

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

In the Matter of)	
)	
Cellular Telephone & Internet Association's)	
Petition for Declaratory Ruling Regarding)	WT Docket No. 05-194
Early Termination Fees in Wireless Service)	
Contracts)	
)	
Petition for Declaratory Ruling Filed by)	
SunCom Wireless Operating Company,)	WT Docket No. 05-193
L.L.C. and Opposition and Cross-Petition for)	
Declaratory Ruling Filed by Debra Edwards.)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES**

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Pursuant to Section 1.4(b)(2) of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, 47 C.F.R § 1.4(b)(2), the National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these reply comments in these proceedings. The Commission should deny the petitions filed by the Cellular Telephone & Internet Association (“CTIA”) and SunCom Wireless Operating Company, L.L.C. (“SunCom”), seeking a declaratory ruling preempting state regulation of early termination fees (“ETFs”) in contracts for commercial mobile radio service (“CMRS”).

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

I. PREDICTABLY, THE CARRIERS DO NOT BOTHER TO ADDRESS THE “ULTIMATE TOUCHSTONE” OF PREEMPTION – CONGRESSIONAL INTENT.

Predictably, the carriers and their trade association (collectively, “carriers”) urge the Commission to consider itself unconstrained by the Constitution, or Congress, or agency or judicial precedent in broadly preempting states’ historic role in protecting consumers from what states may determine to be unreasonable or unfair commercial practices. Not one of the carriers acknowledged that Congress’ intent “is the ultimate touchstone”² in determining whether federal law preempts state law. No carrier bothered to note that the burden on the party claiming preemption is high,³ that any statutory construction indulged in should favor states,⁴ and that the presumption is against preemption.⁵ The carriers pointedly ignore judicial precedent that holds that where matters within states’ historic police powers are involved – and consumer protection and regulation of public utilities are indisputably within that power⁶ – Congress’ purpose to preempt must be “clear and manifest.”⁷

The carriers completely ignore these critical principles of preemption analysis that control the Commission’s decision in determining whether it can preempt state laws governing ETFs. Instead, the carriers assume that the Commission has virtually unbridled power to determine when state laws should be preempted in furtherance of the Commission’s goals.

² See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); see also *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

³ See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); see also *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir., 1998). For purposes of this proceeding, that burden falls on the commenters supporting preemption.

⁴ *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 786, 780-81 (1947).

⁵ See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *N.Y. Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).

⁶ See *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

⁷ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *N.Y. Blue Cross Plans*, 514 U.S. at 655; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

For example, some carriers assert that the Commission should preempt state laws governing their use of term contracts and ETFs because varying state laws will interfere with carriers' ability to adopt national pricing and marketing schemes.⁸ Even if state laws governing ETFs and term contracts interfere with wireless carriers' national pricing and marketing strategies by imposing higher costs and administrative burdens, this does not provide the Commission with a legitimate basis for preempting such state laws. Federal courts recognize that the burden and expense of complying with varying state laws is a fact of life in a federalist system, where states and the federal government share concurrent jurisdiction over many aspects of commercial activity, including wireless carriers' operations and practices.⁹

Two carriers even go so far as to suggest that the existence of state laws governing ETFs threatens wireless competition itself.¹⁰ However, as NASUCA previously made clear, state laws governing term contracts and ETFs have been around for a long time – longer than the wireless industry in many cases.¹¹ Yet by any measure the wireless industry has thrived since, and was thriving before, Congress amended Section 332(c) in 1993.¹²

For example, according to CTIA's most recent survey, there were over 182 million wireless subscribers by the end of 2004¹³ – an increase of over 15% from 2003.¹⁴ Wireless usage

⁸ Cingular Comments at 16-19; Nextel Comments at 12-13; T-Mobile Comments at 8; Verizon Wireless Comments at 28.

⁹ See *Maryland PSC v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990).

¹⁰ US Cellular Comments at 2-3; Nextel Comments at 14-15.

¹¹ NASUCA Comments at 14.

¹² According to the Commission, the number of wireless customers grew one-hundred and thirty fold in the eight years preceding Congress' 1993 amendments to Section 332(c)(3)(A), from 91,600 in 1985, to over 13,000,000 by the mid-1993. See Wireless Competition Bureau, Federal Communications Commission, *Ninth Annual CMRS Report*, Appendix A, Table 1 (Sept. 2004) (“9th CMRS Rept.”).

¹³ CTIA, *Semi-Annual Wireless Industry Survey*, “Year End 2004 Estimated Wireless Subscribers” (2005) (available at: http://files.ctia.org/img/survey/2004_endyear/slides/EstSubscribers_4.jpg).

increased 32.7% over the same time and now stands at over 1 trillion minutes of use annually.¹⁵ Moreover, according to most analysts, wireless carriers' revenues are up sharply as well, and CTIA's own data confirms healthy growth in carriers' revenues.¹⁶ CTIA's vice president put it succinctly when he stated that the wireless industry has enjoyed "unprecedented" growth.¹⁷

Similarly contradicting established jurisprudence regarding preemption analysis, the carriers improperly urge upon the Commission a construction of the Act's provisions – particularly Section 332(c)(3)(A) – that broadens, rather than limits, the scope of the Commission's authority to preempt state law under the Act. This is clearly inappropriate given traditional canons of statutory construction applied by the courts, as well as the strong presumption against preemption embodied in our jurisprudence.¹⁸

NASUCA urges the Commission to bear in mind the critical principles regarding preemption that the carriers ignore. These principles must guide the Commission's decisions regarding preemption of state laws, validly enacted in accordance with their historic and

¹⁴ CTIA's survey notes that 2004 was the "Second Highest Growth Year Ever: Up 23.4 Million from 2003." Wireless growth was not much worse in preceding years. It increased 13% from 2002 to 2003, almost 10% from 2001 to 2002, and over 17% from 2000 to 2001. *Id.*

¹⁵ *Id.*, "Reported Wireless Minutes of Use Exceed One Trillion in 2004" (2005) (available at http://files.ctia.org/img/survey/2004_endyear/slides/wireMinutes_7.jpg). Interestingly, the Commission continues to find that the vast majority – 80% or more – of residential wireless usage is intrastate, not interstate. *9th CMRS Report*, Table 11.4.

¹⁶ CTIA, *Semi-Annual Survey*, "CTIA's Semi-Annual Wireless Industry Survey Results: June 1985 – December 2004" (2005) (available at: http://files.ctia.org/img/survey/2004_endyear/slides/SemiAnnual_3.jpg). From December 2003 to December 2004, wireless revenues increased 12.5%. Revenue growth during the December-to-December period in preceding years was also robust to say the least: 13.9% in 2003, 13.5% in 2002, 19% in 2001, and 26% in 2000. *Id.*

¹⁷ Remarks of K. Dane Snowden to the National Association of Regulatory Utility Commissioners, Consumer Affairs Committee, 2005 Summer Meeting, Austin, Texas (July 24, 2005).

