Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Cellular	)	
Telecommunications & Internet	)	WT Docket No. 05-194
Association for an Expedited	)	
Declaratory Ruling	)	
	)	
Petition for Declaratory Ruling filed	)	
by SunCom Operating	)	WT Docket No. 05-193
Company L.L.C. and Opposition	)	
and Cross-Petition for Declaratory	)	
Ruling Filed by Debra Edwards	)	

COMMENTS OF AARP IN OPPOSITION TO THE CTIA PETITION FOR DECLARATORY RULING

David Certner
Director, Federal Affairs

AARP
601 E Street NW
Washington, DC 20049

August 5, 2005

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 2

II. CTIA MISCHARACTERIZES THE APPLICABLE LAW AND SEEKS FEDERAL PREEMPTION THAT FAR EXCEEDS THE REACH OF § 332(c)(3) AND THE POLICIES IT SERVES 4

A. Subjecting CMRS Providers to States' Consumer Protection and Contract Law Does Not Constitute Rate Regulation Within the Meaning of § 332(c)(3) 4

B. The CMRS Industry Cannot Be Insulated From Both Federal and State Commercial Regulation 6

III. ETFS ARE NOT "RATES" WITHIN THE MEANING OF § 332(c)(3) 9

A. ETFs Are Not Rates Because They Do Not Recover the Cost of Providing Service 9

B. The CMRS Providers' Own Documents Demonstrate That ETFs Are Not Payments for Service 10

IV. ETFS ARE "TERMS AND CONDITIONS" UNDER § 332(c)(3) OVER WHICH STATES HAVE JURISDICTION 12

A. ETFs, As Unenforceable Penalties Under State Contract Law, Are "Terms and Conditions" Under § 332(c)(3) 12

B. Both the FCC and Federal Courts Have Classified ETFs as "Terms and Conditions" 15

V. THE CTIA PETITION IS PROCEDURALLY DEFECTIVE BECAUSE IT SEEKS A DECLARATORY RULING WHEN THERE ARE MATERIAL FACTS IN DISPUTE 18

A. A Declaratory Ruling Is Inappropriate When Material Facts Are In Dispute 18

B. Because Material Facts Are In Dispute In This Case, the CTIA Petition Should Be Dismissed 19

VI. THE CTIA PETITION CITES A NUMBER OF INAPPLICABLE AND POORLY-REASONED AUTHORITIES 20

A. *Central Office Telephone*'s Logic Does Not Apply To De-Tariffed CMRS and *Bastien* Has Been Undermined By *Fedor* 20

B. Associating Lower Per Minute Rates With ETFs Do Not Make Such ETFs "Rates Charged" 21

C. *Ryder* Arose Under A Tariffed Regime, Involved Landline Services, and Turned on § 201(b), Not § 332(c)(3) 23

VII. THE NUMBER OF INFORMAL FCC COMPLAINTS SPEAKS TO A PROFOUND DISSATISFACTION WITH ETFS, WHICH ALSO UNDERMINE THE COMMISSION'S INTEREST IN PROMOTING COMPETITION AND ITS NUMBER PORTABILITY POLICY GOALS 24

A. The Number of Consumer Complaints Regarding ETFs Is Increasing 24

B. ETFs Undermine the Commission's Interest in Promoting Competitive Markets and Its Wireless Number Portability Policies 25

VIII. CONCLUSION..... 26

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling	)	WT Docket No. 05-194
	)	
Petition for Declaratory Ruling filed by SunCom Operating Company L.L.C. and Opposition and Cross-Petition for Declaratory Ruling Filed by Debra Edwards	)	WT Docket No. 05-193

COMMENTS OF AARP

AARP[1] hereby submits its comments in response to the Commission's May 18, 2005 *Public Notices* ("*CTIA and SunCom-Edwards Public Notices*") in the above-captioned proceeding.[2] The Commission should declare that CMRS early termination fees ("ETFs") are "terms and conditions" within the meaning of § 332(c)(3) and therefore subject to state jurisdiction. Alternatively, because significant facts relied upon by CTIA remain in dispute, the CTIA Petition should be dismissed.

---

[1] AARP is a nonprofit, *nonpartisan* membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP has staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

[2] *Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling*, WT Docket No. 05-194, Public Notice, DA 05-1389 (May 18, 2005) *("CTIA Public Notice")*, 70 Fed. Reg. 38928 (July 6, 2005); *Petition For Declaratory Ruling Filed By Suncom, And Opposition And Cross-Petition For Declaratory Ruling Filed By Debra Edwards*, WT Docket No. 05-193, Public Notice, DA 05-1390 (May 18, 2005) *("SunCom-Edwards Public Notice")*, 70 Fed. Reg. 38926 (July 6, 2005).

I. INTRODUCTION AND SUMMARY

In its Petition for Declaratory Ruling,[3] CTIA asks the FCC to declare that the States in general, and state courts in particular, have no power to regulate ETFs imposed by CMRS providers. CTIA's request for relief is premised on the allegation that all ETFs are "rates charged" within the meaning of § 332(c)(3)(A), which provides for federal jurisdiction over "rates charged" by CMRS providers and state jurisdiction over "other terms and conditions" of CMRS contracts. Because CTIA's request is unsupported by the text of § 332(c)(3) and FCC and federal court interpretations of this statutory section, and is instead premised on disputed material facts, it should be denied.

