

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

**COMMENTS OF SUNCOM OPERATING COMPANY L.L.C. ON DEBRA EDWARDS’
OPPOSITION AND CROSS-PETITION FOR DECLARATORY RULING**

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SUMMARY

This case arises from an order by the Court of Common Pleas for Horry County, South Carolina directing SunCom to seek a declaratory ruling from the Commission regarding whether early termination fees are “rate[s] charged” within the meaning of Section 332(c)(3)(A) of the Communications Act. As SunCom showed in its Petition, early termination fees are both rates in themselves and essential components of Commercial Mobile Radio Service (“CMRS”) carriers’ rate structures. Moreover, the Commission long has recognized that early termination fees are integral parts of the rates carriers charge to recover the costs of providing service. Therefore, Section 332(c)(3)(A), which was intended as a means to protect CMRS providers from diverse state regulation of their rates, must be read to include early termination fees in its definition of “rates charged.” SunCom also demonstrated that, at the very least, the Commission must declare that any state action, including state court action, that would examine the reasonableness of a carrier’s early termination fee is flatly barred by Section 332(c)(3)(A).

The requested declarations are necessary to maintain the unified rate deregulatory structure that Congress intended, and they are particularly pertinent now because there has been a great deal of confusion recently in some courts over the boundary between “rates charged,” which cannot be regulated by the states, and “other terms and conditions,” over which the states retain their authority. CTIA also filed a Petition asking for essentially the same rulings from the Commission. These petitions highlight the depth and breadth of the unsettled state of the law and the ways in which plaintiffs’ attorneys are attempting to exploit the confusion of some courts through class action lawsuits designed to induce courts to engage in quasi-ratemaking by examining the reasonableness of carriers’ early termination fees.

While the declarations requested by SunCom and CTIA are demonstrably necessary, consistent with the South Carolina Court's request, and consistent with Commission precedent, the nine additional declarations sought by Debra Edwards (the plaintiff in the underlying South Carolina litigation, *Edwards v. SunCom*) are none of those things. Despite the Commission's repeated determinations that it will not engage in analyses of state law or examine the facts of state court proceedings, Edwards' requests seek numerous findings of fact and conclusions of law in the underlying case. Moreover, despite consistent admonitions from the Commission that it will not decide the question of whether specific claims in state courts are preempted by Section 332(c)(3)(A) (and despite having argued to the trial judge that such a declaration from the Commission would be inappropriate), Edwards asks the Commission to make precisely that finding.

The Commission should reject entirely Edwards' attempts to litigate this case before the agency and should restrict its rulings to the areas requested by the South Carolina Court. The Commission's existing framework, whereby parties may seek Commission rulings on the meaning of Section 332(c)(3)(A), but where courts remain the ultimate arbiters of whether a particular state court claim is preempted, remains sound. There is nothing in either the savings clause portion of Section 332(c)(3)(A) or the general Communications Act savings clause of Section 414 that requires the Commission to divest the state courts of their rightful authority to determine their jurisdiction over claims that come before them. The Commission should deny Edwards' attempt to have the Commission substitute its own judgment on the issue of whether her claims are preempted for the views of the trial court, which is the only body with any jurisdiction to rule on the issue.

Given these impediments and because SunCom and CTIA's requests are consistent with existing law and appropriately bounded by the South Carolina Court's request, the Commission should deny all nine declaratory rulings requested by Edwards and instead declare that: (1) early termination fees charged to CMRS customers are "rates charged" under Section 332(c)(3)(A) of the Communications Act; (2) the use by state authorities, including courts, of quasi-contract equitable doctrines such as quantum meruit or money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A) of the Communications Act; and (3) the early termination fees SunCom allegedly charged to members of the putative class in the case styled *Edwards v. SunCom* constitute "rates charged" for purposes of Section 332(c)(3)(A).

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**COMMENTS OF SUNCOM OPERATING COMPANY L.L.C. ON DEBRA EDWARDS’
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SunCom Wireless Operating Company, L.L.C., f/k/a Triton PCS Operating Company, L.L.C. (“SunCom”), by its attorneys and pursuant to Section 1.415 of the Commission’s rules,¹ hereby files these comments in the above captioned proceedings in support of the Petition filed by the Cellular Telecommunications and Internet Association (“CTIA”) for an expedited Declaratory Ruling (the “CTIA Petition”) and in response to the Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings filed by Debra Edwards (the “Cross-Petition”).² For the reasons set forth below, the Commission should grant the requests

¹ 47 C.F.R. § 1.415.

² See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition for Declaratory Ruling Filed by

for declaratory ruling requested by SunCom and CTIA and deny the requests of Debra Edwards (“Edwards”).

INTRODUCTION

SunCom commenced this proceeding at the direction of the South Carolina Court of Common Pleas for the Fifteenth Judicial Circuit (the “South Carolina Court”) to provide that court with guidance regarding its jurisdiction over the case of *Edwards v. SunCom*,³ a case in which plaintiff Edwards has purported to assert a putative class action challenging SunCom’s imposition of early termination fees on customers who cancel their service contracts outside the termination window established by those contracts.⁴ To assist the Court in determining whether it has jurisdiction over any of Edwards’ claims, the Court directed SunCom to request a determination from the Commission whether the early termination fee Edwards challenges is a “‘rate charged’ within the meaning of 47 U.S.C. § 332(c)(3)(A).”⁵

Debra Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(C)(3)(A), *Public Notice*, WT Docket No. 05-193, DA 05-1390, 70 Fed. Reg. 38,926 (released May 18, 2005); Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are “Rates Charged” Within 47 U.S.C. Section 332(C)(3)(A), *Public Notice*, WT Docket No. 05-194, DA 05-1389, 70 Fed. Reg. 38,928 (released May 18, 2005). *See also* Debra Edwards, Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings, WT Docket No. 05-193, filed March 4, 2005; Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling, WT Docket No. 05-194, filed March 15, 2005.

³ *Debra Edwards v. SunCom*, No. 02-CP-26-3539 (S.C. Ct. of Common Pleas, filed May 25, 2004) (“*Edwards v. SunCom*”).

⁴ Petition for Declaratory Ruling of SunCom Operating Company, L.L.C., WT Docket No. 05-193, filed February 22, 2005 (the “SunCom Petition”).

⁵ *See* Supplemental Order Requiring Defendant to File Petition for Declaratory Ruling at the Federal Communications Commission and Staying Case Until Such Ruling Is Issued (the “Declaratory Ruling Court Order”), attached as Appendix C to the Cross-Petition.

Consistent with the Court's Order and Commission precedent, SunCom sought a Commission declaration that: (1) early termination fees charged to commercial mobile radio service ("CMRS") customers are "rates charged" under Section 332(c)(3)(A); (2) the use by state authorities, including courts, of quasi-contract equitable doctrines such as quantum meruit and money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A) of the Communications Act; and (3) the early termination fees included in SunCom's customer contract, which SunCom allegedly charged to members of the putative class in *Edwards v. SunCom*, constitute "rates charged" for purposes of Section 332(c)(3)(A). Each of the requested rulings is entirely consistent with past Commission decisions, the best-reasoned federal case law, and sound public policy.

The CTIA seeks the Commission's expedited judgment on essentially the same issues. As CTIA showed, challenges to CMRS carriers' rates through attacks on early termination fees are a nationwide phenomenon that threatens to undermine the rate structure of the entire wireless industry. SunCom wholly supports CTIA's Petition and urges the Commission to grant it expeditiously.