¹⁸ See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-370, 374 (1986); *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987); see also *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 479 (6th Cir. 1997). Congress structured the Act in parts, with each piece having its own purpose and serving a distinct function. Indeed, Supreme Court cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Ting v. AT&T Corp.*, 319 F.3d 1126, 1139 (9th Cir. 2003), citing *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990); see also *Gade*, 505 U.S. at 100 ("It is our duty to give effect, if possible, to every clause and word of a statute."); *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir. 1998) (all provisions of a statute must be construed together to give each an independent meaning).

traditional police powers. Those principles, properly applied, compel the Commission to conclude that preemption of state laws governing wireless carriers' ETFs is inappropriate.

II. CONTRARY TO THE CARRIERS' ASSERTIONS, CONGRESS EXPRESSED NO "CLEAR AND MANIFEST" INTENT TO PREEMPT STATE LAWS GOVERNING ETFs.

A. The Carriers' Claims That ETFs Are "Rates" Finds No Support In The Act Or The Act's Legislative History.

The carriers claim that ETFs are "rates" because they are "an essential and integral part of their rate structures,"¹⁹ which allow them to offer heavily discounted wireless equipment (*i.e.*, handsets) bundled with service.²⁰ The first half of this claim finds no support in either the Act or the relevant legislative history, nor in court rulings or Commission decisions. The second half reinforces NASUCA's point made in its initial comments: ETFs and term contracts are within the ambit of the "bundling of wireless services and equipment" that Congress specifically included in "other terms and conditions" of CMRS that are reserved to state regulation.

1. The Act does not support the carriers' claims that ETFs are "rates charged" for CMRS.

Neither Section 332(c)(3)(A) nor the legislative history define what constitute "rates charged" for CMRS. This may be due to the fact that "rates" have a fairly common, well-understood meaning. That meaning clearly excludes liquidated damages (or penalty) provisions that apply only when the customer ceases taking service from the carrier before the expiration of the contract's term.²¹

A "rate" means the "price of a particular service or piece of equipment from a telephone

¹⁹ Cingular Comments at 3; T-Mobile Comments at 5; US Cellular at 3; Verizon Wireless Comments at 10.

²⁰ Cingular Comments at 3, 11; Dobson Comments at 2; Nextel Comments at 4-5; T-Mobile Comments at 5.

²¹ See *In re Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975-76 (2002) (referring to ETFs as "traditional contractual remedies," provided for in the terms and conditions of the carriers' service contracts); see also *Restatement (Second) of Contracts*, § 356(1), Comments a – c; *Uniform Commercial Code* §§ 2-718:9 & 2.718:10.

company.”²² Put another way, a “rate” is the “cost per unit of a commodity or service.”²³ In the public utility context, a rate is understood to mean “the price stated or fixed for some commodity or service of general need or utility supplied to the public measured by specific unit or standard.”²⁴ The Commission adopted the same meaning of “rate,” noting that “a ‘rate’ has no significance without the *element of service for which it applies*.”²⁵

The Commission has also clarified that the prohibition against states regulating “rates charged” for CMRS may include both “rate levels” and “rate structures” and that states “not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.”²⁶ Neither “rates” nor the Commission’s statements clarifying what carrier practices are subsumed within this term (*i.e.*, structures, rate levels or rate elements) would include ETFs. As NASUCA and other commenters noted, ETFs do not constitute charges for any service but rather are charges associated with the discontinuation of service.²⁷

Likewise, the term “regulate” has importance in construing the scope of preemption set

²² See *Newton’s Telecom Dictionary* at 701 (16th Ed. 2000).

²³ *Black’s Law Dictionary*, 1134 (5th Ed. 1979); see also *American Heritage Dictionary*, 1027 (2d Ed. 1985) (same); *Webster’s II New College Dictionary*, 919 (1995) (same).

²⁴ *Blacks Law Dictionary*, 1134 (5th Ed. 1979).

²⁵ *In re Southwestern Bell Mobile Systems, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19901 ¶ 19 (1999) (“*Southwestern Bell*”) (emphasis added), citing *Webster’s Third New International Dictionary* (1993) (“rate” is defined as an “amount of payment or charge based on some other amount”) and *American Telephone and Telegraph Company v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S.Ct 1956, 1963 (1998).

²⁶ *Southwestern Bell* at ¶ 20. None of these particular terms were defined by the Commission. The closest meaning for “level” in the dictionary is “relative position or rank on a scale.” See *American Heritage Dictionary*, 726 (2d Ed. 1985). “Structure” has several meanings, the most appropriate being the “way in which parts are arranged or put together to form a whole.” *Id.* at 1208. Finally, the most appropriate definition of “element” is a “fundamental, essential, or irreducible constituent of a composite entity.” *Id.* at 444-45. These terms merely clarify what is included *within* the term “rates;” they do not expand the Commission’s jurisdiction *beyond* “rates charged” for CMRS. The essence of “rates” remains the price paid for a particular element of CMRS. ETFs simply do not represent the price paid for a particular element of CMRS.

²⁷ NASUCA Comments at 22; Wireless Consumers Comments at 8-10; AARP Comments at 9-10; Consumers Union Comments at 9-11.

forth in Section 332(c)(3)(A). As Wireless Consumers Alliance noted, states are prohibited from “regulating” CMRS rates.²⁸ The Commission has previously concluded that Section 332(c)(3)(A) “prohibit[s] states from *prescribing, setting, or fixing* rates’ of wireless service providers.”²⁹ Accordingly, “states not only *may not prescribe how much* may be charged for these services, *but also may not prescribe the rate elements* for CMRS or *specify which among the CMRS services provided can be subject to charges* by CMRS providers.”³⁰ Clearly not all state action that may affect CMRS carriers’ rates would be prohibited under this interpretation. State action that might have an incidental or indirect impact on wireless carriers’ rates is clearly not the “regulation” of “rates” that is prohibited by Section 332(c)(3)(A) – a point on which both the Commission and courts have agreed.³¹ To read Section 332(c)(3)(A) as prohibiting any state action that might affect carriers’ rates would “allow the exception to swallow the rule.”³²

2. *Neither Commission rulings, nor common sense, support the carriers’ claims that ETFs are “rates.”*

At the outset, one point that should be self-evident needs to be made: The Commission has never expressly stated that ETFs are “rates.” No matter how much the wireless carriers twist and bend Commission statements in prior orders and statements, this fact is beyond dispute.

The carriers’ argument that ETFs are “rates” rely on tidbits taken from Commission decisions on a range of issues, most of them having nothing to do with wireless service or service

²⁸ Wireless Consumers Comments at 10.

²⁹ *Southwestern Bell*, 14 FCC Rcd. at 19906 ¶ 20 & n. 44 (citations omitted).

³⁰ *Id.* at 19906 ¶ 20.

