling of responsibility."[23] Indeed, there is a "persistent jurisdictional tension" as a result of the overlap between interstate and intrastate services.[24] Nevertheless, to the extent Congress has defined these limits, the Commission is prohibited from superseding state laws governing intrastate telecommunications service, no matter whether the Commission considers those laws to be uneconomical or inconsistent with its preferred policy

---

[20] *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Medtronic,* 518 U.S. at 485; *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 432-33 (2002).

[21] *See* Laurence H. Tribe, *American Constitutional Law* §6-28, at 1175-76 (3d Ed. 2000).

[22] 47 U.S.C. §§ 151 & 152(b).

[23] *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

[24] *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1514 (D.C. Cir. 1990), *citing Public Util. Comm'n of Texas v. FCC,* 886 F.2d 1325, 1329 (D.C. Cir. 1989).

approach.[25]

Congress also expressly preserves preexisting rights and remedies under state statute or common law, particularly with regard to contractual relationships between carrier and customer, as well as consumer protection matters, in numerous provisions of the Act. The general savings clause in Section 414 of the Act is but one example.[26] Other clauses preserving states' authority abound throughout the Act.[27]

III. ETFs FALL WITHIN STATES' AUTHORITY TO REGULATE "OTHER TERMS AND CONDITIONS" OF COMMERCIAL MOBILE SERVICE UNDER SECTION 332(c)(3)(A).

State laws regulating CMRS providers' use of ETFs fall within the states' authority to regulate "other terms and conditions" of CMRS, expressly reserved to states by Congress in its 1993 amendments to Sections 2(b) and 332(c)(3)(A) of the Act. This conclusion is consistent with both the language of these sections, as well as their context in the Act. Moreover, the legislative history of Sections 2(b) and 332(c)(3)(A) compels the Commission first, to recognize the broad range of carrier practices that constitute "other terms and conditions" and second, to interpret "rates charged" narrowly if it is to give effect to Congress' intent.[28] Finally, the fact that wireless carriers might have to alter their rates or rate structures if state laws curtail or even prohibit their use of ETFs does not transform regulation of such fees into regulation of "rates charged by" the carriers. Nor do ETFs become "rates charged by" wireless carriers because state

[25] *Louisiana PSC*, 476 U.S. at 375 ("we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy"); *see also Maryland PSC,* 909 F.2d at 1516.

[26] This section provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. 47 U.S.C. § 414.

[27] *See, e.g.*, 47 U.S.C. §§ 221(b), 253(c), 254(f), 256(c), 261(b) & (c), and 601(c).

[28] Although the Commission has not defined "other terms and conditions" of CMRS, it has noted that the "legislative history of [Section 332(c)(3)(A)] *largely speaks for itself.*" *See In re: 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*, Report and Order, 10 FCC Rcd 7025, 7060 ¶ 80 (1995) (emphasis added), *aff'd sub nom., Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

courts must review the carriers' costs allegedly recovered through their ETFs in order to determine whether they should be enjoined or whether carriers should be required to refund or disgorge revenues from such fees.

A. Aside From "Entry" And "Rates," States Retain Their Traditional Authority To Regulate CMRS Providers' Sservices.

Congress' 1993 amendments to Sections 2(b) and 332(c)(3) of the Communications Act of 1934 ("Act") are the basis for SunCom's petition.[29] Prior to 1993, states and the Commission each had jurisdiction over wireless carriers' services.[30] The 1993 amendments to Sections 2(b) and 332(c) of the Act expressly preempted states from regulating certain aspects of commercial mobile services, namely the "entry of" (*i.e.*, licensing, technical standards, etc.) and "rates charged for" commercial mobile services, but specifically preserved states' traditional authority over "other terms and conditions" of commercial mobile services.[31]

Congress' preemption of state authority over commercial wireless carriers' "rates" is not unlimited. For example, in the second sentence of Section 332(c)(3)(A), Congress provided that this subparagraph did not exempt commercial mobile services providers from state requirements imposed in order to ensure the "universal availability of telecommunications services at affordable rates."[32] Similarly, Congress authorized states to seek to reassert authority to regulate commercial wireless carriers' "rates" under certain limited circumstances.[33] Finally, Congress authorized states to seek to continue regulating CMRS providers' rates under, again, limited

---

[29] SunCom Petition at 20-21; *see* 47 U.S.C. §§ 152(b) and 332(c)(3).

[30] The Commission had, however, previously assumed primacy over the licensing of wireless carriers, as well as the technical standards such carriers would be obligated to comply with. *See Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469 (1981). The Commission's technical standards established rules governing the allocation of frequencies, licensing of wireless carriers, radio frequency emissions limitations, interoperability of wireless handsets, etc.

[31] 47 U.S.C. § 332(c)(3)(A).

[32] 47 U.S.C. § 332(c)(3)(A).

[33] 47 U.S.C.. § 332(c)(3)(A)(i) & (ii).

circumstances.[34] The Commission and the courts recognize these continuing roles that states play with respect to intrastate CMRS.[35]

SunCom ignores Congress' statement in Section 332(c)(3)(A) that its preemption of states' regulation of CMRS providers' "entry" or "rates" was "notwithstanding sections 152(b) and 221(b)" of the Act. In other words, Section 2(b) of the Act continues to apply, *i.e.*, states' authority over CMRS providers' intrastate service continues, except with respect to "entry" and "rates." Congress reinforced this notion by amending Section 2(b), which makes clear that the Commission's authority over wireless carriers' intrastate service was "subject to Section 332" of the Act.[36]

Construing Sections 2(b) and 332(c)(3) together, it is clear that the 1993 amendments did not entirely exempt wireless services from the system of dual state and federal regulation. Instead, the amendments preserved the Act's historic dual structure, except in the limited sphere of CMRS providers' "entry" and "rates." Likewise, the Act's general savings clause tempers the preemptive force of the 1993 amendments by providing that the exclusive provisions in the Act do not "in any way abridge, or alter the remedies now existing at common law or by statute...."[37]

Each part of Congress' 1993 amendments, and more precisely what they did and did not amend, must be given effect by the Commission. Congress structured the 1934 Act and its successive amendments in distinct parts – each having its own purpose and serving a distinct

---

[34] 47 U.S.C. § 332(c)(3)(B).