First, while § 332(c)(3) does express a general Congressional policy in favor of market force control over commercial mobile service in the United States, state contract and consumer protection law are well-established parts of these market forces and provide needed elements of commercial certainty. Therefore, § 332(c)(3) must be read in harmony with this body of law and States must continue to have the power to set forth the rules governing the commercial relationship between CMRS providers and their customers. This reservation of State authority is especially important given that the FCC has generally forborne from engaging in CMRS market entry and rate regulation, instead relying strictly on market forces.

[3] Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, WT Docket No. 05-194, filed March 15, 2005 ("CTIA Petition").

Second, contrary to CTIA's contentions, ETFs are not "rates" within the meaning of § 332(c)(3) because they are not charges for commercial mobile services. The disconnect between ETFs and cost recovery for wireless services provided is demonstrated by the fact that ETFs are not prorated over the term of the agreement and are charged anytime the customer elects to change his or her service and/or renew a service contract.

Third, ETFs must be classified as "terms and conditions" under § 332(c)(3) when examined in the context of state contract law principles. In particular, ETFs violate the well-settled rule that contractual damage clauses should make a party whole for a breach, ***not*** compel performance. Indeed, both the FCC and the courts have classified ETFs as "terms and conditions," and the Commission should affirm those decisions in the instant case.

Fourth, the CTIA Petition should be dismissed as procedurally defective because it seeks a declaratory ruling in the presence of material facts that are in dispute. Specifically, AARP vigorously disputes CTIA's unsupported allegation that ETFs recover the costs of providing wireless service, and therefore are "rates" within the meaning of § 332(c)(3).

Fifth, the CTIA Petition is premised on a number of inapposite and poorly-reasoned authorities. Many of these authorities are based on the holding of *Central Office Telephone* that all tariffed terms are "rate affecting," or on *Ryder*'s analysis of ETFs for tariffed landline services within the meaning of § 201(b). The instant case, however, hinges on de-tariffed wireless services and the meaning of "rates" within § 332(c)(3). Other cases relied on by CTIA fail to

adequately explore the relationship between ETFs and a CMRS providers' recovery of costs.

Finally, contrary to CTIA's contentions, the number of consumer complaints regarding ETFs is rapidly growing and evidences a profound dissatisfaction with such anti-competitive devices. ETFs are also at odds with: (1) the pro-competitive policies set forth by the Commission in its wireless number portability orders; and (2) the public interest.

II. CTIA MISCHARACTERIZES THE APPLICABLE LAW AND SEEKS FEDERAL PREEMPTION THAT FAR EXCEEDS THE REACH OF § 332(c)(3) AND THE POLICIES IT SERVES

A. Subjecting CMRS Providers to States' Consumer Protection and Contract Law Does Not Constitute Rate Regulation Within the Meaning of § 332(c)(3)

CTIA misstates the preemptory reach of § 332(c)(3) and requests relief that impermissibly impinges on State sovereignty over commercial activities within their borders. Section 332(c)(3) eliminates state authority to *regulate* CMRS *rates* and market *entry* by CMRS providers, and, as noted by CTIA, does reflect Congress' "general preference in favor of reliance on market forces rather than regulation."[4] Contrary to CTIA's position, however, § 332(c)(3) does *not* uncouple the CMRS carrier-customer relationship from each State's body of commercial law, including the substantial and well-developed body of state contract and consumer protection law.

[4] CTIA Petition at 8.

Specifically, "market forces," include the body of state contract law and consumer protection law which governs the interpretation and enforceability of contract rights and responsibilities. As described by the Commission in the *Wireless Consumers Alliance Petition for Declaratory Ruling*:[5] "Section 332 was designed to promote the CMRS industry's reliance on competitive markets in which private agreements and other contract principles can be enforced. It follows that, if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts." Thus, the common law standards for interpreting and limiting contract provisions determine the reasonable expectations of buyers and sellers, and enable those expectations to be vindicated in the marketplace.

Subjecting vendors to a State's common law of contracts does not constitute rate regulation in the context of § 332(c)(3), notwithstanding CTIA's pervasive suggestion to the contrary. Specifically, § 332(c)(3)'s elimination of state authority to regulate rates and market entry for commercial mobile services does not eliminate 400 years worth of contract jurisprudence and commercial common law governing the interpretation and enforceability of contracts. Moreover, subjecting CMRS providers to the market rules underlying commerce in unregulated services and products—and to the same contract law that enables every other product market to function—does not constitute rate regulation.

---

[5] 15 FCC Rcd 17021, ¶ 24 (2000) ("*WCA Petition*").