Conversely, the Commission should summarily deny Edwards' misguided Cross-Petition for Declaratory Rulings. The nine highly rhetorical rulings Edwards seeks would require the Commission to usurp the rightful authority of the South Carolina Court by requiring the Commission to: (1) evaluate and characterize the claims made by the Complaint in *Edwards v. SunCom*; (2) make findings of fact with respect to the meaning of the early termination fee provision of SunCom's customer contracts; and ultimately (3) determine whether the Court has

jurisdiction over Edwards' claims.⁶ These requests are inappropriate because they go beyond the ruling that the Court has requested and because the Commission repeatedly has held that it is within the jurisdiction of the courts, not the Commission, to find facts and determine jurisdiction in individual cases.

Moreover, Edwards misstates many of the facts and much of the law governing this case. Most notably, Edwards falsely asserts – at least 7 times – that SunCom has sought to impose early termination fees after its customers' service contracts have expired. In fact, SunCom has charged these fees only to customers that were either in their first term or in a subsequent renewal term, and in either case the early termination fee provision contained in the contract was fully applicable. Edwards' continual misstatements of the facts and law in this case show that there is no reason for the Commission to abandon its sound principle of avoiding case-specific determinations of facts and law. Once the Commission has determined that early termination fees are "rates charged" under Section 332(c)(3)(A), the South Carolina Court will be more than capable of evaluating the facts and determining whether it has jurisdiction over Edwards' claims.

ARGUMENT

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

Both SunCom and CTIA have demonstrated in their Petitions that early termination fees are "rates charged" under Section 332(c)(3)(A) of the Communications Act, and that a ruling to that effect is necessary to protect CMRS carriers from unlawful state rate regulation and to ensure the sound judicial and agency administration of consumer claims regarding early

⁶ Cross-Petition at 18-19 and Appendix D (SunCom Customer Service Agreement).

termination fees. Though the Commission has docketed these petitions separately, they each ask for essentially the same declarations, with only one small exception.⁷ While SunCom illustrated Edwards’ attempts to invalidate its early termination fees in South Carolina, CTIA further demonstrated at length that other carriers are facing similar challenges to their rates in several other states. Further, in some of these cases, onerous discovery has been ordered into the justification and cost-basis of carriers’ early termination fees, demonstrating that this is an issue of nationwide import.⁸ As described below, nothing in Edwards’ Cross-Petition or Comments undermines SunCom’s and CTIA’s showings that early termination fees are “rates charged” under Section 332(c)(3)(A) and that claims which require courts to determine the reasonableness of a particular early termination fee would involve the courts in prohibited rate regulation.

⁷ The only substantive difference between the rulings sought is that SunCom has asked for a declaration that the early termination fees at issue in *Edwards v. SunCom* are themselves “rates charged” under Section 332(c)(3)(A). SunCom included this request to fulfill the terms of the South Carolina Court’s Declaratory Ruling Court Order, which directed SunCom to obtain a ruling regarding whether “the early termination fee in the instant case” is a “rate charged” within the meaning of Section 332(c)(3)(A).” *See* Cross-Petition, Appendix C. Recognizing, however, the Commission’s past decisions that state courts should determine whether specific claims are preempted after guidance from the Commission, Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17021, 17036 (2000) (“*Wireless Consumers*”) (“the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by the state trial court based on the specific claims before it”), SunCom also presented to the Commission the general questions of whether: (1) early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A); and (2) claims predicated on an examination of whether the early termination fee is reasonable are barred by Section 332(c)(3)(A). CTIA’s Petition largely repeats these requests, and CTIA explicitly requested that its Petition be joined with SunCom’s for determination. CTIA Petition at n.2.

⁸ CTIA Petition at 2-7.

A. CMRS Early Termination Fees Are Both Rates In Themselves And An Essential Component Of CMRS Carriers' Rate Structures.

Section 332(c)(3)(A) forbids state authorities from regulating the “rates charged” for wireless service, but permits state regulation of the accompanying “terms and conditions of service.”⁹ Under Commission precedent, the term “rates charged” refers to “both rate levels and rate structures for CMRS” and states may not “prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.”¹⁰

Both CTIA and SunCom showed extensively in their Petitions that early termination fees are and have been a crucial component of rate plans for CMRS service for years.¹¹ CMRS “rates” really are a compendium of multiple charges including, among other elements, activation fees, monthly local and long distance minute charges, special features like voicemail and call forwarding, roaming charges, and early termination. As CTIA explained, “[t]aken together, the multiple rate components and various plans are designed to recover the total costs of providing wireless services over the length of the customer relationship.”¹² By way of example, SunCom provided a detailed explanation of the role early termination fees play in its rate structures and the cost-recovery justification behind the early termination fees it charges.¹³

⁹ 47 U.S.C. § 332(c)(3)(A).

¹⁰ Southwestern Bell Mobile Sys., Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19906-07 ¶ 20 (1999) (“*SWBT Mobile*”).

¹¹ SunCom Petition at 4-8, 11-13; CTIA Petition at 11-19.

¹² CTIA Petition at 11.

¹³ SunCom Petition, Declaration of Charles Kallenbach (“Kallenbach Decl.”) ¶¶ 10-13. It bears noting that, although SunCom freely provided this information to the Commission, an examination of the explanation SunCom provided by state legislative, regulatory, or judicial authorities is precisely what Congress sought to preclude when it forbid states from regulating “rates charged” in Section 332(c)(3)(A).

SunCom's and CTIA's factual showing comports with the Commission's historical understanding that early termination fees are "rates" because they allow carriers to recover the costs created when customers terminate service early.¹⁴ In *MCI*, the United States Court of Appeals for the District of Columbia Circuit approved a Commission decision that an early termination fee was a "rate" rather than a "regulation," finding persuasive the reasoning that when customers terminate service early, they create costs that "result in customers' not paying rates sufficient to cover the costs" of service and subject the carrier to "additional costs while facilities lie idle."¹⁵ Similarly, the FCC has held that:

early termination fees [are] . . . a valid quid pro quo for the rate reductions included in long-term price plans . . . because carriers must make investments and other commitments associated with a particular level of service for an expected period of time, carriers will incur costs if these expectations are not met, and carriers must be allowed a reasonable means to recover such costs.¹⁶

This reasoning is echoed in the more thoughtful federal cases on this issue, which have held that where early termination fees are designed to recoup revenue lost when customers prematurely terminate long-term contracts featuring discounted rates, those fees are "rates charged" within the meaning of Section 332(c)(3)(A). For example, in *Chandler v. AT&T Wireless Services, Inc.*,¹⁷ the United States District Court for the Southern District of Illinois,

¹⁴ See *MCI Telecomm. Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1986) ("*MCI*"); *Ryder Communications, Inc. v. AT&T Corp.*, *Memorandum Opinion and Order*, 18 FCC Rcd 13603 (2003) ("*Ryder Communications*").

¹⁵ *MCI*, 822 F.2d at 86.

¹⁶ *Ryder Communications*, 18 FCC Rcd at 13617.

¹⁷ *Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884, No. 04-180-GPM, slip op. at 2 (S.D. Ill. July 21, 2004).

relying upon the reasoning in *Redfern v. AT&T Wireless Services, Inc.*,¹⁸ held that the early termination fees at issue were “rates charged” and the state law claims were preempted. The reasoning of the *Chandler* and *Redfern* courts is instructive, and fully applicable here:

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

It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law. . . .¹⁹

See also Simons v. GTE Mobilnet, Inc., No. H-95-5169, slip op. at 6 (S.D. Tex. Apr. 11, 1996) (dismissing plaintiff’s challenges to a CMRS provider’s early termination fee and holding that such challenges were completely preempted by Section 332(c)(3)(A)).