[35] *See CTIA v. FCC*, 168 F.3d 1332, 1335-36 (D.C. Cir. 1999); *see also In re: Pittencrieff Communications, Inc. Petition for Declaratory Ruling,* Memorandum Opinion and Order, 13 FCC Rcd 1735, 1747 ¶¶ 24-25 (1997); *In re: Southwestern Bell Mobile Systems, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19901 ¶ 6 (1999), *citing Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 432 (5th Cir. 1999).

[36] 47 U.S.C. § 152(b).

[37] 47 U.S.C. § 414

function.[38] Supreme Court cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."[39] Sections 2(b), 332(c)(3) and 414 of the Act, read together, make it quite clear that the Commission's authority over intrastate CMRS extends only to "entry" and "rates," and that any Congressional or Commission preference for national uniformity extends only to these matters. What is more, these sections establish clear limits on the Commission's delegated authority to preempt state regulation over commercial mobile services.

B. The Legislative History Of Section 332(c)(3)(A) Excludes ETFs From Being Considered "Rates Charged For" Commercial Mobile Services.

The legislative history of the 1993 amendments to Sections 2(b) and 332(c)(3) of the Act evidences Congress' intent that preemption of state jurisdiction over commercial mobile services was meant to be limited, and that the reservation of jurisdiction to the states should be broadly – not narrowly – construed. The Committee report to the 1993 amendments made this point crystal clear:

> It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. *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 (*i.e.*, 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 states 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."*[40]

---

[38] *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003).

[39] *Id., citing Pa. Dep't of Pub. Welfare v. Davenport,* 495 U.S. 552, 562 (1990)*; see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) ("It is our duty to give effect, if possible, to every clause and word of a statute."); *Adams v. Apfel,* 149 F.3d 844, 846 (8th Cir. 1998) (all provisions of a statute must be construed together to give each an independent meaning).

[40] H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H. Rpt. 111, at 4 (1993) (emphasis added).

Thus CMRS providers' "bundling of services and equipment" falls within the scope of the phrase "other terms and conditions" of such service. "Other consumer protection matters" are similarly covered by the phrase. Finally, Congress made it clear that the list of matters identified as "other terms and conditions" was not exhaustive and that "other matters generally understood to fall under 'terms and conditions' of CMRS remain subject to states' jurisdiction. Any suggestion that states' authority over "other terms and conditions" of CMRS providers' service is narrowly defined or limited, or that it may be displaced by an overly broad interpretation of "rates" or "entry," is contrary to both Congress' intent and logic.

C. ETFs Are "Other Terms And Conditions" Of Commercial Mobile Services.

1. ETFs are Clearly Part of CMRS Providers' "Bundling of Services and Equipment."

SunCom admits in its petition that CMRS providers employ ETFs to subsidize the costs of equipment and other accessories bundled together with a wireless customer's service. SunCom states that the costs of providing CMRS services are considerable, and that new customer acquisition requires SunCom "to subsidize and rebate charges for *customer handsets and accessories*, and to pay direct and indirect commissions to dealers, retailers, and other salespeople who sell SunCom's services to subscribers."[41] SunCom further advises that ETFs enable carriers to offer customers "a low initial price (often with *a free or discounted handset*) and with discounted monthly charges."[42]

Term contracts and ETFs were endorsed by the Commission in its 1992 order in which it concluded that "subsidizing wireless phones in this way 'is an efficient promotional device

---

[41] SunCom Petition at 4 (emphasis added).

[42] *Id.* at 5 (emphasis added).

which reduces barriers to new customers.'"[43] The significance of the 1992 Commission order endorsing CMRS providers' practice of bundling equipment and services together – including the use of term contracts coupled with ETFs – should be obvious: Congress was fully aware of the carriers' practice and the Commission's order when it amended Section 332(c)(3)(A) a year later.

By specifically including the practice that is the subject of SunCom's petition (*i.e.*, utilizing term contracts to offset the costs of subsidizing equipment bundled with the carriers' service), within the list of matters it defined as "other terms and conditions" of CMRS, Congress intended that states could continue to regulate such practices after 1993. Any other conclusion would be in contravention of Congress' "clear and manifest" intent not to preempt states' authority over such matters.[44]

2. *ETFs Fall Within the Scope of "Other Consumer Protection Matters" Reserved to States by the 1993 Amendments.*

Although the Commission's inquiry need not go further since ETFs are part of wireless carriers' bundling of services and equipment which expressly falls within "other terms and conditions" Congress reserved to states, Section 332(c)(3)(A)'s legislative history also supports continued state regulation of this carrier practice on other grounds. The Committee Report accompanying the 1993 amendments explained that "terms and conditions" included such matters as "customer billing information and practices and billing disputes and *other consumer protection matters*."[45] In this respect, Congress recognized the important state interests in

---

[43] *In re Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, 4030 (1992) ("Cellular Bundling Order"); *see also id*. at 4029 ¶ 10 (discussing fixed term contracts).

[44] *See, e.g., N.Y. State Conf. of Blue Cross & Blue Shield*, 514 U.S. at 655.