³¹ See *In re Wireless Consumers Alliance, Inc.; Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17039-40 ¶¶ 30-34, 38 (2000); see also, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976); *Tenore v. AT&T Wireless Services*, 962 P.2d 104 (Wash. 1998), *cert. denied*, *AT&T Wireless Services v. Tenore*, 525 U.S. 1171 (1999); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004); *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999); *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 at *19-20 (S.D. Iowa 2000); compare *Wireless Consumers*, 15 FCC Rcd at 17036 ¶ 28 n. 87 (collecting cases).

³² *Iowa v. U.S. Cellular*, 2000 U.S. Dist. LEXIS 21656 at * 20; see also *CTIA v. FCC*, 168 F.3d at 1336.

agreements between consumers and wireless carriers. None of the Commission documents cited by the carriers support the notion that ETFs should properly be considered “rates,” or that state laws governing ETFs are, in essence, regulating carriers’ “rates.”

For example, Cingular claims that the Commission is aware that ETFs are a common element of wireless carriers’ rate plans because the Commission’s consumer bulletins alert consumers to ETFs.³³ This is hardly dispositive. Significantly more compelling is the manner in which the Commission identifies ETFs in its quarterly reports regarding consumer complaints.

In its quarterly reports, the Commission makes it clear ETFs are *not* considered “rates.” For wireless complaints, there is a category for “Billing and Rates Related” complaints, broken down into seven subcategories, and another category for “Contract – Early Termination.”³⁴ The subcategories for “Billing and Rates-Related” complaints (*e.g.*, airtime charges, credits/refunds/adjustments, line items, recurring charges, roaming rates, rounding, service plan rate) nowhere identify ETFs. But the “Contract – Early Termination” category of complaints specifically includes the category “Termination of Service by subscriber: *subscriber’s liability for terminating service prior to a specified contract term.*”³⁵ This distinction only makes sense if ETFs are neither billing matters nor rate-related matters but rather are other contractual matters.

The other Commission pronouncements cited in the wireless carriers’ comments fare no better. Cingular claims that the Commission has recognized that ETFs are “one of several rate elements used in setting prices.”³⁶ As an initial matter, the document cited by Cingular is a Commission report, describing the wireless industry in 1995 generally, not an order defining

³³ Cingular Comments at 6.

³⁴ See Report on Informal Inquiries and Complaints: First Quarter Calendar Year 2005, Consumer & Governmental Affairs Bureau, Executive Summary at 4-5, 9 (rel. Aug. 12, 2005).

³⁵ *Id.* at 5 (emphasis added).

³⁶ Cingular Comments at 10, citing *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd. 8844, 8868 ¶ 70 (1995).

“rates” or “other terms and conditions” of CMRS in the context of preemption under Section 332(c)(3)(A). However, even in describing the wireless industry, and pricing for wireless service, the Commission did not, as Cingular claims, proclaim ETFs “one of several rate elements used in setting prices.” What the Commission actually said, in pertinent part, was this:

For mobile radio services, price is a complicated factor. *As discussed in paragraph 22 above, cellular prices have at least three main elements. These are monthly access, per minute peak-use period, and per minute off-peak-use period charges.* In addition, there may be fees for activation, termination, and roaming. In some bundled offerings, monthly access charges are combined with a certain number of "free" minutes of usage. Further, contract length may be a factor. It is also useful to know definitions such as what is the peak period and what are billing increments. Further complicating the analysis, cellular contracts often include bundled terminal equipment. . . . Finally, cellular service providers typically offer several pricing options, each aimed at a different type of customer.³⁷

In other words, monthly access, per minute peak-use period, and per minute off-peak-use period charges are the main elements of wireless prices, though other factors influence the price consumers pay for wireless service. This hardly means that those other factors are “rates” or even that they are “used in setting prices.”

In the quoted passage, for example, the Commission noted that the service contract’s length may be a factor in the price a consumer pays for service. However, contract length is not a “rate” (a price paid for a particular service) or an element of that “rate.” Similarly, choice of law provisions in contracts and mandatory arbitration clauses may influence the price a consumer pays for service, yet these too are not “rates” or “rate elements.” In fact, virtually any decision a wireless carrier makes regarding its operations – such as staffing, marketing efforts, promotions, software and other operations support systems, equipment acquisitions, etc. – impact the CMRS provider’s price. None of these matters should be considered “rates” or “rate

³⁷ *Id.*; see also *id.* at 8851 ¶ 22.

elements,” however.³⁸

Sprint and Nextel assert that the Commission has found that ETFs are “directly linked to rates,” citing the Commission’s decision denying California’s petition to retain “rate” regulation over CMRS pursuant to Section 332(c)(3)(B).³⁹ This assertion is not supported by the Commission’s decision, however. In rejecting California’s petition to retain regulatory jurisdiction over wireless rates, the Commission observed that:

The initial issue we confront is how to analyze the wealth of price data in the record. Although the two major standard components of cellular prices are monthly, flat-rate access charges and per-minute airtime charges, customer bills are driven in part by other variables, including "free" airtime offered with certain pricing plans, termination charges (if any) and contract length (monthly or for a period of months or years). Such variables complicate the task of analyzing pricing data and raise two questions: (1) can the record data be categorized in a way that facilitates meaningful analysis; and (2) what data are the most meaningful?⁴⁰

No one seriously questions whether such things as contract length and termination charges may have an impact, albeit indirect, on wireless rates for service. But such impacts hardly make contract length and termination charges “rates” or “rate elements.”

Other authorities cited by the carriers testify to the lengths they will go to find something, anything, upon which to hang their argument that ETFs are “rates.” For example, Sprint cites *Western Union* for the proposition that the Commission has characterized ETFs as a non-recurring charge.⁴¹ However, that proceeding involved revisions to a *tariff* governing Western

³⁸ On this point, the Commission noted the many differences among wireless carriers that make them competitive with or distinct from other carriers, including “basic facts about prices and rates.” *Id.* at 8847 ¶ 11. In other words, the price of wireless service is not necessarily the same as the rates charged for wireless service. Thus factors that impact the price of wireless service are distinct from the wireless rates.

³⁹ Nextel Comments at 19, citing *In re Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7536 ¶ 115 (1995) (“*California Order*”); Sprint Comments at 8 n. 29.

⁴⁰ *California Order*, 10 FCC Rcd. at 7536 ¶ 115.

⁴¹ Sprint Comments at 8 n. 29, citing *In re The Western Union Telegraph Company*, Memorandum Opinion and Order, 76 F.C.C.2d 372, 374-75 ¶ 8 & 383 ¶ 31 (1980).

Union's *satellite* services and did not involve an *ETF at all* but rather a service cancellation charge that applied when a service order was cancelled less than two hours before it was scheduled to be processed. This decision truly has no relevance to this proceeding.