The factual situation in the instant case is the same as in *Chandler* and *Redfern*. As in those cases, here SunCom offers lower rates on fixed-term plans because the early termination fee accounts for planned future earnings, and it charges higher rates on plans with no expiration date, such as prepaid and month to month plans, because those plans have no early termination fee.²⁰ Moreover, the Commission has approved CMRS carriers’ use of early termination fees

¹⁸ *Redfern v. AT&T Wireless Services, Inc.*, No. 03-206-GPM, slip op. at 1-2 (S.D. Ill. June 16, 2003) (“the early termination fee affects the rates charged for mobile services,” precluding challenges to those fees under state law).

¹⁹ *Chandler*, slip op. at 2.

²⁰ Kallenbach Decl. ¶¶ 14-17.

and noted that they are permissible to allow carriers to “recover[] their investment in their customers.”²¹

In light of these precedents, and particularly in light of their reasoning, SunCom and CTIA’s showing that early termination fees are directly related to rate setting and cost-recovery are decisive on the question of whether those fees constitute “rates” within the meaning of Section 332(c)(3)(A). These demonstrations leave no doubt that early termination fees are either “rates charged” in themselves because they represent a charge that CMRS carriers impose on customers in exchange for the service provided, or at the very least an integral part of CMRS providers’ “rate structures.” As such, early termination fees are insulated from state rate regulation by Section 332(c)(3)(A) of the Act.²²

B. The Plain Language, Legislative History, And Commission Precedent Compel The Finding That Early Termination Fees Are “Rates Charged.”

The Commission’s historical understanding of early termination fees as rates also demonstrates that Congress intended to include early termination fees within the meaning of the term “rates charged” in Section 332(c)(3)(A). Under settled principles of statutory construction, Congress is presumed to understand the prevailing meaning of regulatory terms that it uses when it enacts new statutes.²³ Congress’s understanding of the term “rates charged” must be presumed

²¹ Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 (2003).

²² See *SWBT Mobile*, 14 FCC Rcd at 19906-07 ¶ 20.

²³ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well”) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978); *Goodyear Atomic Corp v. Miller*, 486 US 174, 184 (1988) (Congress is “presum[ed] knowledgeable about existing law pertinent to the legislation it enacts”).

to be the definition that prevailed in 1993 when Section 332(c)(3)(A) was passed. At that time, the United States Court of Appeals for the District of Columbia Circuit had already decided *MCI* (approving the FCC’s determination that an early termination fee was a “rate” rather than a “regulation”),²⁴ and numerous tariff cases had come to the same conclusion.²⁵ Thus both court and Commission precedent determining early termination fees to be rates was well-established when Congress adopted the current Section 332(c)(3)(A) in 1993, and this precedent formed the regulatory background against which Congress used the term “rates charged” for wireless services in that section. Accordingly, Congress should be presumed to have intended that early termination fees, which had been within the Commission’s definition of “rates,” were within the meaning of “rates charged” as used in Section 332(c)(3)(A).

This presumption that Congress intends a regulatory term to have the meaning that the agency has assigned it is strongest where there is some evidence that Congress intended to adopt the agency’s understanding of the term.²⁶ In this case, the legislative history is clear that Congress intended to allow states to regulate only “matters *generally understood* to fall under ‘terms and conditions.’”²⁷ Because Commission precedent at the time recognized early

²⁴ *MCI* reviewed a 1985 Commission decision finding that an early termination fee was a “rate” rather than a “regulation.” *MCI*, 822 F.2d at 86 (citing *AT&T Communications, Inc. Revisions to Tariff F.C.C. Nos. 260 and 266, Memorandum Opinion and Order*, 1985 FCC LEXIS 2952).

²⁵ In *Ryder Communications*, the Commission cited numerous cases that it had decided before 1993 in which it had approved tariffed rates for early termination. *Ryder Communications*, 18 FCC Rcd at 13617 n.92.

²⁶ *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1959)).

²⁷ H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

termination fees as falling within the category of rates, Congress could not have intended to allow the states to regulate them as “terms and conditions.”

Edwards employs various stratagems to evade the plain language of the statute and Commission precedent, but none is effective to alter the conclusion that early termination fees are “rates charged.” First, Edwards claims that an early termination fee must be a term or condition because it is contained in a “term” in customer contracts.²⁸ This *reductio ad absurdum* argument is obviously meritless because every provision of a customer contract, including those governing the rate a customer will pay, is a “term” in that sense. Congress clearly sought to exclude state authorities from regulating the “terms” of customer contracts that determine the “rates charged,” so the allegation that the early termination fee is contained in a “term” cannot be a basis for concluding that an early termination fee is a “term or condition” under the statute.

Second, Edwards claims that to “regulate . . . the rates charged” can mean only to impose “direct price controls” on wireless service.²⁹ This argument fails for at least two reasons. As noted above, the term “rate” had a generally accepted Commission construction prior to the enactment of Section 332(c)(3)(A) that was broader than the bare charge for service and included rate elements like early termination fees. Moreover, the Commission already has rejected Edwards’ crabbed construction of what Section 332(c)(3)(A) prohibits by concluding that all state actions that have the effect of determining the reasonableness of any wireless rate or rate structure are proscribed by the statute.³⁰

²⁸ Cross-Petition at 21.

²⁹ *Id.*

³⁰ *SWBT Mobile*, 14 FCC Rcd at 19906-07.

Third, Edwards seeks to use the legislative history to establish that early termination fees are “terms and conditions” within the meaning of the statute. Since neither the statute nor the legislative history expressly mention early termination fees, Edwards must argue that challenges to such fees are akin to issues that are mentioned in the legislative history such as “consumer protection matters,” “billing disputes,” or other “consumer billing information and practices.”³¹ There is no analogy to be drawn, however, between any of the practices mentioned in the legislative history and the imposition of early termination fees. Given the clear preexisting precedent establishing that the Commission and Congress understood the term “rates” to include early termination fees, the Commission should not stretch the categories enumerated in the legislative history to include challenges to early termination fees, which are wholly unrelated to any of the categories of disputes that are listed there.

Fourth, Edwards seeks to characterize the drift of Commission decisions interpreting Section 332(c)(3)(A) as having already answered the question of whether early termination fees are “rates charged.”³² But this contention is false because the Commission’s previous decisions have focused not on what CMRS rate components are insulated from state regulation, but rather on what types of state law claims and remedies are not barred by the “terms and conditions” language of the statute. Indeed, the only Commission precedent that directly addresses challenges to a component of wireless rates is *SWBT Mobile*, which preempted challenges to rate practices such as charging for incoming calls or charging in whole minute increments.³³

³¹ Cross-Petition at 22.

³² *Id.* at 31-35.

³³ *SWBT Mobile*, 14 FCC Rcd at 19906-07.

The instant case provides the Commission with the complete record necessary to consider whether early termination fees are “rates charged.” SunCom and CTIA have shown that early termination fees are integrally related to carriers’ service rates and they have shown that state litigation is threatening to undermine the universally accepted rate structure of the highly competitive CMRS industry. The record shows that the statute, its legislative history, and Commission precedent compel the Commission to classify early termination fees as “rates charged” under Section 332(c)(3)(A).

C. Section 332(c)(3)(A) Prohibits Courts From Addressing Quasi-Contractual Claims That Would Result In The Invalidation Of Early Termination Fees.