[45] H. R. Rep. No. 103-111 at 261. Committee reports, authorities note, represent the most persuasive evidence of congressional intent and that a clear statement in the principal committee report is powerful evidence of legislative purpose and may be given effect. 2A N.J. Singer, Sutherland, Statutory Construction § 48.06 at 440-41 (2000 rev.).

regulating wireless carriers to protect consumers against unfair business practices.[46]

Prior to 1993, many states had enacted consumer protection laws regulating such matters as consumer installment sales contracts and sellers' obligations and remedies, including liquidated damages or penalties clauses. The Iowa Consumer Credit Code ("ICCC") is one example. The ICCC was enacted in 1974 – two decades before Section 332(c)(3)(A) was amended – and restricts certain practices in Iowa if the transaction is a "consumer credit transaction."[47] The ICCC imposes restrictions on the creation, terms, and enforcement of "executory contracts,"[48] including limits on the enforcement of consumer credit contracts that are performed over a period of four or more months. Those limits include allowing consumers an *unrestricted right to cancel* such contracts, and *limits the sums vendors can obtain at the time of such cancellation*.

Iowa's consumer credit law – which is clearly a "consumer protection matter" – is hardly unique. Most states have similar laws that have been part of their consumer protection laws for many years, certainly long before 1993.[49] NASUCA singles out the ICCC because federal courts have uniformly found lawsuits alleging that CMRS ETFs violate the ICCC are not preempted by Section 332(c)(3)(A).[50]

In *U.S. Cellular*, the court upheld the state attorney general's lawsuit alleging that a carrier's ETFs violated the ICCC and other state consumer protection laws. Citing the legislative

---

[46] *See Communications Telesystems International, Inc. v. California Public Utility Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1990).

[47] *See Iowa Code* § 537.1301(11). Such transactions include "consumer credit sales," which include sales of services. *Id.* §§ 537.1301(12) & (41). All covered transactions must involve credit. *Id.* § 537.1301(15).

[48] *Id.* § 537.3310.

[49] *See, e.g., W. Va. Code* § 46A-2-115 (enacted 1974); *Kansas Stat. Ann*. § 16a-1-201 (enacted 1973).

[50] *See Iowa v. U.S. Cellular Corp*., 2000 U.S. Dist. LEXIS 21656 at * 4-6 (S.D. Iowa 2000); *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000); *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004).

history of Section 332(c)(3)(A), the court stated that it was required to give effect to "the intent of the committee that forged the section to allow state regulation of terms and conditions, specifically via the consumer protection laws."[51] Further, the court noted:

> US Cellular further asserts that the State's claims "not only touch on, but go to the heart of rates." This assertion is overly broad. While there is a connection between the contracts which US Cellular may offer and the rates charged by the company, allowing a company to perpetrate frauds upon consumers was not Congress' intent when it enacted the statute. Indeed, it appears to be just this concern that prompted Congress to include the exception clause to section 332.
>
> US Cellular would have this Court construe "rates" so broadly as to incorporate anything that might touch upon U.S. Cellular's business. ... 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....

Similarly, the court in *Cedar Rapids* rejected the notion that Section 332(c)(3)(A) completely preempted the State's lawsuit alleging CMRS ETFs violated the ICCC. The court's discussion of the scope of state preemption under Section 332(c)(3)(A) is likewise instructive:

> *[T]his Court declines to read "rates" in section 332 so broadly as to necessarily preclude a state's judicial challenge based on a statute designed to protect consumers against fraudulent or deceptive business practices. Under such a reading, any challenge to Plaintiffs' conduct could be couched in terms of its effect on rates, and, as the Court has already concluded, the language of the statute makes it apparent that Congress did not intend such a result.*
>
> *Moreover, it is equally arguable that enforcement of the ICCC against Plaintiffs would not affect rates at all*, even under a relatively broad reading of that term. Rather, it would merely require Plaintiffs to structure their service agreements so that those agreements conform to the disclosure requirements mandated under the ICCC. This requirement might shift the point in the relationship between Plaintiffs and consumers at which costs and charges would be incurred -- in that, e.g., Plaintiffs' hardware costs would be incurred by consumers "up front" rather than spread out incrementally throughout the life of the service agreement, or subsumed in cancellation or liquidation charges -- but ultimately, the "rates" charged by Plaintiffs would remain the same.[52]

[51] *U.S. Cellular*, 2000 U.S. Dist. LEXIS at * 14-15.

[52] *Cedar Rapids*, 2000 U.S. Dist. LEXIS 22624 at * 20-21.

Other courts have construed similar state laws to find claims brought under state consumer protection laws – whether based on statute or common law – not preempted under Section 332(c)(3)(A).[53]

Federal courts in Texas specifically concluded that state common law claims challenging CMRS providers' ETFs fall within state laws regulating "other terms and conditions" of commercial mobile services rather than preempted "rate" regulation.[54] In *Esquivel*, the court noted that SW Bell Mobile's 51-page "Tariff Rate Plan" set forth "detailed price structures for air time rates and service charges but contains only two generic references to a termination charge." Further, the court observed, the "actual language calling for liquidated damages is located in a section of the agreement styled 'Terms and Conditions.'"[55] SW Bell's arguments were practically identical to SunCom's here.[56] The court was not convinced, noting:

> On the other hand, 47 U.S.C. § 332(c)(3)(A) specifically declines to prohibit the states from regulating terms and conditions. The congressional history indicates that the phrase "terms and conditions" was meant to include such matters as customer billing information and practices and billing disputes, *"and other consumer protection matters." Plaintiffs' suit is invoking the common law of Texas designed to protect consumers from excessive liquidated damages provisions that are tantamount to penalties.* Nothing in the Tariff filed by

---

[53] *See, e.g., Moriconi v. AT&T Wireless PCS*, 280 F.Supp.2d 867, 873-78 (E.D. Ark. 2003) (refusing to find plaintiffs' claims that carriers' pre-printed contract terms limiting the carrier's liability, allowing unilateral changes to material contract terms and imposing mandatory arbitration, violated *Ark. Code Ann.* § 16-111-104, among other things); *State ex rel. Nixon v. Nextel West Corp.*, 248 F.Supp.2d 885, 890-93 (E.D. Mo. 2003) (refusing to find state attorney general's claims under Missouri Merchandising Practices Act regarding carrier's advertising of fees preempted).