B. The CMRS Industry Cannot Be Insulated From Both Federal and State Commercial Regulation

The text and legislative history of § 332(c)(3) clearly demonstrates that Congress understood the legal background against which it was legislating by explicitly preserving the States' power to protect their citizens from unfair and fraudulent commercial contract practices. Section 332(c)(3) therefore expressly reserves to the States the authority to regulate "other terms and conditions" pursuant to each State's body of contract and consumer protection law: "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 … or such other matters as fall within a state's lawful authority."[6]

CTIA seeks a ruling from the Commission to insulate cellular service providers from the common law of contracts that applies in *un*regulated markets and establishes the standards courts use to evaluate contract provisions and determine their enforceability. The FCC correctly rejected similarly overreaching preemptive claims made by CMRS providers six years ago: "We … do not agree with the arguments of … CMRS provider commenters to the extent that they imply that such preference for competition over regulation results in a general exception for the CMRS industry from the neutral application of state contractual

---

[6] H.R. Rep. No. 103-111, at 261 (1993). *See also GTE Mobilnet of Ohio v. Johnson,* 111 F.3d 469, 477 (6th Cir. 1997) (quoting *id.*) ("The House report provides a list of examples of matters that fall within the phrase 'other terms and conditions,' but specifies that the list is 'illustrative only and not meant to preclude other matters as fall within a state's lawful authority.'")

or consumer fraud laws."[7] Here, the Commission should confirm its determination not to grant CMRS providers such an unprecedented ability to operate outside the States' well-established commercial framework including state contract and consumer protection law.[8]

Moreover, CTIA's overreaching interpretation of Section 332 would introduce disruptive uncertainty into the market for commercial mobile services because economically efficient markets require predictable and consistent rules governing the relationship between buyers and sellers. CMRS customers (and vendors) are entitled to the protection of market rules and the consistent application of the same contract law principles that apply when they purchase any product in a competitive market. Blurring the distinction between rate regulation and the application of common law contract principles and standards, as suggested by CTIA, will de-stablilize competitive CMRS markets.

---

[7] *Southwestern Bell Petition,* 14 FCC Rcd 19898, ¶ 10 (1999) ("*SWN Bell Petition*").

[8] The "Savings Clause" of the Communications Act, 47 U.S.C. § 414, also confirms that state law claims challenging the legality of early termination fees as a penalty are not subject to federal preemption. Under § 414, "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The Savings Clause "clearly reflects Congress' determination that state law causes of action should not be subsumed by the act, but remain as independent causes of action." *Sanderson Thompson Rutledge & Zinny v. AWACS Inc.*, 958 F. Supp. 947, 958 (D. Del. 1997). That interpretation of the savings clause has been adopted overwhelmingly by other courts. *See Esquivel v. Southwestern Bell Mobile Systems, Inc.,* 920 F. Supp. 713, 716 (S.D. Tex. 1996) ("Also militating against complete preemption [of customers claims against a CMRS provider] is the 'savings clause' of the Communications Act …."); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 551 (D. N.J. 1996) ("Many courts have relied upon this savings clause to find that Congress intended to preserve state law claims for breaches of duties which are distinguishable from duties created by the Act."); *KVHP TV Partners, Ltd. v. Channel 12 of Beaumont, Inc.*, (874 F. Supp. 756, 761 (E.D. Tex. 1995) ("The inclusion of this savings clause is plainly inconsistent with the congressional displacement of state contract and fraud claims); *Weinberg v. Sprint Corp*, 165 F.R.D. 431, 440 (D. N.J. 1996) (savings clause preserved plaintiffs' claims for fraud, consumer fraud and negligent misrepresentation relating to the defendants' advertising.)

In short, CTIA advocates an approach that would allow CMRS providers to have their cake and eat it too. Under CTIA's reading of § 332(c)(3), the wireless industry would escape state "regulation" because of Congress's determination that only the federal government, and not the States, can regulate CMRS rates or market entry. The industry would then hide behind the fact that the FCC has generally forborne from engaging in rate and entry regulation in favor of free market competition (*i.e.*, CMRS is a de-tariffed service),[9] to escape any federal oversight.

Just as it properly rejected the CMRS industry's earlier request that it forbear from requiring CMRS providers to engage in just and reasonable and non-discriminatory practices,[10] the Commission should not accept this self-serving interpretation of § 332(c)(3). Rather, the FCC should preserve the States' Congressionally-sanctioned right to control commercial activities within their borders and confirm that the CMRS industry must be subject to "the neutral application of state contractual or consumer fraud laws."[11]

---

[9] *Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, ¶¶ 124-219 (1994) (CMRS Second Report and Order) (forbearing from requiring CMRS providers to comply with the tariff filing obligations of section 203, the domestic market entry and market exit requirements of section 214, and several other provisions of Title II).

[10] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 18 (1998) ("The record does not show … that the current market conditions ensure that the charges, practices, classifications and regulations of broadband PCS carriers are just and reasonable and are not unjustly or unreasonably discriminatory, that market forces are sufficient to protect consumers from discriminatory charges and practices of broadband PCS providers").

[11] *SWN Bell Petition*, 14 FCC Rcd, ¶ 10.

III. ETFS ARE NOT "RATES" WITHIN THE MEANING OF § 332(c)(3)

A. ETFs Are Not Rates Because They Do Not Recover the Cost of Providing Service

The gravamen of CTIA's request for relief—that ETFs are "rates" within the meaning of § 332(c)(3)—is contrary to well accepted definitions of the term "rates." As such, CTIA's claim that states are prohibited from engaging in regulation of ETFs pursuant to § 332(c)(3) must be rejected.