As SunCom also has requested, the Commission should declare that any state court claim that would allow state authorities, including courts,³⁴ to use quasi-contract equitable doctrines such as *quantum meruit*, unjust enrichment, money had and received (or any other claim seeking determination of the reasonableness of early termination fees or the value of services received in connection with such fees) to nullify, modify, condition, or require the return of payment of early termination fees is rate regulation within the meaning of Section 332(c)(3)(A). Because a determination of the reasonableness of an early termination fee in light of services rendered cannot help but involve the courts in prohibited rate setting, the Commission should make clear that such claims are not preserved by Section 332(c)(3)(A).

³⁴ It is well established that “judicial action can constitute state regulatory action for purposes of Section 332.” Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17021, 17027 (2000) (“*Wireless Consumers Alliance*”). The Commission therefore should ignore Edwards’ claims that Section 332(c)(3)(A) prohibits only legislative rate regulation. See Comment Re Petition for Declaratory Ruling Filed by SunCom Regarding Whether Early Termination Fees Are “Rates charged” Within 47 U.S.C. Section 332(c)(3)(A), WT Docket No. 05-193, filed June 10, 2005 (“Edwards Comments”).

As CTIA and SunCom have established, wireless carriers in many locales are being subjected to challenges to service termination fees that are designed to embroil courts in examinations of the reasonableness of early termination fees in specific cases.³⁵ Commission precedent already confirms that courts should avoid entertaining claims that involve consideration of the reasonableness of rates charged by CMRS providers,³⁶ and the Commission has indicated that requests for relief employing equitable doctrines like *quantum meruit*, unjust enrichment, and money had and received are particularly suspect given their traditional focus on the fair value of goods and services.³⁷ In this case, the Commission should definitively state that in the early termination fee context, Section 332(c)(3)(A) bars all challenges that would rely on an adjudication of the reasonableness of charging the fee or the level of that charge.³⁸

³⁵ CTIA Petition at 2-7; SunCom Petition at 8-9.

³⁶ *Wireless Consumers Alliance*, 15 FCC Rcd at 17035 ¶ 25.

³⁷ See *Sprint PCS and AT&T Corp., Declaratory Ruling*, 17 FCC Rcd 13192, 13198 n.40 (2002) (emphasis added) (“*Sprint*”) (an award of quantum meruit would require the court to establish a value (i.e., set a rate) for the service provided . . . there is substantial question whether a court may award quantum meruit or other equitable relief under state law [in a case involving CMRS rates] without running afoul of section 332(c)(3)(A)”) (citing *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 986 (7th Cir. 2000); *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (“*Gilmore*”).

³⁸ Edwards does not appear to object to the requested ruling in her Cross-Petition or her Comments. Instead, she chooses to argue that the claims presented in *Edwards v. SunCom* are not equitable claims of the sort questioned by the Commission in *Sprint*. As described more fully in Section II, there is no call for the Commission to comment upon the nature of Edwards’ claims in the South Carolina litigation, although clearly those claims require a determination of the reasonableness of SunCom’s early termination fees in violation of Section 332(c)(3)(A) and Commission precedent.

D. The Misconceptions Of Some Courts Regarding Whether Challenges To Early Terminations Fees Should Be Permitted Should Prompt The Commission To Issue A Clear Ruling That Termination Fees Are Rates Charged Under Section 332(c)(3)(A).

Edwards' extended discussion in the Cross-Petition of the case law governing the preemptive force of Section 332(c)(3)(A)³⁹ only serves to reinforce SunCom's and CTIA's contention that confusion in some state and federal courts is leading to disparate decisions and conflicting legal responsibilities based on disparate determinations of whether early termination fees are "rates charged."⁴⁰ A comparison of the existing case law cited by Edwards, SunCom, and CTIA shows that some courts are misconceiving the question of the preemptive force of Section 332(c)(3)(A), a state of affairs that does not reflect the unified deregulatory structure that Congress originally intended to create through Section 332(c)(3)(A).⁴¹

As SunCom and CTIA have shown, the confusion in the courts over whether challenges to elements of CMRS rate structures may go forward has resulted in protracted litigation that is embroiling the courts in judicial proceedings that resemble cost of service rate setting

³⁹ Cross-Petition at 35-41; Edwards Comments at 31-37.

⁴⁰ SunCom Petition at 19-20; CTIA Petition at 29.

⁴¹ The Commission has noted that Congress intended to "avoid inconsistent court decisions" which "could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c)." Personal Communications Industry Association's Broadband Personal Communications Services Alliance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16872 ¶30 (1998). Edwards' claim that the result sought by SunCom in this case would be contrary to Congress' deregulatory purpose barely warrants discussion. Cross-Petition at 6. Suffice it to say that by enacting Section 332(c)(3)(A), Congress sought to insulate wireless carriers from the type of rampant rate regulation that would occur if claims like Edwards' were permitted to go forward unimpeded. Congress had a choice between allowing the market to protect customers from unreasonable rates and from allowing state governments and courts to impose the type of ubiquitous and onerous rate regulation traditionally imposed on wireline carriers. Edwards' claims demonstrate that Congress chose wisely when it chose market-based protection.

proceedings.⁴² The Commission can do much to put a stop to that trend by granting the declaratory rulings requested in SunCom’s and CTIA’s Petitions.

Edwards argues that the federal and state court case law supports classifying early termination fees as “terms and conditions,” but most of the cases that Edwards cites do not even address early termination fees or the issue of whether such fees constitute “rates charged” within the meaning of the statute. Edwards even attempts to substantiate its position with regard to early termination fees by citing a case addressing arbitration clauses.⁴³ This citation, like most of Edwards’ case cites, sheds absolutely no light on whether early termination fees are “rates charged” under Section 332(c)(3)(A) or any other issue relevant to SunCom’s Petition or the Cross-Petition. As SunCom and CTIA showed in their Petitions, the better reasoned cases that do address this issue have found that Section 332(c)(3)(A) bars challenges to early termination fees.⁴⁴ The cases Edwards cites, on the other hand, typically address the question of whether

⁴² CTIA Petition, Executive Summary at 3.

⁴³ Cross-Petition at 39.

⁴⁴ See *Redfern v. AT&T Wireless Services, Inc.*, No. 03-206-GPM, slip op. at 1-2 (S.D. Ill. June 16, 2003) (“the early termination fee affects the rates charged for mobile services,” precluding challenges to those fees under state law); *Aubrey v. Ameritech Mobile Communications, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002) (“[B]y alleging that the rates which AMC charged for terminating a subscriber’s service were exorbitant, it is clear that the Plaintiff is challenging the rates charged by AMC for its wireless services.”); *Chandler v. AT&T Wireless Services, Inc.*, No. 04-180-GPM, slip op. at 2 (S.D. Ill. July 21, 2004) (“It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law.”); *Simons v. GTE Mobilnet, Inc.*, No. H-95-5169, slip op. at 6 (S.D. Tex. Apr. 11, 1996) (dismissing plaintiff’s challenges to a CMRS provider’s early termination fee and holding that such challenges were completely preempted by Section 332(c)(3)(A)); *Consumer Justice Foundation v. Pacific Bell*, Case No. BC 214554 at *4 (Cal. Sup. Ct. July 29, 2002) (finding that early termination fee was “inextricably linked to the rates charged . . . for providing . . . wireless services”). See also *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (challenge to “corporate account administrative fee” “necessarily raises the issue of

Section 332(c)(3)(A) establishes “complete preemption,” thereby making removal of state-law challenges to CMRS carriers’ practices proper.⁴⁵ These cases are inapposite. A decision that Section 332(c)(3)(A) does not preempt the field of CMRS regulation (i.e., “complete preemption is not applicable”), still leaves unresolved the question of whether the statute preempts particular claims, an issue the Commission has expressly indicated state courts should resolve.⁴⁶ Even then, the cases that Edwards relies most heavily upon acknowledge that the question of whether Section 332(c)(3)(A) permits claims challenging early termination fees is a very close question.⁴⁷ In this case, issues of complete preemption and removal jurisdiction are not presented. Accordingly, the vast bulk of the case law cited by Edwards is inapplicable.