[54] *See Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Texas 1996). In *Esquivel*, the plaintiff consumers challenged SW Bell Mobile's written service agreements that provided that, if the customer terminates service before the expiration of the agreed term, liquidated damages in the amount of $200 were to be paid to the carrier. The plaintiff contended that this sum was not a reasonable estimate of actual damages that result from terminating the agreement and therefore is punitive and invalid under Texas common law.

[55] *Id*. at 715.

[56] For example, SW Bell claimed that: (1) it "incurs certain fixed acquisition costs each time it adds a customer to its network and must recover those costs through the total price charged for the service;" (2) "to allow customers the opportunity to avoid payment of these costs 'up front,' those costs are spread over the life of the agreement;" and (3) its "liquidated damages provision is needed to enforce this arrangement." *Id*.

> Defendant indicates that the FCC has ever passed upon the amount of liquidated damages specified in Defendant's agreements. Also militating against complete preemption is the "savings clause" of the Communications Act, 47 U.S.C. § 414, which states: “Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”[57]

More recently, challenges to CMRS providers’ ETFs under the ICCC, as well as the Iowa Unfair Debt Collection statute, were found not to be completely preempted as “rate” regulation under Section 332(c)(3)(A).[58] In *Phillips,* AT&T offered arguments virtually identical to those advanced by SunCom (*i.e.*, that ETFs are a “critical” component of its rate structure that subsidizes the carrier’s low rates and discounted customer acquisition costs)[59] and sought to distinguish the court’s decision in *Esquivel*.[60] With regard to the allegedly “critical” and “integral” relationship of ETFs to rates, the court in *Phillips* wrote:

> While AT&T makes a compelling argument that its early termination fee is an integral part of its rate structure and thus any challenge to those fees is a challenge to its rates, an area within federal law under the complete preemption doctrine, the 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.[61]

The *Phillips* court likewise rejected AT&T’s efforts to distinguish *Esquivel*. Among other things, AT&T asserted that *Esquivel*’s finding that the liquidated damage provision was a “term

---

[57] *Id.* at 715-16.

[58] *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004).

[59] *Compare* SunCom Petition at 4-8 and *Phillips*, at 2004 U.S. Dist. LEXIS at *26-27.

[60] *Phillips*, at 2004 U.S. Dist. LEXIS at * 34 n. 19.

[61] *Id.* at * 36-37.

and condition" was merely *dicta* and was based on a "superficial" observation that the provision was located in a section of the agreement styled "Terms and Conditions."[62] The court in *Phillips* rejected AT&T's assertions, noting that the *Esquivel* court held that the clause "other terms and conditions" in section 332 was meant to include "consumer protection matters."[63] Moreover, the court noted, "the liquidated damages provision in *Esquivel* [was] strikingly similar to the AT&T early termination fee at issue here."[64]

Courts addressing CMRS carriers' late payment penalties – a practice similar to ETFs – have likewise concluded that such provisions are subject to state regulation as "other terms and conditions" of CMRS under Section 332(c)(3)(A). The court in *Brown* allowed consumers to challenge late fees that exceeded the legal rate of interest provided by state law.[65] The court ruled that state laws limiting CMRS providers' late fees were not preempted "rate" regulations because such fees were part of the "other terms and conditions" of service subject to state regulation. In *Brown*, the court concluded:

> While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment. Defendants argue that late fee charges are completely preempted because a reduction in late fee charges will result in an increase in rates. However, any legal claim that results in an increased obligation for Defendants could theoretically increase rates. For example, a claim of false advertising could lead to an increased obligation to notify customers of charges, which could in turn lead to an increase in rates. Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.[66]

In sum, federal courts that have addressed the issue of how state regulation of CMRS providers' ETFs should be characterized under Section 332(c)(3)(A) have concluded that such

---

[62] *Id.* at * 34 n. 19.

[63] *Id., citing Esquivel,* 920 F. Supp. at 715-16.

[64] *Id.*

[65] *See Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421 (D. Md. 2000).

[66] *Id.* at 423.

provisions fit within the scope of "other consumer protection matters" states may continue to regulate as "other terms and conditions" of CMRS.

3. *ETFs are Practices That Fall Within the Scope of "Other Matters Generally Understood to Fall Under 'Terms and Conditions.'"*

In keeping with the broad scope of matters that Congress intended to reserve to states' authority over "other terms and conditions" of commercial mobile service, the non-exhaustive list of examples ended with a broader still catch-all clause: "This list is intended to be illustrative only and not meant to preclude *other matters generally understood to fall under 'terms and conditions.'*"[67] It is hard to conceive of Congress providing a more direct injunction that courts and the Commission should construe "other terms and conditions" broadly. Contract provisions like ETFs are commonly understood, both in the public utility context and in the broader commercial context, to be among those terms and conditions related to the parties' respective performance obligations rather than among the central components of most commercial transactions: price (*i.e.*, rates)[68] and quantity.

In the public utility context, provisions relating to monthly and usage-based rates (prices) are typically distinguished from non-recurring charges, such as service activation or rearrangement charges, and other service charges, such as late fees, cancellation penalties, penalties for non-performance of the parties' material obligations. In short, local service tariffs distinguish between rates customers pay, on a monthly basis, in order to use a particular service or feature of that service, and non-recurring charges customers may incur in certain circumstances. Non-recurring charges, like service activation charge or carrier change charges, are typically set forth separately from rates, as are provisions relating to the consequences of

[67] LEXSEE H. Rpt. 111, at 4 (emphasis added).