Specifically, a "rate" recovers the cost of providing a service. As the Commission recognized in *SWN Bell Petition,* "rates" are "an 'amount of payment or charge based on some other amount.'"[12] The FCC, quoting the Supreme Court's Opinion in *AT&T v. Central Office Telephone, Inc.,*[13] went on to describe "rates" as not "exist[ing] in isolation," but "hav[ing] meaning only when one knows the ***services*** to which they are attached."[14] Thus, the *Central Office Telephone* definition cited in the *SWN Bell Petition* emphasized the requirement that rates be associated with a service.

Moreover, "rates," or "rate elements," generally produce charges for service that appear as "line items" on each month's bill.[15] ETFs do not appear on

---

[12] 14 FCC Rcd, ¶ 19 (quoting Webster's Third New International Dictionary (1993)). *See also Ball v. GTE Mobilnet of California,* 81 Cal. App. 4th 529 (2000) (Defining "rates" as "The cost per unit of a commodity or service[;] A charge or payment calculated in relation to a particular sum or quantity…." (internal quotations and citations omitted)).

[13] 118 S. Ct 1956 (1998).

[14] *SWN Bell Petition,* 14 FCC Rcd, ¶ 19 (quoting *Central Office Tel.,* 118 S. Ct. at 1963).

[15] *Truth-in-Billing and Billing Format, NASCUA Petition for Declaratory Ruling Regarding Truth-in-Billing*, FCC 05-55 (Second Report and Order and Declaratory Ruling), ¶ 30 (March 18, 2005).

monthly bills as "rates" or "rate elements" because they are not charges for the wireless services that the customer receives.

Even CTIA recognizes, as it must, that rates are charges "for service [provided],"[16] and that "a 'rate' has no significance without the element of service for which it applies."[17] Specifically, CTIA states that a rate is what customers pay "for the services and equipment previously provided by the carrier,"[18] and rate components and rate plans are "designed to recover the total costs of providing wireless services" and "compensate carriers for the ongoing costs of providing wireless services."[19]

ETFs like those at issue in the cases cited by CTIA are not "rates" because they are not associated with an element of service nor designed to recover the cost of service. Because they do not appear on carriers' monthly bills for service, ETFs are not collected as payment for services rendered. In fact, ETFs apply when service is terminated.

B. The CMRS Providers' Own Documents Demonstrate That ETFs Are Not Payments for Service

ETFs are designed, not to recover the costs of providing service, but to influence and constrain customer behavior. Documents and testimony of the CMRS providers produced in state court litigation in several forums across the country establish that the major wireless carriers do not consider ETFs as a

---

16 CTIA Petition at 10 n.36 and text accompanying.

17 *Id.* at 9 n.32.

18 *Id.* at 11.

19 *Id.*

significant source of operating revenue to recoup costs. As the employee responsible for cost accounting at a major carrier, for example, admitted, he had never been asked, nor had ever even seen, heard, or otherwise acquired information of any kind that showed ETFs were designed to recover operating costs.

Similarly, at one point in California state court coordinated and consolidated proceedings in which the plaintiffs alleged that ETFs are unenforceable penalties, the providers primarily contended that ETFs were intended to recover the costs of the handset. As it turned out, the evidence produced by the carriers established that the cost of the handsets is much less significant than the carriers claimed. In the face of such evidence, the carriers then changed their explanation, arguing that the ETFs were designed to *generally* defray their customer acquisition costs.

Other evidence establishes that the CMRS providers' assertion that ETFs recover the cost of service is not credible. The amount of the ETFs, ranging from $150 to $200 per handset or telephone number does not vary over the length of the contract.[20] Thus, CMRS providers do not prorate the fees as would be expected if they were contemplated as a source of operating revenue. Moreover, the same ETF is charged whenever the customer requests or accepts ***any*** change in service, promotions, purchase of an additional or replacement handset, and/or renewal of the contract. Because, for example, the cost of a

[20] One major carrier, for example, charges an early termination fee of $175 whether the length of the subscribers' agreement is for one or two years and no matter the reason for the commencement of the new contract. *See* contracts of the major wireless providers, attached hereto as Exhibit 1.

customer's election to change the number of minutes of airtime per month (which must be *de minimis*) is unlikely to be exactly the same as the cost of acquiring that customer, it is hard to believe that the ETFs produced by these activities are intended as operating revenue.

In sum, the fact that the ETFs are not prorated over the term of the agreement and are charged anytime the customer changes service or renews the contract are consistent with the conclusion that ETFs are intended to tether customers to the carrier with whom the subscriber contracted. These fees, designed to constrain consumer conduct, are neither prices for services provided nor properly considered part of the CMRS' providers' rate structure.

IV. ETFS ARE "TERMS AND CONDITIONS" UNDER § 332(c)(3) OVER WHICH STATES HAVE JURISDICTION

A. ETFs, As Unenforceable Penalties Under State Contract Law, Are "Terms and Conditions" Under § 332(c)(3)

Because ETFs are "terms and conditions" of commercial mobile service contracts, and not "rates" for CMRS, the States have jurisdiction over such ETFs pursuant to § 332(c)(3). In particular, "term" is defined as "that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter …."[21] ETFs are terms. If the customer elects to terminate before the contract term, the customer will be charged a penalty. Moreover, ETFs are not charges for service (rates) because the amount paid is a flat fee

[21] Restatement (Second) of Contracts § 5 (1981).

that does not vary with usage, features of service, or time remaining on the contract before the customer can terminate without penalty.