Likewise irrelevant is the decision Sprint and T-Mobile cite for the proposition that the Commission has recognized that ETFs are "mutually beneficial."⁴² The cited portion of the Commission's lengthy order dealt with whether an earlier decision allowing early termination clauses in interconnection agreements between incumbent and competitive local exchange carriers should apply when the competitor converted high-capacity special access local loops to unbundled network elements.⁴³ The Commission's decision regarding the reasonableness of provisions in interconnection agreements between local wireline carriers under Section 251 of the Act are hardly relevant to the widespread use of ETFs in wireless customers' standard service agreements.

T-Mobile similarly cites several Commission orders that are not on point in support of its assertions that the Commission has "unambiguously" concluded that ETFs are rates, that the regulation of ETFs falls directly within the Commission's ratemaking authority and that the Commission has characterized cancellation fees as part of carriers' rate structures.⁴⁴ None of the Commission's statements in the cited orders clearly indicates that ETFs are "rates," and in any event the context in which these Commission pronouncements were made is radically different from the wireless industry.

Thus, nowhere in the orders T-Mobile cites does the Commission conclude, let alone

⁴² Sprint Comments at 8 n. 29, citing *In re the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17400 ¶ 692 (2003) ("*Advanced Unbundling Order*"); see also T-Mobile Comments at 14 n. 36.

⁴³ *Advanced Unbundling Order* at 17400-402 ¶¶ 693-95.

⁴⁴ T-Mobile Comments at 13-14.

“unambiguously” conclude, that wireless carriers’ ETFs are rates. For example, the first decision T-Mobile cites dealt with whether the Commission should take a “fresh look” at term discounts in long-term special access arrangements between wireline carriers in their Commission-approved tariffs.⁴⁵

Similarly the Commission did not conclude that ETFs are part of wireless carriers’ “rate structure” in its order dealing with BellSouth’s application for Section 271 authority in Louisiana.⁴⁶ The Commission merely observed that, as a whole, the rate structure of AT&T’s wireless “Digital One Rate Plan” – which included requiring a term contract, the purchase of a handset, and cancellation fees for early termination – was unlikely to accelerate the substitution of wireless service for more affordable local wireline service.⁴⁷ The Commission could just have easily noted that other aspects of AT&T’s service (*e.g.*, inadequate service coverage, dropped calls, poor customer service or oppressive contractual provisions) made it unattractive. Nearly every aspect of a wireless carrier’s operating practices affects the overall price paid for its service but, again, those practices do not thereby become “rates.”

T-Mobile also cites the Commission’s decision arbitrating interconnection agreement issues between competitive local exchange carriers and the incumbent Verizon local carrier for its claim that ETFs are “rates.”⁴⁸ Once again, the decision cited is inapposite since the Commission merely rejected AT&T’s claim that it should not be subject to penalties for

⁴⁵ *In re Expanded Interconnection with Local Telephone Company Facilities*, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341, ¶¶ 14-17 (1993).

⁴⁶ T-Mobile Comments at 14 n. 34, *citing In re Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd. 20599 (1998).

⁴⁷ 13 FCC Rcd at 20631 ¶ 43.

⁴⁸ T-Mobile Comments at 14 n. 36 *citing In re Petition of WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002).

terminating tariffed special access services under the carriers' interconnection agreement.⁴⁹ Not only was the Commission dealing with tariffed wireline services and carriers' interconnection agreements, but if the decision was clearly made in the context of the "filed rate doctrine" which clearly does not apply in the CMRS context.⁵⁰

Several carriers also cite Commission decisions relating to wireline interexchange services provided pursuant to tariff for the proposition that ETFs, or their functional equivalents, are essential rate elements.⁵¹ AARP addressed the inapplicability of the Commission's *Ryder* decision to the wireless context and NASUCA concurs in and adopts AARP's arguments.⁵² In addition, a number of carriers cite to the Commission's March 18, 2005 order in its "Truth-in-Billing" docket in support of their assertions.⁵³ Suffice it to say, that order is on appeal and its viability is open to question.⁵⁴

Finally, Verizon Wireless asserts that Commission precedent demonstrates that ETFs are an integral part of carriers' rate structures.⁵⁵ Yet the decision Verizon Wireless cites actually provides a very strong argument undermining the carriers' assertions that ETFs are "rates." Rather than characterizing ETFs as "rate structures," the Commission referred to such fees as "*traditional contractual remedies*," provided for in the terms and conditions of the carriers'

⁴⁹ *Id.* at 27204-206 ¶¶ 344-48 (2002).

⁵⁰ *See Wireless Consumers*, 15 FCC Rcd. at 17029-34 ¶¶ 15-22.

⁵¹ Cingular Comments at 12-13; Nextel Comments at 19; Sprint Comments at 8 (*citing In the Matter of Ryder Communications v. AT&T*, Memorandum Opinion and Order, 18 FCC Rcd. 13603, 13617 ¶ 32 (2003) ("Ryder") and *In the Matter of Procedures for Implementing Detariffing of Customer Premises Equipment and Enhanced Services*, Memorandum Opinion and Order, 100 F.C.C.2d 1298, 1324-25 ¶ 39 (1985)).

⁵² *See* AARP Comments at 23.

⁵³ *See, e.g.*, Cingular Comments at 8-10; T-Mobile Comments at 12-13; Verizon Wireless Comments at 16.

⁵⁴ *See NASUCA v. FCC*, No. 05-11682-DD (11th Cir., petition for review filed March 28, 2005).

⁵⁵ Verizon Wireless Comments at 15, *citing In re Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975-76 ¶¶ 11-15 (2002). In this order, the Commission rejected wireless carriers' efforts to refuse to port customers' numbers on the grounds that such actions violated the customers' term agreements or made them subject to ETFs.

service contracts, rather than as “rates” charged by wireless carriers.⁵⁶ Further, the Commission specifically noted that the “contractual provisions” of wireless carriers’ standard service agreements included “minimum contract terms, *early termination fees*, credit requirements, or other similar provisions.”⁵⁷ The Commission clearly understood that ETFs, just like minimum contract terms, credit requirements, etc., are not “rates” but rather fit within “other terms and conditions” of CMRS service. This is consistent with not only common sense but also the legislative history of Section 332(c)(3)(A).

3. *The court decisions cited by the carriers are inapposite as well.*

The carriers also cite a number of judicial rulings as support for their claim that ETFs are “rates.” As with the Commission rulings previously discussed, the case law cited by the carriers does not support their arguments.

For example, Cingular cites *MCI v. FCC* for the proposition that ETF-like charges in the wireline context are “rates.”⁵⁸ In that case the Commission was called upon to construe a settlement agreement among AT&T and MCI, among others, and merely determined that Project Liability cancellation and discontinuance charges discussed in the settlement were part of the “rates” established under the agreement. The D.C. Circuit concluded that the Commission “reasonably found that the Project Liability charges are ‘rates’ *within the meaning of the Agreement*.”⁵⁹ The *MCI v. FCC* decision thus involved neither “rates” under Section 332(c)(3)(A), commercial mobile service, nor ETFs in contracts between carrier and customer.