[68] *See Newton's Telecom Dictionary* at 701 (16th Ed. 2000) (defining "rate" as: "The price of a particular service or piece of equipment from a telephone company. Telephone companies don't use the word 'price'. They use the word 'rate.' No one knows why….").

their failure to comply with their obligations for service.[69] – such as paying bills on time or terminating service arrangements that require service to be taken for a period longer than one month.

In the broader commercial context, matters that do not directly deal with the price or quantity of goods or services being contracted for are generally understood to be other "terms and conditions" of the contract. Such terms and conditions include provisions defining the term (duration) of the contract, the time, place and manner of performance, actions that constitute a material breach of the contract and events that excuse performance, and penalties or damages that flow from either party's material breach. These latter provisions include liquidated damages clauses, which specify amounts that a party agrees to pay in the event of a failure to perform under the contract. Liquidated damages clauses may be upheld where the damages flowing from non-performance are difficult to calculate and the amount specified is not so great as to be patently unreasonable or punitive.[70]

If the Commission concludes that ETFs are not already among the examples of "other terms and conditions" of CMRS already discussed (*i.e.*, bundling of services and equipment, consumer protection matters), then the Commission should conclude they are included as "other matters generally understood to fall under 'terms and conditions.'" To conclude otherwise would be completely inconsistent with Congress intent that the phrase "rates charged for" should be construed narrowly and the phrase "other terms and conditions" construed broadly, as well as

[69] *See, e.g.*, BellSouth Telecommunications, Inc. – Florida, *General Subscriber Service Tariff*, Section A3.4.2, Pages 17-23 (eff. Nov. 23, 2004); Qwest Corporation – Minnesota, *Exchange and Network Services Tariff*, Section 5.2, Pages 61 to 80.1 (Eff. Sept. 29, 2000); Verizon West Virginia Inc., *General Regulations Tariff*, P.S.C.-W.Va.-No. 201, Sections 1 & 4 (Eff. Jan. 8, 2001); *id.*, *Local Exchange Services Tariff*, P.S.C.-W.Va.-No. 202, Section 2.C (Eff. Jan. 8, 2001). Apparently, the tariffs wireless carriers previously utilized, prior to 1993, were not too dissimilar. As noted in *Esquivel*, SW Bell Mobile's provision stipulating the $200 liquidated damages customers were obligated to pay for early termination of the service agreement were contained, not in the 51 pages of "rates," but rather in the more generic "other terms and conditions" section of its tariff. 920 F. Supp. at 715.

[70] *See Restatement (Second) of Contracts*, § 356(1), Comments a – c; *see also Uniform Commercial Code* §§ 2-718:9 & 2.718:10.

traditional preemption analysis.

D. "Rates" Are Not As Broadly Defined As SunCom Suggests.

1. The Commission Has Not Defined "Rates" Broadly Enough to Include ETFs.

The Commission has not defined "rates" broadly enough to include ETFs. For example, in *Southwestern Bell*, the Commission was asked to declare that the "rates charged" in Section 332(c)(3)(A) included at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for these services. SW Bell argued that Congress' intent would be thwarted if a state could regulate either which service a CMRS can charge for or how much it could charge for that service.[71] In its order, the Commission first noted that "a 'rate' has no significance without the element of service for which it applies," and that the dictionary defines the term "rate" as an "amount of payment or charge based on some other amount."[72] The Commission also cited the Supreme Court's conclusion in *Central Office Telephone* that "rates ... have meaning only when one knows the services to which they are attached."[73] Finally, the Commission reiterated that it had previously interpreted Section 332(c)(3)(A) to "prohibit states from prescribing, setting or fixing rates" of CMRS providers.[74]

Based on the foregoing, the Commission concluded that "rates charged" in Section 332(c)(3)(A) "may include both rate levels and rate structures" for wireless service, that states "not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the services provided can be

[71] *Southwestern Bell*, 14 FCC Rcd at 19906 ¶ 18. The Commission noted that the class action plaintiffs' opposing comments did not specifically address the issue raised by SW Bell Mobile. *Id.*

[72] *Id.* ¶ 19.

[73] *Id., citing Central Office Telephone*, 524 U.S. 214 (1998).

[74] *Id.* n 44 (citations omitted).

subject to charges by CMRS providers."[75] Applying these principles, the Commission concluded that states "do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments."[76]

NASUCA does not question the Commission's definition of "rates" to include the price of a particular telecommunications service, including those elements that go into the calculation of that price (such as calculating air time or rounding up minutes). As the Commission correctly observed, charging in whole minute increments and for incoming calls are common industry practices.[77] However, the logic in the Commission's interpretation of "rates" does not extend to ETFs or late payment fees.

Unlike calculating air time or rounding up minutes, ETFs are purely ancillary to the services the carriers provide to customers. ETFs are clearly not themselves a service, nor are they a price a customer pays on a monthly bill for a particular service. Moreover, ETFs do not figure in the calculation of how much a customer pays for a particular service, as is the case with calculating air time or rounding minutes of use. Rather, ETFs are totally conditional and fixed, without any regard to the customer's service plan, usage, or calling activity. Furthermore, ETFs are premised not on the customer's use of the carrier's service, but on the customer's discontinuation of service. Among the strongest evidence for ETFs exclusion from being considered "rates" comes from the CMRS providers themselves, who bury ETFs in "other terms and conditions" of service in their marketing and service materials.

---

[75] *Id.* at 19907 ¶ 20.

[76] *Id.* at 19908 ¶ 23.

[77] *Id.* at 19903 ¶ 12.