CMRS providers themselves, quite logically, treat ETFs as terms and conditions rather than rates by including ETFs under "Terms and Conditions" in their form contracts[22] and imposing the same ETF, in terms of dollar amount, regardless of when the customer terminates service.[23] Such "one size fits all" ETFs do not recover the costs of service remaining at the time a particular customer terminates service. Because these ETFs do not reflect the carrier's unrecovered costs of providing service at the time of termination, they are simply one-time, flat penalty charges. Penalties constitute "terms or conditions," not rates, and are therefore subject to state regulation.

The specific ETFs at issue in the state proceedings cited by CTIA must be classified as terms and conditions (and not rates) because they constitute improper penalties under contract law principles, not lawful liquidated damages or some other "proper measure of contract damages to make the carrier whole for services and goods delivered."[24] Although the law of contracts is founded upon the enforcement of negotiated agreements, the right to enforce agreed-upon terms is not unlimited. Usurious contracts, contracts with minors, and contracts to perform illegal acts, for example, will not be enforced.

---

22 *See* contracts of the major wireless providers, attached hereto as Exhibit 1.

23 *Id.*

24 CTIA Petition at 12.

ETFs that constitute penalties under state law are unenforceable: "[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive."[25] As described by the Seventh Circuit, "Illinois like ***all other states*** does not enforce penalty clauses in contracts."[26]

One indicia of unenforceable penalties is their purpose—compulsion of performance rather than compensation for losses: "A penalty provision ***operates to compel performance of an act*** and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach."[27] Or, "a penalty is to secure performance, while a liquidated damages provision is for payment of a sum in lieu of performance."[28]

Under these long-standing principles, the ETFs under attack in the state court proceedings cited by CTIA constitute penalties because they are intended

---

[25] Restatement (Second) of Contracts, § 356 comment a (1981).

[26] *Lawyers Title Ins. Co. v. Dearborn Title Corp.*, 118 F.3d 1157, 1160 (7th Cir. 1997).

[27] *Ridgley v. Topa Thrift & Loan Assn.,* 953 P.2d 484, 488 (Cal. 1998) (emphasis added, citations omitted). *See also Garrett v. Coast & Southern Federal Savings and Loan Assoc.*, 511 P.2d 1197, 1202-03 (Cal. 1973) ("If the sum extracted from the borrower is designed to exceed substantially the damages suffered by the lender, the provision for the additional sum, whatever its label, is an invalid attempt to impose a penalty inasmuch as ***its primary purpose is to compel prompt payment*** through the threat of imposition of charges bearing little or no relationship to the amount of the actual loss incurred by the lender.") (emphasis added); *Holt Cigar Co. v. 222 Liberty Associates,* 591 A.2d 743, 747-48 (Pa. Super. Ct. 1991) (The defendant "chose the stipulated sum not as a reasonable forecast of anticipated damages due to delay, but rather solely as a penalty to discourage breach (delay).")

[28] *Unified School District No. 315 v. DeWerff*, 626 P.2d 1206, 1208 (Kan. Ct. App. 1981). *See also Stone v. City of Arcola,* 536 N.E.2d 1329, 1336 (Ill. App. Ct. 1989) ("If the provision is in fact a penalty imposed upon a party to compel performance of a contract rather than a term giving compensatory damages to the nonbreaching party, then it is unenforceable.")

to compel customers not to switch wireless carriers. As such, the ETFs at issue are unenforceable "terms and conditions," and not "rates."

B. Both the FCC and Federal Courts Have Classified ETFs as "Terms and Conditions"

Against this background, it is not surprising that both the FCC and federal courts have followed the common sense notion that ETFs are "terms and conditions." For example, in its *California Order*, the FCC stated that ETFs should be classified as "terms and conditions."[29] Similarly, in one of its most recent wireless number portability orders, the Commission classified ETFs as contractual provisions (i.e., "terms and conditions") rather than as "rates:" "Carriers may *include provisions in their customer contracts on issues such as early termination* and credit worthiness, but, to the extent that carriers' customer contracts have provisions stating specifically that consumers may not port their number before settling their account, we find such provisions to be without effect on the carrier's porting obligation."[30]

Courts have also properly treated ETFs as terms and conditions, rather than charges for the provision of CMRS service. The courts have concluded that ETFs—as terms and conditions—are imposed by carriers for reasons other than

---

[29] *See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates,* 10 FCC Rcd 7486, ¶ 45 (1995) ("*California Order*") (noting that prior to the passage of § 332(c)(3), California's CMRS "guidelines appl[ied] only to tariffed rates" and not to "*tariffed terms and conditions, including termination penalties …*") (emphasis added).

[30] *Telephone Number Portability—Carrier Requests for Clarification of Wireless-Wireless Porting Issues* (Memorandum Opinion and Order), FCC 03-237, ¶ 15 (Oct. 7, 2003) (emphasis added).

recovering the costs of providing service and are, in fact, penalties. For example, in *Esquivel v. Southwestern Bell Mobile Systems, Inc.,*[31] the court held that,

> [Section] 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 [*i.e.,* ETFs] that are tantamount to penalties.