Cingular also cites *Equipment Distributors* to support its argument that ETFs are not

⁵⁶ *Id.* at 20976 ¶ 16 (emphasis added).

⁵⁷ *Id.* at 20975 ¶ 14 (emphasis added). Similarly, the Commission noted that wireless carriers “may include provisions in their customer contracts on issues such as early termination and credit worthiness,” but could not abrogate their porting obligation through such contractual provisions. *Id.* at 20975 ¶ 15.

⁵⁸ Cingular Comments at 13 n. 27, *citing MCI v. FCC*, 822 F.2d 80 (D.C. Cir. 1987).

⁵⁹ *Id.* at 86 (emphasis added).

anticompetitive and to illustrate the Commission's opinion on the purpose of ETFs.⁶⁰ However, *Equipment Distributors* dealt with ETFs provided for in telecommunications equipment leases between telecommunications carriers. This case too has no bearing on whether ETFs in service contracts are rates.

Even more off-base is Verizon Wireless' discussion of a Ninth Circuit decision dealing with ETFs in the context of hydroelectric power transmission.⁶¹ In that case, the court merely quoted another court's statement that "rates are simply the charges [the electric utility] imposes on its customers for the provision of services."⁶² The Commission should hardly take a general statement about the rates of a hydroelectric power company into account in defining "rates charged" in the wireless telecommunications context. It is clear that ETFs do not result from wireless carriers' "provision of services."

B. In Any Event, The Legislative History Of Section 332(c)(3) Resolves The Matter Against The Carriers' Claims That ETFs Are "Rates Charged" For CMRS.

The Commission ultimately does not need to consider the carriers' flawed claims that ETFs are somehow subsumed within wireless carriers' "rates charged" because, as NASUCA noted in its initial comments, *Congress has spoken directly to the issue* in the legislative history of Section 332(c)(3)(A).

In the legislative history of Section 332(c)(3)(A), Congress made it clear that it intended CMRS to include a broad, non-exhaustive list of matters to be reserved to state regulation as "other terms and conditions" of CMRS. One matter expressly identified by Congress as falling within "other terms and conditions" of CMRS was the "bundling of services and equipment" by

⁶⁰ Cingular Comments at 13 n. 27, citing *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197 (D.C. Cir. 1987).

⁶¹ Verizon Wireless Comments at 10, citing *Calif. Energy Res. Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 831 F.2d 1467 (9th Cir. 1987).

⁶² *Calif. Energy Res.*, 831 F.2d at 1472.

CMRS providers.⁶³ NASUCA noted that both CTIA and SunCom conceded that their ETFs, coupled with term contracts, were intended to subsidize the cost of handsets and other equipment provided in conjunction with their wireless service – in other words, bundle equipment with service.⁶⁴ The carriers’ comments confirm this point.⁶⁵

Regardless of how the Commission has characterized ETFs in various industries and contexts over time, and regardless of the carriers’ attempts to pound contractual terms into a “rates” hole, the fact remains that Congress clearly included carriers’ use of fixed term service contracts, and ETFs, in the matters that states are permitted to regulate under Section 332(c)(3)(A).⁶⁶

It may be argued that the “bundling of services and equipment” specifically reserved to state regulation preserved only state antitrust laws that might apply to such bundling arrangements. If Congress had intended “bundling of services and equipment” to be so narrowly construed, it could have easily accomplished that purpose simply by stating so.⁶⁷ It did not. Moreover, in its 1992 *Cellular Bundling Order*, the Commission rejected CTIA’s suggestion that it employ antitrust standards in analyzing the effects of packaging wireless equipment and

⁶³ H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H. Rpt. 111, at 4 (1993) (“*House Report*”).

⁶⁴ NASUCA Comments at 12 (WT Docket No. 05-194); NASUCA Comments at 11 (WT Docket No. 05-193).

⁶⁵ *See* Cingular Comments at 6 (ETF-supported term rate plans allow carriers to recoup expenses associated with customer acquisition and reduced handset prices); Dobson Comments at 2 (fixed long-term arrangements coupled with ETFs allow the carrier’s handset subsidy to be amortized over a long term); Nextel Comments at 4-5 (equipment discounts protected by ETFs are critically important because Nextel has some of the highest handset and equipment costs in the industry); Sprint Comments at 2-3 (term plans, which include ETFs, allow customers to get free or heavily discounted phones and lower prices during the term); T-Mobile Comments at 5 (plans that include ETFs allows customers to be offered handsets or accessories at low or no cost and reduced rates for service); Verizon Wireless Comments at 15 (fixed-term plans depend on ETFs to allow carriers to offer a substantial subsidy to offset the price of new handset equipment).

⁶⁶ *See House Report*.

⁶⁷ *See, e.g., Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 780-81 (1947) (Frankfurter, J., opinion) (Congress can speak with drastic clarity whenever it chooses to assume full federal authority, completely displacing states).

services on consumer welfare, noting:

We decline to adopt CTIA's narrow standard which focuses exclusively on anticompetitive effects because, as the Commission has noted in the past, *the public interest standard encompasses matters that go beyond the promotion of competition.*⁶⁸

There is no reason why the same broad public interest standard identified by the Commission would not apply with equal vigor to states reviewing wireless carriers' bundling practices under their own laws. The public interest embodied in state statutes or common law similarly upholds state laws governing or even prohibiting wireless carriers' ETFs.

III. CONGRESS' PREFERENCE FOR DEREGULATORY POLICIES AND COMPETITION DOES NOT CONFER BROAD PREEMPTIVE AUTHORITY ON THE COMMISSION

Several carriers claim Congress' preference for competition and deregulation in the wireless industry impliedly gives the Commission broad authority to preempt state laws governing ETFs in order to advance those Congressional goals.⁶⁹ The carriers' claims miss their mark.

A. The Implied Preemption Urged By Carriers Exceeds The Commission's Delegated Authority.

Under the 1934 Act, Congress delegated authority to the Commission to regulate telecommunications carriers' interstate services while authority over carriers' intrastate services was reserved to the states. The Act and its amendments generally reflect federal policy in favor of increasing competition in the telecommunications industry.⁷⁰ However, with certain limited

⁶⁸ *In re Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, 4028 ¶ 6 n. 13 (1992) ("*Cellular Bundling Order*"), citing *Cellular Communications System*, 86 FCC 2d 469, 486 (1981); see also *Cellular Bundling Order* at 4028-29 ¶ 7.

⁶⁹ See Cingular Comments at 16-17; Sprint Comments at 6; Verizon Wireless Comments at 25-28.