2. *The Decisions Cited By SunCom for the Proposition That State Laws Regulating ETFs are Prohibited "Rate" Regulations are Inapposite.*

SunCom claims that judicial precedent dictates that ETFs are "rates charged" under Section 332(c)(3)(A).[78] The cases cited by SunCom do not support its claim. Virtually all the cases cited by SunCom rely on the U.S. Court of Appeals for the Seventh Circuit's *Bastien* decision,[79] and none engage in any particularly extensive analysis of either Section 332(c)(3)(A) or its legislative history.[80] The *Bastien* decision itself turned on the application of the "filed rate doctrine," which is clearly inapplicable to commercial mobile service. Moreover, the Seventh Circuit has since limited *Bastien*'s application.[81]

The court in *Bastien* determined that a complaint, setting forth state law breach of contract and consumer fraud claims challenging the adequacy of service provided by a wireless carrier, directly challenged the carrier's rates and right to enter the market and were therefore preempted under Section 332(c)(3)(A). The *Bastien* court concluded:

> In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service. *See Central Office Telephone*, 524 U.S. at 223, 118 S.Ct. 1956 ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.") As the Supreme Court recognized in *Central Office Telephone*, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law. *Id.* In addition to rates and service, federal regulations expressly dictate the terms under which a

[78] SunCom Petition at 11.

[79] *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000).

[80] SunCom Petition at 11-14; *see Gilmore v. Southwestern Bell Mobile Systems*, 156 F.Supp.2d 916, 922 (N.D. Ill. 2000) ("In any event, this court is bound to follow decisions of the Seventh Circuit"); *Redfern v. AT&T Wireless Services, Inc.*, 2003 U.S. Dist. LEXIS 25745 at * 2 (S.D. Ill. 2003) (*citing Bastien*); *Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884 at * 4 (S.D. Ill. 2004) (*citing Bastien*). NASUCA notes that two of these decisions, *Redfern* and *Chandler*, were written by the same judge (Judge G. Patrick Murphy) and that, in *Redfern* (the earlier decision, cited in *Chandler*), the plaintiff's attorney did not even appear in order to argue against preemption at the hearing on plaintiff's motion for remand. SunCom cites another decision – *Simons v. GTE Mobilnet*, Civ. No. H-95-5169 (S.D. Tex., April 11, 1996) – as well. However, this decision is neither reported nor attached to SunCom's petition.

[81] *See Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004).

provider may enter a new market.[82]

Although it referenced both entry and rates, the *Bastien* court made it clear that "entry" was the crux of the plaintiff's complaint, reviewing the complaint's specific allegations and then concluding: "These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago area."[83]

The *Central Office Telephone* decision, upon which *Bastien* relied, dealt with claims that a long distance carrier made certain promises regarding its service that were not contained in its federally-approved tariff. The Court rejected those claims, citing the "filed rate doctrine," under which "the rate of the carrier duly filed is the only lawful charge," from which "derivation ... is not permitted under any pretext."[84] The Court conceded the harshness of the "filed rate doctrine" but observed "its strict application is necessary to prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts, the very evil the filing requirement seeks to prevent."[85] More importantly – for this proceeding – the Court observed that the filed rate doctrine covers more than just rates, but also covers provisioning of services and billing:

> The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices and regulations affecting such charges; 47 U.S.C. § 203(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communications, or employ or enforce any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203(c).[86]

[82] *Bastien*, 205 F.3d at 988, *citing AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998). The Bastien court then cited several provisions of the Commission's rules dealing with wireless carriers' buildout of facilities and technical operating standards. *Id., citing* 47 C.F.R. §§ 24.103, .132 and .232.

[83] *Id.* at 989; *see also Wireless Consumers Alliance*, 15 FCC Rcd 17021, 17036-37 ¶ 28 n. 90-91 (noting that the substance of plaintiff's claims in *Bastien* involved "entry").

[84] *Central Office Telephone*, 524 U.S. at 222, *citing Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

[85] *Id.* at 223 (citations omitted).

[86] *Id.* at 223-24.

Relying on *Bastien* to adopt an expansive reading of what state laws or regulations constitute preempted regulation of wireless carriers' "rates" or "entry" is not appropriate. For one thing, the Commission itself has recognized that the filed rate doctrine is inapplicable to CMRS providers.[87] In particular, the Commission has concluded:

> The purposes behind the filed rate doctrine do not have the same relevance in CMRS cases. The statutory scheme of Section 203 directs the agency to assure reasonable rates, rate uniformity, and the absence of price discrimination by carriers through tariff filings and the filed rate doctrine. A mandatory detariffing regime, when applied to both CMRS and other nondominant carriers, constitutes a totally different framework for fulfilling our statutory responsibilities. We do not set CMRS rates or require that carriers only charge rates as filed. Rather than file tariffs to establish the legally effective rates *(and other terms and conditions)* for their offering, CMRS carriers enter into service contracts with their customers. We rely on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination. We have found that this approach produces better results for CMRS consumers than assuring reasonable rates through tariffing and the application of the filed rate doctrine. Since the economic and regulatory regime is different and the purposes behind the filed rate doctrine do not apply to the unregulated CMRS market, we conclude that the analysis and logic found in the filed rate cases regarding the issue of whether the award of monetary damages are equivalent to rate regulation is not applicable.[88]

Moreover, the Commission specifically addressed the *Central Office Telephone* decision, upon which *Bastien* relied, observing:

> The application of the filed rate doctrine sometimes has resulted in hardship to customers, as the Supreme Court acknowledged in *Central Office Telephone*, saying "thus, even if a carrier intentionally misrepresents its rates and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." *The Commission, accordingly, has concluded that the application of the filed rate doctrine "may undermine consumers' legitimate business expectations" and that its application with respect to competitive communications services is contrary to the public interest.*[89]

---

[87] *See In re: Wireless Consumers Alliance, Inc.; Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17029-34 ¶¶ 15-22 (2000).

[88] *Id.* at 17033 ¶ 21 (emphasis added).