The United States District Court for the Southern District of Illlinois concurred with the *Esquivel's* finding that ETFs are not "rates" within the meaning of § 332(c)(3):

> All that can be said with certainty is that the [ETFs] discourage[] the customer from terminating service before the expiration of the agreement. This can serve legitimate and important business considerations, such as maintaining market share or holding down the market share of competitors. These concepts, however, are different from rate structure. If the [ETF] was prorated or adjusted according to the term of the agreement, this court would look at things differently.[32]

Similarly, the State of Iowa brought suit against a wireless provider alleging violation of state consumer protection laws, including misrepresentation of the terms of its service and the fact that its "policy of requiring customers to pay a monetary penalty for the cancellation of a contract for future service violates [the] Iowa Code."[33] The United States District Court for the Southern District of Iowa held that such claims did not constitute prohibited rate regulation:

---

[31] 920 F. Supp. 713, 715-16 (S.D. Texas 1996).

[32] *Kinkel v. Cingular Wireless, et al.,* No. 02-999-GPM, slip op. at 3-4 (S.D. Ill. Nov. 8, 2002) *See also Zobrist v. Verizon Wireless*, No. 02-CV-1000-DRN, slip op. at 4-5 (S.D. Ill. Dec. 6, 2002) (quoting *Kinkel*); *Votava v. Sprint Spectrum, et al,* No. 02-CV-0932-DRH, slip op. at 4-5 (S.D. Ill. Dec. 10, 2002) (quoting *Kinkel*).

[33] *Iowa v. United States Cellular Corp.,* 2000 U.S. Dist. LEXIS 21656 at *2-4 (S.D. Iowa Aug. 7, 2000).

> US Cellular would have this Court construe 'rates' so broadly as to incorporate anything that might touch upon US Cellular's business … Inherently, any interference with US 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 …The claims do not attempt to regulate rates, they merely require US Cellular to fairly and adequately disclose its contract terms to consumers and to refrain from unjust and oppressive business practices.[34]

The Northern District of Iowa, addressing the same issues, concurred:

> [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 [CMRS providers'] conduct could be couched in terms of its effect on rates, and … the language of the statute makes it apparent that Congress did not intend such a result."[35]

The Southern District of Iowa recently affirmed its ruling in *United States Cellular* in a private action disputing the legality of a wireless provider's ETF:

> [T]he AT&T early termination fee is not a "rate." … "[R]ate" 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.[36]

---

[34] *Id.* at *19-20, 21.

[35] *Cedar Rapids Cellular Tel., L.P. v. Miller*, 2000 U.S. Dist. LEXIS 22624, *21-22 (N.D. Iowa Sept. 15, 2000).

[36] *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa July 29, 2004). *See also Corbett, et al. v. Sprint PCS,* Case No. 04-14142, slip op. at 7 (S.D. Fla. Aug. 24, 2002) ("Such [early] termination fees are not considered 'rates' for purposes of section 332(c)(3)(A)"); *Waldman, et al. v. Cingular Wireless,* Case No. 04-80537-CIV, slip op. at 7 (S.D. Fla. Sept. 14, 2004) (ETFs are "other terms and conditions"); *Cherry v. AT&T Wireless Serv., Inc.,* Case No. 8:04-cv-1356-T-26MSS, slip op. at 3 (M.D. Fla. July 27, 2004) (same).

Another federal district court, analyzing the applicability of § 332(c)(3) to late fees (as opposed to ETFs) held that "late fees are not included in 'rates' of service, but rather are part of the 'other terms and conditions' of service. While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment."[37] The same logic applies to ETFs—because they are not a "charge for the use" of CMRS—ETFs are not "rates."

V. THE CTIA PETITION IS PROCEDURALLY DEFECTIVE BECAUSE IT SEEKS A DECLARATORY RULING WHEN THERE ARE MATERIAL FACTS IN DISPUTE

A. A Declaratory Ruling Is Inappropriate When Material Facts Are In Dispute

As discussed above, the Commission should determine that ETFs are not "rates" within the meaning of § 332(c)(3), but rather are "terms and conditions" over which the States have jurisdiction. But, if the Commission concludes otherwise, the CTIA Petition should nevertheless be dismissed because it impermissibly seeks a declaratory ruling in the presence of disputed material facts.

It is well-settled that the presence or absence of factual disputes is a significant factor in deciding whether a declaratory ruling is an appropriate method for resolving a controversy. As described by the Commission, "A declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed. The petitioner in such a proceeding must

[37] *Brown v. Washington/Baltimore Cellular, Inc.,* 109 F. Supp. 2d 421, 423 (D. Md. 2000).

provide sufficient information to enable the Commission to resolve the controversy in a meaningful manner."[38]

B. Because Material Facts Are In Dispute In This Case, the CTIA Petition Should Be Dismissed

The facts in this case are not "clearly developed and essentially undisputed." CTIA's entire case is premised on its factual assertion that ETFs recover CMRS providers' costs of providing wireless service to their customers and therefore are "rates" within the meaning of § 332(c)(3). To grant CTIA's Petition, the Commission must have a factual record that illuminates each CMRS provider's rate structure, cost structure, and customer contracts and demonstrates that ETFs recover the costs of service. The only "evidence" of these critical facts is CTIA's naked assertion that "ETFs are charged to compensate carriers for the ongoing costs of providing wireless services, for the costs they incur in acquiring and retaining customers, and to earn a profit from those business activities."[39] Moreover, in at least one of the actions cited by CTIA, that is simply not true. Discovery in that case has revealed that the ETFs at issue in that case were developed without regard to costs, are unrelated to the cost of providing service and retaining customers, and are merely a means of preventing customers from switching carriers.