⁷⁰ *Louisiana PSC*, 476 U.S. at 369. To some extent, that policy has been implemented – though there are dissenting voices being raised about the degree to which competition in the local exchange has been realized at a time when there is increasing concentration of market share in the local, long distance and wireless market.

exceptions,⁷¹ Congress has preserved the dual state-federal jurisdiction over telecommunications services. This basic division of authority is set forth in Sections 1 and 2(b) of the Act.⁷²

Section 1 of the Act established the Commission and sets forth its authority to regulate

[I]nterstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication [and to] execute and enforce the provisions of this chapter.⁷³

Although this section of the Act gives the Commission broad authority, the Supreme Court roundly rejected the argument that Section 1 gives the Commission broad, implied power to preempt state regulation that allegedly frustrates the Commission's asserted goal of ensuring efficient, nationwide phone service.⁷⁴

Instead, Section 2 of the Act – like Section 332(c)(3)(A) – is a direct check on such broad preemptive authority. On this point, the Court wrote:

We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again [section 152(b)] asserts that ‘nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. . . .’ *By its terms, this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters ‘in connection with’ intrastate service. Moreover, the language with which it does so is certainly*

⁷¹ For example, those portions of the 1996 amendments that vested exclusive jurisdiction in the Commission to implement the local competition provisions of the amendments. *See AT&T Corporation v. FCC*, 525 U.S. 366, 378 n. 6 (1999). Similarly, the amendment of section 332(c)(3) of the Act in 1993, which prohibited states from regulating CMRS providers' rates or entry. *See* 47 U.S.C. § 332(c)(3)(A).

⁷² 47 U.S.C. §§ 151 & 152(b).

⁷³ 47 U.S.C. § 151.

⁷⁴ *Louisiana PSC*, 476 U.S. at 370.

*as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.*⁷⁵

In resolving the tension between the two sections of the Act to avoid a conflict, the Court in *Louisiana PSC* observed that “the [two] sections are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal.”⁷⁶ Finally, to disabuse the Commission and others of any notions to the contrary, the Court opined further that: “[W]ere we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.”⁷⁷

The Court’s decision in *Louisiana PSC* still governs.⁷⁸ In fact, the Court in *AT&T Corp.* recently noted that:

After the 1996 Act, § 152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States’ exclusive control. *Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate any aspect of intrastate communications not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission’s primary jurisdiction.*⁷⁹

Congress’ 1993 amendments to Sections 2(b) and Section 332(c)(3)(A) of the Act altered that basic division of authority in a limited fashion by preempting states from regulating wireless carriers’ “entry” and “rates charged” for wireless service. However, the 1993 and subsequent

⁷⁵ *Id.* (emphasis added). Consistent with the Court’s analysis in *Louisiana PSC*, courts have similarly rejected efforts to read the preemption of “rates charged by” CMRS providers broadly and the reservation of state jurisdiction over other “terms and conditions” narrowly. See, e.g., *Iowa v. US Cellular*, 2000 WL 33915909, *4 (S.D. Iowa 2000).

⁷⁶ *Id.* (emphasis original).

⁷⁷ *Id.*

⁷⁸ See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 381 n. 7 (1999) (noting the continued viability of the *Louisiana PSC* decision).

⁷⁹ *Id.* (emphasis added).

amendments to the Act expressly preserved state authority over “other terms and conditions” of wireless service.

It is, or at least should be, axiomatic that “an agency cannot confer power upon itself,” and that permitting “an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.”⁸⁰ Congress’ “pro-competitive federal scheme,” expressed in its preemption of state authority over wireless carriers’ “market entry” and (to a lesser extent) their “rates charged,” does not confer upon the Commission broad authority to preempt state laws that are otherwise expressly preserved.

B. The Deregulatory Goals of Congress Do Not Confer Preemption Authority On The Commission.

Nor can the Commission preempt state law on the grounds that the pro-competition and deregulatory aims of the Act impliedly give the Commission power to broadly preempt state laws governing telecommunications carriers. Where Congress expressly preempts state law in a statute but reserves state authority in other provisions of that law, the Supreme Court has concluded that the scope of preemption is governed by the express statutory language, because Congress has declared the extent of preemption in the statute.⁸¹ On this point, the Court has noted:

Where Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a “reliable *indicium* of congressional intent with respect to state authority,” “there is no need to infer congressional intent to preempt state laws from the substantive provisions” of the legislation.⁸²

Given the explicit statutory language regarding the areas in which state law is either preempted or preserved in Section 332(c)(3)(A), the Commission may not broadly preempt state laws

⁸⁰ *Louisiana PSC*, 476 U.S. at 374-75.

⁸¹ *Cipollone*, 505 U.S. at 517 (internal citations omitted).

⁸² *Id.*

governing CMRS providers' ETFs on the grounds that such authority is implied from Congress' general objectives.⁸³

Moreover, it is well settled that where Congress intends to preempt broadly or narrowly, it uses language to that effect. Thus, in the context of rates, the Court has explained that statutes “designed to preempt state law in . . . a limited fashion” will prohibit states “to regulate rates.”⁸⁴ On the other hand, when Congress intends broader preemption, it uses broader language, such as prohibiting states from enacting or enforcing laws “relating to” rates. Congress has used such “relating to” language in other preemptive federal legislation,⁸⁵ but it did not do so in Section 332(c)(3)(A).

Furthermore, construing the 1993 amendments to impliedly grant the Commission broad preemptive authority would be entirely inconsistent with the other provisions of Section 332(c)(3), as well as other provisions of the Act. Section 332(c)(3), for example, does not totally or permanently preempt state regulation of wireless rates. The 1993 amendments permit state regulation of CMRS rates in certain contexts – namely where such regulation is necessary to

⁸³ The carriers never indicate whether the implied preemption they assert is “field” preemption or the sort of implied conflict preemption where state laws stand as “obstacle to the accomplishment and execution” of the full purposes and objectives of Congress” in enacting Section 332(c)(3)(A). *But see* Verizon Wireless Comments at 24-28, *citing inter alia*, *City of New York v. FCC*, 486 U.S. 57 (1988). Since Congress expressly preserves state authority to regulate telecommunications carriers in provisions throughout the Act, “field” preemption clearly is inapplicable. *Cipollone*, 505 U.S. at 517. Likewise, where Congress has expressly preempted some, but not all, state authority, the exercise of that remaining authority cannot be considered to stand as an obstacle to the achievement of Congress’ purposes since those purposes contemplated the application of those state laws now claimed to present an obstacle. *See City of Dallas v. FCC*, 165 F.3d 341, 348-49 (5th Cir. 1999). Verizon Wireless’ reliance on *City of New York* is misplaced, since that case was decided under Section 624(e) of the Cable Communications Policy Act of 1984, 47 U.S.C § 544, which the Court determined – based on a detailed analysis of the statute and its legislative history – expressly provided for the Commission’s adoption of rules preempting state and local technical standards governing cable television signals. *City of New York*, 486 U.S. at 66-69.