[89] *Id.* at 17030 ¶ 17 (emphasis added); *accord Spielholz v. The Superior Court of Los Angeles County*, 86 Cal.App.4th 1366, 1380 (Cal. Ct. App., 2nd Dist., 2001) (disagreeing with *Bastien*'s expansive interpretation of *Central Office Telephone* and rejecting notion that a challenge to service quality necessarily attacks the

Finally, the Seventh Circuit itself has more recently suggested that the *Bastien* decision should be limited. In *Fedor,* the Seventh Circuit concluded that there must be a distinction between state law 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."[90] This approach, the court noted in *Fedor*, was consistent with its decision in *Bastien* because the claims in that case "required the state court to determine the infrastructure appropriate to market entry, which is an area reserved under § 332."[91]

The Commission cannot simply assume that *any* state regulation or limitation of CMRS providers' ETFs constitutes "rate" regulation, which is the essential thrust of SunCom's petition. NASUCA believes that where state law limits or prohibits liquidated damages or penalty provisions like the ETFs in question, there would certainly be no basis for preempting the states where injunctive or other equitable relief alone is sought. In other words, wireless carriers' use of ETFs may be restricted or even prohibited under state consumer protection or other laws, or under common law, without requiring any analysis of any specific ETF's "reasonableness." Such laws would not involve the states in "setting, fixing or prescribing rates" or otherwise require them to engage in any inquiry into the "reasonableness" of wireless carrier's ETFs.

The Iowa statutory restrictions on "consumer credit sales" are a good case in point. Under that law, consumers have an unrestricted right to cancel consumer credit contracts and there are limitations on the fees that vendors (*i.e.*, wireless carriers) can obtain at the time of

---

reasonableness of rates approved by the FCC; also distinguishing *Bastien* because the Commission had approved AT&T's filed tariff for wireless telephone whereas wireless carriers in California are exempted from filing tariffs and therefore the filed rate doctrine is inapplicable).

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

[91] *Id.*

cancellation. There is no "reasonableness" determination about any particular vendor's or carrier's ETF. Instead, to the extent any ETF exceeds the cancellation charge allowed under the ICCC, the excess cannot be charged.

Similarly, contrary to SunCom's assertions, the state law suit that gave rise to this proceeding will not require the state court to make any inquiry into the reasonableness of SunCom's ETFs. [92] SunCom characterizes the plaintiffs claims in that case as a "perfect example" of a "gambit . . . to avoid the restrictions of Section 332(c)(3)(A)."[93] In fact, it is SunCom that is engaged in a gambit.

The plaintiffs in *Edwards* are not challenging SunCom's ability to charge ETFs altogether, nor are they challenging the dollar amount of SunCom's ETFs as unreasonably high or not justified by the services provided. Rather, the plaintiffs allege that "SunCom has imposed the 'early-termination fee' when customers switch cellular phone companies *after* the expiration of the initial 12 months of service under the SunCom 12 month contract."[94] The plaintiffs simply assert a straightforward breach of contract claim based entirely on state law. SunCom is attempting to avoid any liability for the alleged breach by asking the Commission to declare that any state court action involving ETFs is preempted by federal law as prohibited rate regulation.

IV. SUNCOM'S ASSERTIONS REGARDING ETFS ARE EXAGGERATED.

A. Although ETFs May Be A Profit Center For Wireless Carriers, And A Means Of Reducing Customer "Churn," Consumers And Regulators Would Not Consider ETFs "Central" Or "Integral" To Carriers' Rates.

Consistent with CMRS providers' ETFs not being "rates" or "rate structures," NASUCA

[92] *Debra 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.

[93] SunCom Petition at 8-9.

[94] *In re: SunCom Operating Company, LLC's Petition for Declaratory Ruling*, Opposition and Cross-Petition of Debra Edwards at 8, WT Docket No. 05-193 (Filed March 4, 2005) (emphasis original)..

notes that carriers' service plans do not disclose ETFs in conjunction with rates in their marketing materials. For example, Sprint's marketing materials clearly identify how much a customer will pay for a monthly calling plan, how many minutes of calling are included in that plan, and what the per-minute cost of air time minutes in excess of plan allowed minutes will be.[95] Nowhere in this material is Sprint's ETF mentioned. While the rates portion of Sprint's guide notes that "a two-year Sprint PCS Advantage Agreement is required for all lines," it does not disclose the ETF's existence, its application, or its amount. Only on page 14 of Sprint's 16-page guide, in the middle of the second paragraph setting forth the Advantage Agreement's terms and conditions, is the $150 ETF identified.[96]

Other CMRS providers similarly bury their ETFs in marketing materials, far away from their rates (*i.e.*, the prices consumers expect to pay for service on either a monthly or usage-sensitive basis). For example, Nextel's guide (entitled "We've Got Big Plans for You") clearly provides the rates associated with the carrier's "National Free Incoming," "National 1000," "National Power," "National Team Share" and "Local Instant Connect" plans. Asterisked below the plans is a disclosure advising consumers that a one-year contract is required on new activations, and a two-year contract is required for two-year handset pricing. In very fine print (plain type) at the bottom of the guide, Nextel advises that "additional fees" include a $200 ETF. Similarly, only in "Additional Calling Plan Information," located well below calling plan and rates information, does Verizon Wireless advise that a $175 ETF applies.[97]

To treat CMRS providers' ETFs as "rates," given their segregation from carriers' rates,

---

[95] *See* Exhibit A.

[96] *Id.* at 14.

[97] *See* http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanOverview. In order to locate information regarding ETFs, a particular plan must be selected. Once a plan is selected, different pricing and service features are presented. The ETF information is located in "additional calling plan information" near the bottom of the screen.

and their placement in other "terms and conditions" of service, would be inconsistent with the carriers' own treatment of the fees in marketing and service-related materials.