The South Carolina Court has sought guidance on the specific question of whether early termination fees are “rates charged” under the statute. The Commission should follow the lead of the courts that have confronted that question directly and answered in the affirmative. Doing so will assist courts in permanently eliminating any confusion over whether challenges to early termination fees should be permitted to move forward.

whether plaintiff received adequate services in return for the Fee. It also raises the question of whether the Fee was unjust.”).

⁴⁵ See, e.g., *Moriconi v. AT&T Wireless*, 280 F. Supp.2d 867, 876-77 (E.D. Ark. 2003) (explaining issues involved in preemption analysis); *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa August 7, 2000); *Cedar Rapids Cellular Telephone v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa September 15, 2000).

⁴⁶ *Wireless Consumers Alliance*, 15 FCC Rcd at 17021.

⁴⁷ See *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 *36-37, 41-42 (July 29, 2004).

E. Granting SunCom’s And CTIA’s Requested Declaratory Rulings Will Vindicate Congress’s Intention That CMRS Operators Be Free Of State Rate Regulation.

Unless the Commission issues the rulings that SunCom and CTIA request, some courts will continue to subject CMRS carriers to burdensome and inappropriate proceedings that examine the supposed reasonableness of their early termination fees in ways that Congress never intended. So long as this continues, Congress’s vision of a unified deregulatory framework that “foster[s] the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure” will be frustrated.⁴⁸ This case gives the Commission the opportunity to take a step towards restoring Congress’s deregulatory model.

As SunCom explained in its Petition, the consequences of failing to protect early termination fees from state regulation could be dramatic.⁴⁹ In place of the single, nationwide, deregulated market for rates that Congress intended, CMRS providers will be liable to as many as 50 individual regulatory schemes and countless different state law theories under which their collection of early termination fees could be found unlawful. This is precisely the danger Congress sought to guard against when it sought a “national regulatory policy for CMRS, not a policy that is balkanized state-by-state.”⁵⁰ The Commission should restore the national approach to challenges to CMRS rates by confirming that rate components like early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A).

⁴⁸ See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 260 (1993).

⁴⁹ SunCom Petition at 20-23.

⁵⁰ Petition of the Conn. Dept. of Pub. Util. Control, *Report and Order*, 10 FCC Rcd 7025, 7034 (1995) (“*CDPUC Order*”).

II. THE COMMISSION SHOULD DENY EDWARDS' DECLARATORY RULING REQUESTS.

The nine highly rhetorical declaratory rulings that Edwards seeks are expressly contrary to settled Commission precedent that Edwards herself cites multiple times in her submissions to the Commission:

[T]he determination of whether any particular claim or remedy is consistent with section 332 must be determined in the first instance by the state trial court based on the specific claims before it.⁵¹

Consistent with this principle, the Commission does not and should not decide whether individual cases are preempted, and the South Carolina Court has not asked for such a declaration. Instead, the South Carolina Court asked SunCom to seek guidance from the Commission on whether the early termination fees SunCom allegedly charged to Edwards and other members of her class were “rates charged” under the Communications Act, because if they are, that “may” determine the extent of the Court’s jurisdiction over that case.⁵² The South Carolina Court clearly reserved for itself the ultimate question of whether Edwards’ claims are preempted. In accordance with the court’s limited request, the Commission should likewise limit its ruling and deny Edwards’ nine-part request that the Commission take the unwarranted step of determining the Court’s jurisdiction over Edwards’ specific case.

⁵¹ Cross-Petition at 13 (quoting *Wireless Consumers Alliance*, 15 FCC Rcd at 17036).

⁵² Declaratory Ruling Court Order attached to Cross-Petition at Appendix C.

A. The Rulings Edwards Seek Inappropriately Ask The Commission To Rule On Matters That Should Properly Be Decided By The South Carolina Courts.

Edwards' Cross-Petition asks the Commission to vastly overstep its rightful authority by declaring whether her specific claims before the South Carolina Court are preempted.⁵³ This is a step that the Commission always has refused to take, and for good reason. The question of whether specific claims in existing cases are preempted involves complex questions of fact and state law over which the Commission has no jurisdiction, and which it is ill-equipped to address adequately. As the Commission has noted, "it is the substance, not merely the form" of state law claims that determines whether a regulation is preempted under Section 332(c)(3)(A),⁵⁴ and the state court is in the best position to assess the substance of a claim.

Edwards's Cross-Petition shows the wisdom of the Commission's traditional restraint. The Cross-Petition is predicated on the false proposition that SunCom has sought to collect early termination fees from its customers who cancel after the term of their contracts expire.⁵⁵ This is pure fantasy. The early termination fees that SunCom collected and Edwards challenged were assessed during the renewal terms of her contract, just as that contracts provided.⁵⁶ The collection of those fees during the renewal term is entirely appropriate because SunCom incurs

⁵³ Cross-Petition at 51. Although Edwards claims that she is requesting only those rulings necessary to allow the South Carolina Courts to determine jurisdiction, her claims go much further, as described below. Edwards' request that the Commission "enter a Declaratory Ruling that claims of the nature pending in the state courts of South Carolina in the underlying litigation are not foreclosed by federal law," is starkly at odds with her claim that the South Carolina Courts should be free to determine these issues without federal intervention. Cross-Petition at 13, 52-54, 55.

⁵⁴ *Wireless Consumers Alliance*, 15 FCC Rcd at 17037.

⁵⁵ *See, e.g.*, Cross-Petition at 4, 11, 14, 15, 18, 29, 31.

⁵⁶ Cross-Petition at Appendix B.

considerable expenses in retaining its customers for additional one-year terms after the first term of their contracts expire. Among other expenses, the Kallenbach Decl. explains that:

SunCom bears considerable ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base. Many of these costs require SunCom to make long-range forecasts of what its customer base will be.⁵⁷

Thus, not only would it be wrong for the Commission to impinge on the fact finding and law declaring functions of the South Carolina Court, the facts and law that Edwards asks the Commission to find are simply wrong in themselves.

Moreover, this case comes before the Commission as a direct result of an order from the South Carolina Court directing SunCom to obtain a Commission ruling on the very narrow question of whether early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A).⁵⁸ The Court intentionally did not ask SunCom to request a ruling as to whether or not Edwards’ claims were preempted.⁵⁹ Indeed, at oral argument before the Court, Edwards’ attorney argued that the Commission *could not* address the preemption issue without making findings of fact that are solely within the purview of the court to determine.⁶⁰ Edwards’ attempt to request that the Commission make exactly the same types of factual and legal conclusions that Edwards previously argued the Commission is in no position to make should be ignored. Indeed, such conclusions would go far beyond answering the questions that the South Carolina Court

⁵⁷ Kallenbach Decl. ¶ 6.

⁵⁸ See Declaratory Ruling Court Order, attached as Appendix C to the Cross-Petition.

⁵⁹ See Transcript of Record, *Edwards v. SunCom*, January 18, 2005, at 9 (“I see this more as accumulating information for the Court to ultimately make a decision:), 14 (“[u]ltimately the decision rests with this Court as to whether or not I believe I have jurisdiction to hear this case, or what the matters are. I am not giving authority to the F.C.C. to make a decision.”).

⁶⁰ *Id.* at 5-6.

believed it needed to know to ascertain the extent (if any) of its jurisdiction over Edwards' claims.