⁸⁴ *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992); *see also Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995) (explaining that the phrase “to regulate” “is associated with a more limited preemptive intent,” whereas the phrase “related to regulation” “signifies a broad preemptive purpose sufficient to preempt state laws of general application”); *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91, 101 (2nd Cir. 1992) (“where Congress has intended to preempt all state laws affecting a particular subject, it has employed language well suited to the task The courts have consistently interpreted the words ‘relate to’ in broad, common sense fashion. . . .”).

⁸⁵ *See, e.g.*, 49 U.S.C. § 1305(a) (Airline Deregulation Act of 1978); 29 U.S.C. § 1144(a) (Employee Retirement Income Security Act of 1974).

ensure the availability of universal service or where market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.⁸⁶ For the Commission to conclude that it has broader preemptive authority than what Congress expressly delegated to the Commission in Section 332(c)(3)(A) would be inconsistent with that section.

Moreover, the suggestion that the Commission has broader preemptive authority than was expressly delegated to it in Section 332(c)(3)(A) is also inconsistent with other provisions of the Act. The notion that there can be no implied preemption of state laws governing ETFs where Section 332(c)(3)(A) has specifically identified the scope of state preemption is bolstered by the fact that the Act contains numerous savings provisions expressly preserving preexisting rights and remedies under state statute or common law. As NASUCA noted, the general savings clause in Section 414 of the Act is but one example.⁸⁷ Other expressions of Congress' intent to preserve states' authority abound throughout the Act.⁸⁸

Section 601(c)(1) of the Act is of particular note. That section, added to the Act in 1996, states that: "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly provided in such Act or amendments."⁸⁹ While the language of this provision of the Act is clear, any questions about whether Congress may have impliedly preempted state laws in pursuit of federal objectives embodied in the Act are dispelled by Section 601(c)(1)'s legislative history:

The conference agreement adopts the House provision stating that the bill does

⁸⁶ 47 U.S.C. § 332(c)(3)(A) & (A)(i) – (ii).

⁸⁷ This section provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. 47 U.S.C. § 414.

⁸⁸ See, e.g., 47 U.S.C. §§ 152(b), 221(b), 253(c), 254(f), 256(c), 261(b) & (c), and 601(c).

⁸⁹ 47 U.S.C. § 601(c)(1).

not have any effect on any other Federal, State, or local law unless the bill expressly so provides. *This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*⁹⁰

Thus, to the extent that Congress has defined limits on preemption of state laws in the Act, the Commission is prohibited from superseding state laws governing intrastate telecommunications service, no matter whether the Commission considers those laws to be uneconomical, unreasonable or inconsistent with its preferred policy approach.⁹¹

The Commission itself poured cold water on the carriers' suggestions that the 1993 amendments and the Act dictate that the CMRS industry must be governed by competitive forces rather than regulation in *Southwestern Bell*.⁹² Although the Commission agreed that "as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation,'" in the next breath it emphasized that:

*We do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied.*⁹³

A similar assertion – that state laws must yield to Congress' goal of uniformity in carriers' interstate offerings – was denied in the wake of Congress' (and the Commission's) detariffing of interstate wireline service. In *Ting v. AT&T*, the Ninth Circuit rejected AT&T's argument that state consumer protection laws should not be allowed to invalidate its nationwide customer service agreement's mandatory arbitration provision, noting:

Under the old regime, state law interfered with Congress' chosen method of rate

⁹⁰ H. R. Rep. No. 104-458, at 201 (1996), *reprinted in* 1996 U.S.C.C.A.N. 215.

⁹¹ *Louisiana PSC*, 476 U.S. at 375 ("we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy"); *see also Maryland PSC*, 909 F.2d at 1516.

⁹² *Southwestern Bell*, *supra* note 25.

⁹³ 14 FCC Rcd. at 19903, ¶ 10 (emphasis added).

filing in that, pursuant to the filed rate doctrine, the tariff could not be “varied or enlarged by either contract or tort of the carrier.” *Cent. Office*, 524 U.S. at 227 (quoting *Keogh*, 260 U.S. at 163); *MCI*, 512 U.S. at 230. Federal law therefore preempted state law. But under the competition-based regime adopted by Congress in 1996, and implemented by the FCC, state law protections are no longer excluded as they once were under the express terms of the filed rate doctrine. *In the post-tariff environment, we find no reason to imply a conflict between otherwise complimentary state and federal laws. In deregulated markets, compliance with state law is the norm rather than the exception.* Congress recognized as much in authorizing forbearance authority and in emphasizing competition in the 1996 Act.⁹⁴

The *Ting* court cited the Commission’s orders mandating detariffing as additional support for its conclusion that, with the demise of the “filed rate doctrine” in the wake of detariffing, the role of state laws that protect consumers from unfair or unreasonable carrier practices was expanded, not diminished.⁹⁵ As the court noted, the Commission made it clear that the availability of state law remedies in the newly-detariffed telecommunications marketplace is an essential part of consumer protection.⁹⁶

IV. STATE LAWS GOVERNING ETFs DO NOT VIOLATE THE COMMERCE CLAUSE.

Verizon Wireless asserts another purported basis for Commission preemption of state laws governing wireless carriers’ ETFs, namely the Commerce Clause of the United States Constitution.⁹⁷ This argument is without merit.

⁹⁴ *Ting*, 319 F.3d at 1143.

⁹⁵ In fact, it was federal law that was diminished. The Ninth Circuit noted that, “[a]fter detariffing, federal telecommunications regulation is silent with respect to how to determine the rights and obligations of parties to individual contracts like the CSA,” and that “there is no federal common law of contracts that the FCC can apply in resolving private contract disputes between long distance carriers and their customers.” *Id.* at 1146.

⁹⁶ *Id.* at 1144, citing *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order on Reconsideration, 12 FCC Rcd 15014, 15057 ¶ 77 (1997) (responding to argument consumers would not be adequately protected in a detariffed environment, the Commission noted consumers will not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws); *Id.*, Second Report and Order, 11 FCC Rcd 20730, 20733 ¶ 5 (1996) (“[W]hen interstate . . . services are completely detariffed, consumers will be able to take advantage of remedies provided by *state consumer protection laws and contract law against abusive practices.*”) (emphasis added).

⁹⁷ Verizon Wireless Comments at 29.

If there is a burden on interstate commerce that results from carriers having to comply with state regulations governing consumer disclosures and other billing details, that is nothing less than what Congress envisioned and intended when it enacted the Act in 1934. In Section 2(b) of the Act,⁹⁸ Congress expressly limited the Commission’s authority to preempt state regulation over matters relating to intrastate communications services, including wireless telecommunications. In other words, Congress itself concluded that state regulation of intrastate telecommunications services (more precisely, matters relating to intrastate service) does not burden interstate commerce.