Because CTIA's Petition thus rests upon facts that are in dispute, the Commission cannot grant CTIA the relief it seeks—a declaration that all ETFs

---

[38] *American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, 4 FCC Rcd 550, ¶ 18 (1989).

[39] CTIA Petition at 11.

are "rate[s] charged by a commercial mobile radio service under Section 332(c)(3)(A)."[40] The Commission should therefore dismiss the CTIA Petition.

VI. THE CTIA PETITION CITES A NUMBER OF INAPPLICABLE AND POORLY-REASONED AUTHORITIES

The CTIA Petition should further be rejected because its conclusion—that all ETFs are "rates" within the meaning of § 332(c)(3)—is based on inapposite and poorly-reasoned sources.

A. *Central Office Telephone*'s Logic Does Not Apply To De-Tariffed CMRS and *Bastien* Has Been Undermined By *Fedor*

Many of the cases relied on by CTIA are premised on the Supreme Court's observation in *Central Office Telephone* that, for purposes of the filed tariff (rate) doctrine, all terms and conditions are "rate affecting."[41] This reliance is misplaced because terms and conditions that may affect rates are not *rates*, and nothing in *Central Office Telephone* suggests they are. Moreover, CMRS is a de-tariffed service. Therefore, as noted in the *WCA Petition*,[42] neither the filed rate doctrine nor the logic of *Central Office Telephone* applies to CMRS.

Bastien v. AT&T Wireless Services, Inc.[43]— cited by CTIA—impermissibly relies on *Central Office Telephone*. *Bastien* also has been significantly

---

40 *Id.*

41 *See Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 987 (7th Cir. 2000); *Gilmore v. Southwestern Bell Mobile Systems*, 156 F. Supp. 2d 916, 924 (N.D. Illinois 2001).

42 15 FCC Rcd, ¶¶ 19-21.

43 *Bastien,* 205 F.3d at 987.

undermined by the Seventh Circuit in *Fedor v. Cingular Wireless Corp*.[44] In *Fedor*, a customer alleged that a CMRS provider failed to adhere to its agreed-to monthly allotment of minutes.[45] The *Fedor* court noted that *Bastien* centered on a CMRS provider's alleged failure to build out its wireless network, an area of the law specifically committed to federal jurisdiction under § 332(c)(3)'s preemption of the States' ability to regulate "market entry."[46] By contrast, the claims in *Fedor*, like those at issue in this proceeding, do not address "market entry" or "rates," but are rather "the type of state law contract and tort claims that are preserved for the States under § 332 as the 'terms and conditions' of commercial mobile services."[47]

B. Associating Lower Per Minute Rates With ETFs Do Not Make Such ETFs "Rates Charged"

Other cases cited by CTIA assume, without meaningful analysis, that ETFs must be "rates charged" because contracts with ETFs charge a lower per minute rate than prepaid contracts not containing ETFs.[48] In *Chandler*, the court acknowledges that a liquidated damages provision will only be construed as part of the rate structure where the provision is "prorated or ***adjusted according to the term of the agreement***," but then assumes without further analysis that the ETFs in question were rates, based solely on the fact that AT&T also offered prepaid

---

[44] 355 F.3d 1069 (7th Cir. 2004).

[45] *Id.* at 1074.

[46] *Id.* at 1073.

[47] *Id.* at 1074.

[48] *See* CTIA Petition at 14, n.46 (citing *Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004) and *Redfern v. AT&T Wireless Services, Inc.*, 2003 U.S. Dist. LEXIS 25745 (June 16, 2003)).

plans with higher per minute rates and without early termination fees.[49] In fact, the ETFs are not "adjusted according to the term of the agreement," but rather apply in the same amount to all term contracts, regardless of duration, degree of completion or cost of services.

Similarly, the court in *Redfern* relied solely on AT&T's ***representation*** that the ETFs are an "integral part of the rates charged" as purportedly evidenced by the fact that AT&T offered prepaid contracts without ETFs at a higher rate per minute.[50] Based on this representation, the court erroneously concluded that plaintiffs' claims were preempted because ETFs ***affected*** rates charged.[51] The analysis was further flawed in that the court incorrectly assumed any state action affecting wireless rates was necessarily ***completely*** preempted.[52] Not even the wireless industry has asserted that complete preemption applies. As explained above, and conceded by CTIA,[53] § 332(c)(3) does not preempt all state regulation of the business practices of CMRS providers. Rather, preemption applies only to the regulation of market entry or of rates charged by wireless carriers.

Thus, neither *Chandler* nor *Redfern* adequately addresses whether the ETFs are related to the cost of services provided, as required by § 332(c)(3). Moreover, the Judge who authored the *Chandler* and *Redfern* opinions, Patrick

---

49 *Chandler* at *4 (emphasis in original) (quoting *Kinkel v. Cingular Wireless, et al.*, Civ. No. 02-CV-999-GPM (S.D. Ill. Nov. 8, 2002)).