Once the Commission has determined whether early termination fees are "rates charged" under Section 332(c)(3)(A), the South Carolina Courts will be more than competent to determine whether the specific claims Edwards presses are preempted by the statute. Accordingly, the Commission should deny Edwards' requests for declaratory rulings. Edwards' submissions to the Commission demonstrate why this is the only legal and practical course for the Commission to take.

The specific shortcomings of several of Edwards' claims are addressed below in this context.

1. Edwards' First And Second Declaratory Ruling Requests Must Be Denied Because They Ask The Commission To Engage In The Fact-Finding That The Commission Has Consistently Rejected.

The Commission has expressly declined in previous cases to make the kinds of case-specific factual determinations that would be necessary to grant Edwards' requested rulings. In *Sprint*, the Commission refused to pass on the entirely factual question of whether contract formation had taken place between the parties.⁶¹ Here, Edwards asks the Commission to make numerous findings of fact that are properly within the jurisdiction of the trial court.

For example, Edwards asks the Commission to determine that the language of SunCom's customer contract permits the recovery of early termination fees only during the first 12-month term of the contract as a predicate for her first two declaratory ruling requests.⁶² This request is

⁶¹ *Sprint*, 17 FCC Rcd at 13198.

⁶² Cross-Petition at 15 and Appendix D.

based on Edwards' repeated misstatements regarding what the language of SunCom's customer service contract actually provides.⁶³ The language of that contractual provision actually confirms that early termination fees would be charged during the renewal term of the contract,⁶⁴ but in any case, such matters of contract construction are the South Carolina Court's, not the Commission's, responsibility. As a consequence, the Commission must dismiss Edwards' first and second declaratory ruling requests.

2. Edwards' Sixth And Seventh Declaratory Requests Must Be Rejected Because They Invite The Commission To Determine The Scope Of Her Claims Before The South Carolina Court.

Edwards repeatedly characterizes her claims as nothing more than a simple breach of contract and *quantum meruit* case that does not require the South Carolina Court to engage in any analysis of the reasonableness of the rates that SunCom charged for service.⁶⁵ This assertion forms the basis for her sixth and seventh declaratory ruling requests.⁶⁶ The construction of Edwards' complaint, however, and the determination of the scope of the Court's review of the claims presented therein are functions solely within the jurisdiction of the trial court. The Commission expressly recognized this principle in *Sprint*, when it commented upon the potential preemption of equitable claims under Section 332, while explicitly leaving the question to the state court of whether such claims were in fact preempted in that case.⁶⁷

⁶³ See n.55, *supra*.

⁶⁴ Cross-Petition, Appendix B (SunCom Customer Service Agreement”).

⁶⁵ See, e.g., Cross-Petition at 14-18, 31, 32, 48, 50.

⁶⁶ See Cross-Petition at 19 and Appendix D.

⁶⁷ 17 FCC Rcd 13192, 13198 n.40 (2002) (“we defer to the court to address this state law claim”).

Edward's inaccurate assertions about the scope of South Carolina's law of unjust enrichment and *quantum meruit* are a case in point for why the Commission is right to avoid wading into the facts of individual cases and the state law governing them. Edwards claims that under South Carolina law, its unjust enrichment and *quantum meruit* theories would not require the South Carolina Court to evaluate the reasonableness of SunCom's rates or its alleged assessment of early termination fees.⁶⁸ This assertion is demonstrably false. Under South Carolina law, a party can be unjustly enriched only if the value of what has been received exceeds the value of the goods or services rendered, and *quantum meruit* likewise requires the court to make a determination of the value of the services performed.⁶⁹ Thus if Edwards is permitted to proceed on her unjust enrichment and *quantum meruit* theories, the South Carolina Court inevitably would be called upon to consider whether the early termination fee allegedly charged to her was reasonable in light of the discounted service that she received as a result of her long-term service contract.

Thus, there is simply no basis for Edwards' request that the Commission determine that it has not challenged the reasonableness of SunCom's rates or that its unjust enrichment claim does not seek to change the level of SunCom's early termination fee *because* those are questions that can be answered only by the state trial court after a thorough review of Edwards' complaint. Accordingly, Edwards' sixth and seventh requests for declaratory ruling should be denied.

⁶⁸ Cross-Petition at 15-16.

⁶⁹ *Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (S.C. Ct. App. 1984); *QHG of Lake City v. McCutcheon*, 360 S.C. 196, 206, 600 S.E.2d 105, 110 (S.C. Ct. App. 2004) (citations omitted).

3. The Commission Should Refrain From Issuing The Requested “Even If” Ruling Sought By Edwards’ Eighth Declaratory Ruling Request.

Having asked the Commission to make these findings of fact and law regarding the underlying South Carolina litigation, Edwards asserts that existing law would not support preemption of a case like the one she has asserted regardless of whether early termination fees are “rates charged.”⁷⁰ But there is no call for the Commission to make such a speculative ruling. As described above, the Court has not requested such a ruling and Edwards’ attorney actually argued to the trial court that such a ruling based on the facts of the underlying case actually would be worthless in the South Carolina Court. Indeed, Edwards’ eighth request asks the Commission to remove the Court entirely from the determination of whether her claims would be barred by Section 332(c)(3)(A).

It would be wholly inappropriate for the Commission to grant Edwards’ request that it explicitly hold her case is within the realm of those that are not preempted. As described above, the Commission cannot make such a ruling without intruding into the sphere of authority of the South Carolina Court. This case calls only for the Commission to provide new guidance regarding whether early termination fees are “rates charged” within the meaning of the statute. To go beyond that to determine the ultimate preemption issue would be, as the Commission itself has recognized,⁷¹ to usurp the proper authority of the South Carolina Court to determine the facts, the law, and the appropriate jurisdiction over Edwards’ claims.

⁷⁰ Cross-Complaint at 47-55 and Appendix D.

⁷¹ *Sprint*, 17 FCC Rcd at 13198.

B. Edwards’ Third, Fourth and Fifth Declaratory Ruling Requests Must Be Rejected Because They Fundamentally Misconstrue The Role That Early Termination Fees Play In CMRS Rate Structures.

Edwards’ third, fourth, and fifth declaratory ruling requests are mere rhetorical devices, which erroneously assert that early termination fees are not “rates charged” because: (1) they are not imposed on all customers; (2) they are not usage sensitive; and (3) they do not appear on monthly billing statements.⁷² None of these factors, however, is relevant to whether early termination fees are part of SunCom’s rates or rate structures.

First, despite Edwards’ claim, contractual early termination fees affect all customers that have entered into a contract that contains them, even those customers that never have to pay them. This is because the rate plans that SunCom offers and offered during the period relevant to Edwards’ complaint were possible only because SunCom had built early termination fees and the cost recovery that they assure, into its rate structures.⁷³ This is readily apparent upon examining the way that early termination fees affect three types of customers: those that never terminate service, those that terminate service properly in accordance with the terms of the contract, and those that terminate early. Customers that never terminate service obviously never pay an early termination fee. They continue to enjoy SunCom’s service at rates that allow SunCom to recover its costs and a reasonable profit over the life of the contract, including the “ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base” that accompany customers in their renewal term.⁷⁴

⁷² Cross-Petition at Appendix D.

⁷³ SunCom Petition at 4-8.

⁷⁴ Kallenbach Decl. ¶ 6.