Even absent this conclusion by Congress, state laws governing ETFs do not, in fact, impose an unreasonable burden on interstate commerce. A state law is invalid under the Commerce Clause only if the burden imposed “is clearly excessive in relation to the putative local benefits.”⁹⁹ State regulation to protect consumers from false, misleading or otherwise unreasonable carrier billing practices serves a legitimate local interest, namely protecting state citizens and consumers. Meanwhile, as previously discussed, the burden of complying with such regulations is not excessive – the state laws in question (common law as well as statutory provisions) have been in effect for years, and carriers have been operating subject to those laws during this time. No telecommunications carrier, particularly in the wireless industry, appear to have been substantially harmed (at least, if revenues and subscriber growth are reliable indicators for the health of this sector). Nor is there any claim that such regulations unreasonably discriminate in favor of in-state carriers.

V. THE CARRIERS’ OVERSTATE CONSUMERS’ PREFERENCE FOR TERM CONTRACTS AND UNDERSTATE THE ANTI-CONSUMER, ANTI-COMPETITION ASPECTS OF ETFs.

⁹⁸ 47 U.S.C. § 152(b).

⁹⁹ *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981).

The carriers argue that consumers prefer service agreements with ETFs.¹⁰⁰ However, a recent survey of wireless customers published by U.S. PIRG shows just the opposite.¹⁰¹ In PIRG's survey, eighty-nine percent of those surveyed view ETFs as a penalty meant to discourage them from switching to a different carrier, not as carrier rates. In addition, forty-seven percent of respondents indicated that, if they did not have to pay an ETF, they would either definitely switch cell phone companies or consider switching.¹⁰² PIRG's survey also found that only three percent of cell phone customers choose to pay an ETF to switch carriers before their contracts expire.¹⁰³

PIRG's survey report serves to show that ETFs create "captive customers." While carriers characterize ETFs as providing consumers with a choice, in reality consumers often find themselves in a "damned if they do, damned if they don't" situation: either they stick with inferior service at high monthly rates or they pay a high penalty for switching to a better company. Whichever option they choose, wireless consumers are penalized.¹⁰⁴

Although the carriers characterize state regulation of ETFs as anticompetitive, the opposite is true. ETFs themselves appear to be anticompetitive and competition may increase with their elimination. Of the three percent of wireless customers noted in PIRG's report who did pay an ETF to switch carriers, nearly seventy percent listed lower rates, better reception, better customer service, and more widespread calling areas offered by a different company as

¹⁰⁰ Nextel Comments at 5; Sprint Comments at 2-3; T-Mobile Comments at 7.

¹⁰¹ Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," U.S. PIRG Education Fund (August 2005) (<http://uspirg.org/uspirg.asp?id2=18537>).

¹⁰² *Id.* at 15-16.

¹⁰³ *Id.* at 14.

¹⁰⁴ *Id.* at 2, 5-6; *see also* Michelle Singletary, "Contracts Lock Phone Users in Cell Block," *Washington Post*, D02 (Aug. 18, 2005).

reasons for switching.¹⁰⁵ Without ETFs, wireless carriers would have a real incentive to offer these better services.¹⁰⁶

VI. THE ABUSES CITED BY OTHER CONSUMER ADVOCATES WARRANTS REVISITING THE COMMISSION'S *CELLULAR BUNDLING ORDER*.

In its initial comments, NASUCA cited factors that warranted the Commission revisiting its 1992 decision approving wireless carriers' practices associated with bundling equipment and service.¹⁰⁷ NASUCA's suggestion was prompted by increasing concentration in the wireless service and the wireless equipment markets, as well as by the fact that some of the economic justifications underlying the Commission's *Cellular Bundling Order* (e.g., high cost of wireless equipment, lack of dominance in the service or equipment markets) may no longer hold true. NASUCA also suggested that wireless carriers' use of term contracts and ETFs may have an anticompetitive effect, just as carriers' and manufacturers' apparent efforts to ensure that consumers must buy a new handset and accessories (even if they are discounted) rather than allowing them to re-use their existing handsets.¹⁰⁸

Other consumer advocates' comments provide real evidence suggesting that wireless carriers are, in fact, utilizing term contracts and ETFs to both unreasonably enhance their profits

¹⁰⁵ *Id.* at 14. Seventy-seven percent of survey respondents either strongly support or somewhat support the elimination of ETFs; only twenty-two percent either somewhat or strongly oppose the elimination of ETFs. *Id.* at 15.

¹⁰⁶ Several carriers suggest that consumers will still have a remedy under federal law, namely filing complaints with the Commission or in federal court. *See, e.g.*, SunCom Comments at 35; Verizon Wireless Comments at 24. There are two problems with the carriers' suggestion. First, it appears far from certain that the Commission would take enforcement action in response to a consumer's complaint. *See In re Truth-in-Billing and Billing Format: National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, Separate Statement of Michael J. Copps and Separate Statement of Jonathan S. Adelstein (2005). Second, it is not clear whether there is a federal common law of contracts that would apply in such actions. *See Ting v. AT&T*, 319 F.3d at 1146.

¹⁰⁷ NASUCA Comments at 32-33.

¹⁰⁸ *Id.* at 33, *citing Beckermeyer v. AT&T Wireless*, 69 Pa. D. & C.4th, 2004 Pa. D. & C. 117 (Common Pleas Court, Oct. 22, 2004).

and to keep consumers from “voting with their feet” by switching to other carriers offering better service for the price.¹⁰⁹ This evidence is corroborated by both the steadily increasing number of complaints regarding wireless contracts and ETFs noted in the Commission’s quarterly complaint reports,¹¹⁰ as well as PIRG’s recently released study.¹¹¹

Further evidence of problems with wireless carriers’ use of term contracts and ETFs is provided by consumer advocates’ comments regarding the use of ETFs by wireless carriers’ independent sales agents. Such agents, who are unregulated by the Commission, utilize their own ETFs to ensure that they “earn” their money one way or another – either through the commission they receive from the wireless carrier (which is delayed for some period), or through the ETFs they recover when consumers terminate service early (after discovering the service was not what they expected).¹¹² In light of this information, the Commission must make good on its assurance, given thirteen years ago, that it would take up again its decision approving the bundling of services and equipment should new facts or problems come to light.¹¹³ It now has that information.

¹⁰⁹ See, e.g., UCAN Comments at 5-14.

¹¹⁰ See AARP Comments at 24; see also Report on Informal Inquiries and Complaints: First Quarter Calendar Year 2005, Consumer & Governmental Affairs Bureau, Executive Summary at 9 (rel. Aug. 12, 2005).

¹¹¹ See *supra*, at 26-27.

¹¹² UCAN Comments at 14-18; Consumers Union Comments at 10-11.

¹¹³ See *Cellular Bundling Order*, 7 FCC Rcd 4035 ¶ 31.

VII. CONCLUSION.

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

Respectfully submitted,

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