50 *Redfern,* 2003 U.S. Dist. LEXIS 25745, at *2.

51 *Id.*

52 *Id.*

53 CTIA Petition at 21.

Murphy, came to precisely the opposite conclusion—that ETFs are not "rates"—in *Kinkel v. Cingular Wireless*.[54] The Commission should therefore give *Chandler* and *Redfern* less weight than the other well-reasoned, overwhelming weight of authority.[55]

C. *Ryder* Arose Under A Tariffed Regime, Involved Landline Services, and Turned on § 201(b), Not § 332(c)(3)

CTIA's reliance on the Commission's decision in *Ryder Communications, Inc. v. AT&T Corp.,*[56] is similarly misplaced. *Ryder* involved landline services, arose under a tariffed regime and addressed the reasonableness of ETFs under § 201(b) of the Communications Act, which requires that "[a]ll charges, practices, classifications and regulations for and in connection with…communication service" to be just and reasonable.

Critically, § 201(b) makes no mention of "rates," the term at issue in this proceeding. Moreover, whether ETFs violate the § 201 prohibition against unreasonable "charge[s], practice[s], classification[s], and regulation[s]" is irrelevant to the question of whether they constitute "rates" within the meaning of § 332 (c)(3). Because the legality of ETFs associated with CMRS must be analyzed consistent with § 332(c)(3)'s division of authority between the FCC and the States, the *Ryder* decision is of little precedential value.

---

[54] No. 02-999-GPM (S.D. Ill. Nov. 8, 2002).

[55] *See Union Ink Co., Inc. v. AT&T Corp.*, 352 N.J. Super. 617, 637 (2002) (the weight of authority is to be measured by the logical force of the decisions regarding preemption). Similarly, *Aubrey v. Ameritech Mobile Communications Inc*, 2002 U.S. Dist. LEXIS 15918, at *12 (E.D. Mich. June 14, 2002) is entitled to no weight on the issue of whether the ETFs are rates. There, the court simply assumed, with no analysis whatsoever, that the exorbitant termination fee alleged was a rate.

[56] File No. EB-02-MD-038 (rel. July 7, 2003).

VII. THE NUMBER OF INFORMAL FCC COMPLAINTS SPEAKS TO A PROFOUND DISSATISFACTION WITH ETFS, WHICH ALSO UNDERMINE THE COMMISSION'S INTEREST IN PROMOTING COMPETITION AND ITS NUMBER PORTABILITY POLICY GOALS

A. The Number of Consumer Complaints Regarding ETFs Is Increasing

Contrary to the contentions of CTIA, consumers are profoundly dissatisfied with ETFs. CTIA's statement that wireless complaints have undergone a "sharp decline" is glaringly misleading.[57] The number of overall complaints against wireless providers actually *increased* sharply, from 4,369 in the fourth quarter of 2004,[58] to over 7,000 in the first quarter of 2005.[59] Further, the number of complaints against CMRS providers that specify ETFs as a source of friction has also increased dramatically. In particular, the following table uses the FCC's *Quarterly Reports on Informal Consumer Inquiries and Complaints* to summarize the annual number complaints regarding wireless ETFs.[60]

Year	Total Number of ETF Informal Complaints
2002	1,860
2003	2,386
2004	3,958

This steadily increasing number of consumer complaints specifically directed at ETFs refutes CTIA's contention that ETFs are not a significant source of customer concern. Against this background, the Commission should allow

---

[57] CTIA Petition at 2 n.6.

[58] http://ftp.fcc.gov/cgb/quarter/

[59] Remarks of Monica Desai, Chief, Consumer and Governmental Affairs Bureau at the National Association of Regulatory Utility Commissioners 2005 Summer Meeting, Committee on Consumer Affairs, Austin, Texas, July 24, 2005.

[60] http://ftp.fcc.gov/cgb/quarter/

such disaffected customers to avail themselves of state consumer protection and contractual causes of action.

B. ETFs Undermine the Commission's Interest in Promoting Competitive Markets and Its Wireless Number Portability Policies

ETFs also discourage customers from seeking the carrier with the best rates, terms, and conditions, a key policy goal of § 251(b) of the Communications Act and the Commission's number portability rules and orders implementing this Congressional mandate for CMRS providers. As stated by the Commission, "Unless [number portability] is available, increasing numbers of wireless service consumers—especially those who routinely provide their wireless number to others—will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high."[61]

Therefore, just as the Commission determined that allowing customers to port their wireless numbers facilitated inter-carrier competition, so too should it determine that ETFs, which discourage customers from changing carriers, are anti-competitive.

---

[61] *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, 17 FCC Rcd 14972, ¶ 18 (2002).

VIII. CONCLUSION

The Commission should declare that ETFs are "terms and conditions" within the meaning of § 332(c)(3) and subject to state jurisdiction. Alternatively, the Commission should dismiss the CTIA Petition as procedurally defective because it is premised on a disputed factual record.

Respectfully submitted,

/s/ David Certner

David Certner
Director, Federal Affairs

AARP
601 E Street NW
Washington, DC 20049

August 5, 2005

EXHIBIT 1: CONTRACTS OF THE MAJOR WIRELESS PROVIDERS