Similarly, customers that terminate their service in accordance with the terms of their contract (notice at least thirty days prior to the end of the then-current term),⁷⁵ also never pay early termination fees. This is because when a customer cancels service in accordance with the contract he or she has fulfilled the terms of her service agreement by providing SunCom with sufficient revenue to cover the costs it incurred to provide service plus a reasonable profit by paying the agreed price over the term of the contract. Equally important, that customer also has not negatively affected SunCom's ability to predict its needs for ongoing overhead and network capacity because he or she has terminated during the period when SunCom adjusts those planning factors. In each of these cases, the early termination fee is a part of the rate structure enjoyed by SunCom's customers because the presence of the early termination fee allows the customers to receive lower overall rates in exchange for a long-term service commitment.⁷⁶

Only parties that terminate service outside the contractual termination window actually pay the early termination fee, and in those cases the fee acts as a means of recovering the costs of providing service over a period shorter than that contemplated by the service contract, *i.e.*, the "ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base."⁷⁷ In essence, the early termination fee works to ensure that the early terminating customer's rates more closely approximates the rates that customer would have paid had he or she enrolled in a shorter-term, month-to-month, or prepaid service plan. Contrary to Edwards' assertion, therefore, these illustrations show the extent to which early termination fees are intricately bound up in wireless

⁷⁵ Cross-Petition at Appendix B (SunCom Customer Service Agreement).

⁷⁶ SunCom Petition at 4-8.

⁷⁷ *Id.* at 6; *see also* Kallenbach Decl. ¶ 6.

carriers' rate structures. Thus, there is no basis for Edwards' requested ruling that an early termination fee is not a rate charged if it would never be imposed on a party that continues to receive SunCom service.

Second, Edwards also is wrong to assert through its fifth request for declaratory ruling that early termination fees are not rates charged because they are not "affected by the customer's usage of telephone service."⁷⁸ Edwards cites several authorities for the proposition that wireless charges can only be "rates" if they are charged "by the minute" for service a customer actually uses.⁷⁹ The Commission has never held, as Edwards asserts, that "rates charged" under Section 332(c)(3)(A) refers only to per-minute charges.⁸⁰ The supposed "distinction" Edwards identifies in the FCC rulings between rates and early termination fees consists of nothing more than Commission descriptions of the features of wireless service contracts, with no judgment as to whether any of those individual features actually constitutes a rate charged under Section 332(c)(3)(A). In truth, the Commission never has decided or suggested that early termination fees are not rates because they are not charged on a per-minute basis. Indeed, in its clearest statements on early termination fees, the Commission always has recognized their intimate relationship to the rates themselves and their place in telephone service providers' rate structures:

⁷⁸ Cross-Petition at 33-35 and Appendix D (sixth request).

⁷⁹ *Id.* None of the authorities cited by Edwards even remotely supports her assertion that "the Commission has found that 'early termination fees' are distinct from 'rates,'" which must be charged to customers on a per-minute basis. Cross-Petition at 33-34. In particular, the language Edwards cites from the *Wireless Number Portability Order* does not support that proposition. Cross-Petition at 34 (citing Telephone Number Portability – Carrier Requests for Clarification of Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 ¶14 (2003)). The quoted language merely makes the point that the breach of contractual provisions by a customer would allow the carrier to recover damages for the breach.

⁸⁰ Cross-Petition at 24 (citing Application of BellSouth Corporation for Provision of In Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599 ¶ 43 (1998)).

The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long term service arrangements with their customers.⁸¹

Moreover, from a policy perspective, deciding whether a particular rate component is a “rate[] charged” based on whether that component was charged by the minute of use would be a terrible mistake because it would strip almost all long-term wireless service plans of protection from state rate regulation. Under current wireless industry practice, long-term wireless service plans almost never charge customers for usage by the minute of use, but instead reserve for them a certain number of minutes per month that the customer is permitted to use for a fixed price.⁸² The customer pays the same whether they use those minutes or not. If early termination fees can only be “rates charged” under Section 332(c)(3)(A) if they are charged on a per minute basis for service that actually is utilized, then the monthly fee for most wireless monthly service plans would not be “rates charged” either. Such a result would completely destroy Congress’s efforts to insulate wireless carriers from rate regulation.

Third, Edwards provides no support for her assertion that termination fees cannot be “rates charged” because they do not appear on customer bills, nor are there any grounds for a declaration to that effect. While the Commission’s rules do provide for “full and non-misleading descriptions of the service charges that appear” on customer bills,⁸³ there is no requirement that

⁸¹ See *Ryder Communications*, 18 FCC Rcd at 13617.

⁸² See SunCom Petition at 7 (describing SunCom service plans).

⁸³ Truth in Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492 ¶ 37 (1999).

CMRS carriers include on their bills potential fees that are not actually assessed in a given month. Termination fees do not generate charges on a monthly basis, so there is no reason to include them on monthly customer bills. Customers can hardly claim that they do not have notice of the early termination fees because those fees are spelled out in the customer contract along with the service term and the rate for service under the contract.⁸⁴ In any case, the question of whether early termination fees should be listed on customer bills really has no bearing on whether they are a rate or rate structure protected from rate regulation by Section 332(c)(3)(A).

C. The Commission Should Not Address Either Of Edwards' Preemption Arguments.

In her Cross-Petition and Comments, Edwards makes two additional statutory arguments in asking the Commission to declare that her claims before the South Carolina Court are not preempted. First, in her Comments, Edwards argues that her claims cannot be preempted because Section 332(c)(3)(A) does not contain the clear statement necessary to evidence Congress's intent that claims regarding early termination fees are preempted. Second, in her Cross-Petition, Edwards argues further that her claims are not preempted because the general savings clause found in Section 414 of the Act preserves her claims. Each of these arguments requests Commission declarations that are beyond the scope of this proceeding and that are properly the responsibility of the South Carolina Court under the doctrine of *Sprint* discussed above. In any event, each of the arguments is meritless.

⁸⁴ See Cross-Petition, Appendix B (SunCom Customer Service Agreement).

1. Edwards Wholly Misconstrues The Preemptive Effect Of Section 332(c)(3)(A).

Edwards argues that Section 332(c)(3)(A) preempts only direct price controls imposed by state regulatory bodies and legislatures. If Edwards were correct, then the Commission would be required to overturn settled case law. As described above, the Commission has already barred claims regarding wireless billing practices like incremental billing and rounding up on the basis of Section 332(c)(3)(A).⁸⁵ These claims did not seek direct price controls, but merely contested those practices. Moreover, the Commission would be required to reverse its decision in *Wireless Consumers Alliance* holding that state court action that has the effect of evaluating the reasonableness of a rate is outlawed by the statute.⁸⁶

Despite these (unacknowledged) obstacles, Edwards argues that the ‘plain statement rule’ required Congress to have specifically singled out early termination fees or any other rate element besides “direct price controls” in the statute for such terms to be preempted.⁸⁷ Edwards cites the recent case of *Bates v. Dow Agrosiences LLC*,⁸⁸ as having announced a new “clear and unequivocal” test to be used when there are competing interpretations of a statute. But this misstates the law because, in reality, *Bates* does no more than apply the plain statement rule developed in *Gregory v. Ashcroft*.⁸⁹ Under that rule, Congress must make its intention to

⁸⁵ *SWBT Mobile*, 14 FCC Rcd at 19906-07.

⁸⁶ *Wireless Consumers Alliance*, 15 FCC Rcd at 17027.

⁸⁷ Edwards Comments at 13-16.

⁸⁸ 125 S. Ct. 1788, 161 L. Ed. 2d 687 (April 27, 2005) (“*Bates*”).