B. The Discounted Equipment and Customer Acquisition Costs Purportedly Engendered by ETFs Do Not Square With Reality.

SunCom also exaggerates the extent to which it "subsidizes" its large customer acquisition costs and discounted equipment.[98] Virtually all the CMRS providers requiring term contracts have large service activation charges. For example, in Sprint's marketing materials, consumers are advised that the carrier charges $36 to activate a line under its "Fair & Flexible" plans (the charge is waived for additional lines if the customer signs up for the "Family" plan variant). Nextel charges a $35 "set up" fee for each phone. Similarly, Cingular charges a $36 activation fee, while Verizon Wireless charges either $35 or $20, depending on whether the customer signs a one- or two-year contract respectively. These "activation" fees compare to service initiation fees charged by local carriers, who generally do not utilize term contracts.[99] In contrast, many prepaid CMRS providers – like Virgin Mobile – do not charge an activation fee at all.[100]

With regard to the "subsidized" handsets and equipment that SunCom cites, there is little difference between the up-front cost of handsets and accessories between fixed-term CMRS providers and prepaid wireless carriers, except that prepaid carriers' handsets appear to be less expensive. For example, Virgin Mobile's (prepaid) handsets range from $40 to $170. Fixed-term providers' handsets cost the same, if not more: Sprint's handsets range from $150 to $600

---

[98] SunCom Petition at 4-8.

[99] For example, Verizon's operating companies charge approximately $42 to activate and connect each line. *See, e.g.*, Verizon West Virginia Inc., *General Services Tariff*, P.S.C.-W.Va.-203, Sec. 3, Original Pages 4a -5 (eff. Jan. 8, 2001). BellSouth's local companies likewise charge residential customers a $42.50 "line connection charge" for the first line and $16.75 for each additional line. *See, e.g.*, BellSouth Telecommunications, Inc. – Georgia, *General Subscriber Service Tariff*, A4.3.1.A.1 (a) & (b), Seventh Revised Page 4 (eff. June 1, 2002).

[100] However, Verizon Wireless charges its prepaid customers up to $35 in activation fees. *See* http://www.verizonwireless.com/b2c/store/controller?item=prepayItem&action=viewPrepayOverview.

(though it typically provides a $150 rebate); Cingular's handsets range from $35 to $235 (with a two-year contract) while $50 is added to the purchase cost if a one-year contract applies.[101]

V. THE COMMISSION SHOULD REEXAMINE WIRELESS CARRIERS' BUNDLING OF EQUIPMENT AND SERVICES.

In any event, the Commission should reexamine the economic and policy justifications underlying its 1992 decision approving wireless carriers' bundling of service and equipment as a means of subsidizing wireless customer premises equipment (*e.g.*, handsets). Evidence – in the form of complaints to the Commission, to states and to consumer organizations – shows that wireless customers are growing increasingly dissatisfied with carriers' billing and marketing practices, particularly the widespread use of ETFs.

When the Commission issued its *CMRS Bundling Order* in 1992, the wireless market was in its infancy. There were only 11 million wireless customers nationwide[102] and there was no evidence of consumer harm or dissatisfaction with either term contracts or ETFs, or the effects of carriers' bundling of services and equipment. Today, there are over 182 million wireless customers nationwide and the Commission and states receive thousands of complaints regarding CMRS, not to mention thousands of individual consumers' comments in this and other Commission proceedings.[103]

Moreover, the economic and policy assumptions that may have justified the

[101] Interestingly, however, Cingular's ETF does not vary by the contract's term.

[102] *See 9th CMRS Rept.,* Table 1.

[103] NASUCA notes the problems identified by Debra Edwards in her cross-petition for declaratory ruling in this proceeding. *See In re: SunCom Operating Company, LLC's Petition for Declaratory Ruling*, Opposition and Cross-Petition of Debra Edwards, WT Docket No. 05-193 (Filed March 4, 2005). Ms. Edwards' class action lawsuit against SunCom alleges that the wireless carrier imposed, or sought to impose, ETFs on customers after their term contracts expired. *Id.* at 8 & 12. SunCom's actions are the sort of anti-consumer, anti-competition efforts that states must be able to respond to. Likewise, NASUCA refers the Commission to *Beckermeyer v. AT&T Wireless*, 69 Pa. D. & C.4th, 2004 Pa. D. & C. 117 (Common Pleas Court, Oct. 22, 2004). The complaint in *Beckermeyer* focuses on the fact both AT&T and Panasonic refused to provide the plaintiff with information necessary to program his handset to operate on another carrier's network, despite the fact such changes could readily be made by changing the system operator code. These sorts of matters exemplify the problems that the Commission indicated it would be open to consider in its 1992 order. *See Cellular Bundling Order*, 7 FCC Rcd 4035 ¶ 31.

Commission's *CMRS Unbundling Order* have radically changed since 1992. The telecommunications industry, including wireless, is widely recognized as a declining cost industry.[104] While the number of wireless customers has grown tremendously since 1992, the wireless industry has become increasingly concentrated in the hands of a few carriers and equipment manufacturers.[105]

Thirteen years is a long time in the telecommunications industry. It is time the Commission reexamined the assumptions underlying its 1992 decision regarding carriers' subsidization of wireless handsets.

---

[104] *See, e.g., Cellular Bundling Order*, 7 FCC Rcd 4031 ¶ 23 n. 39.

[105] According to industry research group Strategy Analytics, Nokia has a 32.2% share of the worldwide wireless market, while Motorola has an 18% share and Samsung holds 13% of the market. In other words, three handset manufacturers hold over 63% of the market. Three other manufacturers (LG Electronics, Samsung and Sony Ericsson) accounted for another 17% of the market. *See* Mike Dano, "Biggest Handset Makers Take More Market Share," *RCR Wireless News* (July 28, 2005).

VI. CONCLUSION

NASUCA urges the Commission to issue an order concluding this proceeding in accordance with NASUCA's arguments and recommendations.

Respectfully submitted,

/s/ Patrick W. Pearlman
Deputy Consumer Advocate
Jennifer L. Hughes
Staff Attorney
The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications
Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

August 5, 2005