⁸⁹ 501 U.S. 452 (1991) (“*Gregory*”).

displace state authority “clear and manifest.”⁹⁰ But the *Gregory* test simply does not require the level of specificity that Edward’s theory demands. But Appellant asserts a level of specificity and detail that the “plain statement rule” simply does not demand. “A statute can be unambiguous” under *Gregory*, “without addressing every interpretive theory” conceivable.⁹¹ To satisfy the plain statement rule, a statute’s meaning “need only be ‘plain to anyone reading Act.’”⁹²

The *Gregory* test is fully met here. Congress’ intention to preclude state regulation of the rates for wireless services could not be clearer or more manifest, as the text and legislative history of Section 332(c)(3)(A) show, so there is really no question whether the statute satisfies the plain statement rule. Moreover, as explained above, because Congress can be presumed to have intended early termination fees to be included in the meaning of the term “rates charged,” Congress did not have to specifically mention those fees to preempt regulation of them to the extent that it preempted “rates charged” generally.

Edwards also cites *Nixon v. Missouri Municipal League*⁹³ for the proposition that an agency cannot preempt a statute simply by adopting a plausible reading of an ambiguous statute.⁹⁴ There is nothing ambiguous, however, about Congress’ intent to preempt state regulation of “rates charged” in Section 332(c)(3)(A). By contrast, in *Nixon*, the term at issue

⁹⁰ See *id.* at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230).

⁹¹ *Salinas v. U.S.*, 522 U.S. 52, 60 (1997).

⁹² *Id.*; see also *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998) (“The fact that §371 has been applied to agreements not expressly anticipated by Congress nor specifically articulated in the statute does not demonstrate ambiguity . . .”).

⁹³ 541 U.S. 125 (2004) (“*Nixon*”).

⁹⁴ Edwards Comments at 17.

was “entity,” a word that had no particular meaning, history, or application in the municipal franchising context of that case. In this case, the term “rate” and the historical inclusion of early termination fees within that term make the *Nixon* precedent inapplicable. There is simply no ambiguity in Congress’s stated intention to preempt state regulation of “rates charged,” nor is there any ambiguity regarding whether early termination fees are included within that term. At bottom, the argument that Section 332(c)(3)(A) preempts only “direct price controls” is meritless.

Equally problematic is Edwards’ claim that Section 332(c)(3)(A) preempts only “positive” enactments like laws and regulations (but not common law court actions) made by state legislatures or regulators (but not courts).⁹⁵ The Commission has long held that judicial remedies are part of the type of regulation that Congress sought to bar through Section 332(c)(3)(A), and none of the cases that Edwards cites are to the contrary.⁹⁶ Edwards claims that in *Spreitsma v. Mercury Marine*,⁹⁷ the United States Supreme Court interpreted identical “regulate . . . the rates charged” language in a different statute to refer only to “positive enactments,” not private contract claims. In reality, however, the statute at issue in that case did not use that language and did not involve rates at all. The Court did indicate that because the statute used both the term “law” and the term “regulation,” it made sense to conclude that Congress did not intend to include common law actions within the scope of the statute’s preemption.⁹⁸ But that reading hardly suggests that when Congress used the phrase “regulate . . . rates charged” it could not have meant to forbid state courts from engaging in *de facto* rate

⁹⁵ *Id.* at 16, 18-19.

⁹⁶ *Wireless Consumers Alliance*, 15 FCC Rcd at 17027.

⁹⁷ 537 U.S. 51 (2002) (“*Spreitsma*”).

⁹⁸ *Id.* at 63.

regulation. The Commission's contrary conclusion on this point is well reasoned and controlling.⁹⁹

In the end, Edwards' *Gregory*-based arguments that state courts *cannot* preempt wireless rate regulation carried out by courts provides the Commission with no basis to reverse its prior rulings or interfere with the process it always has envisioned, whereby the South Carolina Court will determine the preemption issue itself after the Commission releases its declaratory ruling on the early termination fees issue.

2. Edwards' Ninth Declaratory Ruling Request Should Be Denied Because The Specific Preemption Provision Of Section 332(c)(3)(A) Overrides The General Savings Clause Found In Section 414.

Edwards ninth and final request for declaratory ruling asks the Commission to find that the general savings clause found in Section 414 of the Communications Act¹⁰⁰ overrides the specific prohibition of state CMRS rate regulation found in Section 332(c)(3)(A), thereby preserving common law claims against early termination fees.¹⁰¹ It is well-settled, however, that a specific preemption clause like that of Section 332(c)(3)(A) supersedes a general savings clause, particularly when the general savings clause preceded the later-enacted specific

⁹⁹ Edwards' citation to *American Airlines v. Wohlers*, 513 U.S. 219, 299 n.5 (1995), is similarly unavailing. In that case, the Court interpreted the preemption clause in the Airline Deregulation Act ("ADA") to save claims against airlines based on breach of private contracts. The ADA, however, barred all state regulation of airlines and made no distinction between "rates charged" and "terms and conditions." *Id.* Moreover, the language used in the ADA was so different from that used in Section 332(c)(3)(A) that analogizing from the airline context is problematic at best. Finally, the Court in *Wohlers* did not have the benefit of the opinion of an agency expert in interpreting the ADA, as a reviewing court would with the FCC's prior construction of Section 332(c)(3)(A).

¹⁰⁰ 47 U.S.C. § 414.

¹⁰¹ Cross-Petition at 42-46.

preemption statute.¹⁰² Under this well-established rule, if the Commission finds that early termination fees are “rates charged,” and the specific provisions of Section 332(c)(3)(A) apply to preempt an individual claim, then the Section 414 savings clause cannot save that claim. In other words, nothing in Section 414 of the Act should keep the Commission from retaining its current procedures whereby the ultimate preemption decision when it comes to individual claims and classes of claims should be made by the trial court – in this case the South Carolina Court – and not by the Commission.

Finally, unlike many of the cases Edwards cites, a finding that early termination fees are rates and that state courts could therefore find preemption of common law claims against such fees will not deprive any consumer of a right of action or a forum to raise it.¹⁰³ As SunCom and CTIA showed in their Petitions, any plaintiff that believes that a CMRS carrier has behaved unreasonably in the application of early termination fees can file a complaint with the Commission under Section 201(b), 207, and 208 of the Communications Act.¹⁰⁴

¹⁰² *Morales v. TWA*, 504 U.S. 374, 384-85 (1995) (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (the specific governs the general) and *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (“we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.”). *See also Wireless Consumers Alliance*, 15 FCC Rcd at 17040 (declining to determine whether Section 414 can save claims apparently barred under Section 332, but noting that as a general rule of statutory construction the specific overrides the general).

¹⁰³ *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

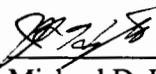
¹⁰⁴ 47 U.S.C. §§ 201(b), 207, 208. *See also Gilmore*, 156 F. Supp.2d at 924.

CONCLUSION

For the foregoing reasons, SunCom requests that the Commission grant the declaratory rulings requested in SunCom's and CTIA's Petitions and deny in full the nine declaratory rulings that Edwards requests.

Respectfully submitted,

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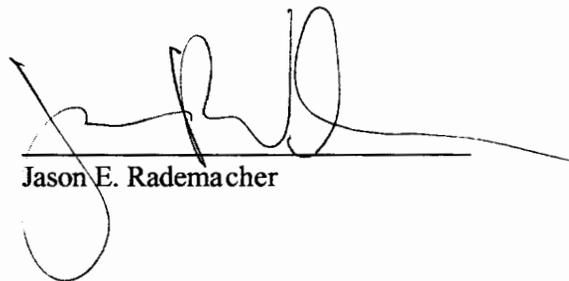
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August 5, 2005

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of August, 2005, the undersigned caused to be served the foregoing Comments, by First Class U.S. Mail, return receipt requested, on the following:

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