

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

In the Matter of Petition of the Cellular Telephone & Internet Association for an Expedited Declaratory Ruling Confirming that Early Termination Fees in Wireless Contracts Are “Rates Charged” for Commercial Mobile Services Within the Meaning of Section 332(c)(3)(A)

WT Docket No. 05-194

Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition for Declaratory 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)

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**REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS  
& INTERNET ASSOCIATION**

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August 25, 2005

## EXECUTIVE SUMMARY

The record in this proceeding clearly establishes that under the plain language of 47 U.S.C. § 332(c)(3)(A), and Commission precedent, the *Petition for an Expedited Declaratory Ruling* filed by the Cellular Telecommunications & Internet Association (“CTIA”) on March 15, 2005, should be granted. Four key points, made in CTIA’s Petition and in many of the comments in support of the declaratory ruling, stand unrebutted:

1. An ETF is an integral part of the overall rate level and rate structure in term wireless contracts. The ETF is necessary to recover costs incurred by the carrier in initiating and providing wireless service, including handset subsidies, costs of customer acquisition and service initiation, and the offer of lower monthly rates under term service agreements. The agreement to pay an ETF has value at the time the contract is struck, and it is part of the consideration paid by the subscriber in exchange for lower up-front payments and lower monthly rates. It is thus a rate element that is interdependent with other rate elements and forms an overall rate structure. Labeling the ETF a “liquidated damages clause,” as some commenters do, merely reinforces that an ETF is a form of compensation for service – and therefore a rate. As the Commission has recognized, in a competitive market, where tariff filings are prohibited, rates are set and governed by contract. A rate does not cease to be a rate simply because in some instances the carrier must collect the rate in a contract enforcement action.

Opposing commenters’ arguments that the ETF must be prorated or “cost-based” (under criteria dictated by state law) only serves to demonstrate that these lawsuits seek to regulate rates, not any carrier conduct extrinsic to rates. The exercise of state authority to select among the various measures of “cost,” and then require a wireless carrier to justify a particular rate element as calibrated to recover only those state-authorized “costs,” is at the core of traditional

forms of rate regulation that Section 332 was designed to prohibit. And, as even the opposing comments concede, state court orders invalidating or prohibiting ETFs would necessitate changes in other rate elements, thus denying consumers the substantial benefits of a rate structure created by market forces and replacing it with a state-mandated rate structure. Finally, the contentions that the term “rates” as used in 47 U.S.C. § 332(c)(3)(A) should be “narrowly construed,” that a “rate” is only a charge directly linked to “metered service,” and that conditional payments that are not necessarily made by every subscriber cannot be part of the “rate charged” for wireless service should be dismissed as contrary to Commission precedent, judicial precedent, and common sense. *See* Sections II.A-C.

2. Any state court order invalidating, modifying, or conditioning the use or enforcement of ETFs results in a reduced price for the same equipment and services. This is rate regulation pure and simple. As the Commission made quite clear in its ruling in *Wireless Consumers Alliance*: “If a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332.”<sup>1</sup> The opposing comments actually highlight the fact that under these “unlawful liquidated damages” claims, state courts must hold their own measure of “actual damages” up against the ETF rate set by the service agreement. Whatever metric state law superimposes over a contractual price term, both the theory of liability and the calculation of any monetary relief require a state court to determine what carrier costs or lost revenues *should be recovered* for services rendered in the past. Like *quantum meruit* claims, these lawsuits do not challenge any disclosure practices or carrier conduct extrinsic to rates; nor do they seek to enforce the service contract as written. Rather, they seek to use an equitable doctrine under state

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<sup>1</sup> Memorandum Opinion and Order, 15 FCC Rcd 17021, 17035, ¶ 25 (2000) (“*Wireless Consumers Alliance*”).

law to *override an existing price term in the contract* and then substitute a set of cost or revenue criteria dictated by state law to “establish a value (*i.e.*, set a rate) for the service provided in the past.”<sup>2</sup> Opposing commenters simply cannot explain how a “rebate” of a payment made in exchange for equipment and services already received or the prospective elimination of a particular rate element from the structure of all future wireless contracts can be anything but rate regulation. *See* Sections III.A-C.

3. Even apart from the preemptive force of Section 332, the Commission has the power to preempt state laws that stand as an obstacle to or frustrate national wireless policy. The opposing comments ignore the fact that the “other terms and conditions” exception only applies to express preemption under Section 332(c)(3)(A). It does not preclude the Commission from exercising its plenary authority over wireless service – confirmed by the exclusion of wireless from Section 2(b) (47 U.S.C. § 152(b)) – to preempt state law to the extent that it conflicts with federal wireless policy as enunciated by the Congress and this Commission. For two decades, that policy has been guided by two fundamental precepts – allowing market forces to work except where intervention is clearly necessary,<sup>3</sup> and attempting to achieve nationwide service and uniformity.<sup>4</sup> As both goals are threatened by these lawsuits, the Commission can and should hold in the alternative that these lawsuits are preempted pursuant to its authority under 47 U.S.C.

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<sup>2</sup> *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, 13198, ¶ 13 n.40 (2002) (“*Sprint PCS Declaratory Ruling*”).

<sup>3</sup> “Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.” *Petition of the Connecticut DPUC To Retain Regulatory Control of Rates of Wholesale Cellular Service Providers in the State of Connecticut*, Report and Order, 10 FCC Rcd 7025, 7031-32, ¶ 10 (1995) (“*Connecticut DPUC Petition*”).

<sup>4</sup> *See generally Truth-in-Billing and Billing Format*, Second Report and Order, 20 FCC Rcd 6448 (2005) (“*Truth-in-Billing*”).

§§ 151, 154(i), 201, and 202, *completely independent of its authority (or the limits on state authority) under Section 332. See Section IV.*

4. Finally, many of the opposing comments and the “surveys” submitted by groups such as U.S. Public Interest Research Group (“US PIRG”) read as if the Commission were addressing a rate element unilaterally adopted by a sole provider in a closed market. The plain fact is that consumers have a choice—every one of the major nationwide carriers offers some form of pre-paid plan either directly or through resellers. The vast majority of consumers choose term service agreements that include up-front discounts on equipment and service activation fees, lower monthly rates, as well as an ETF, precisely because they have concluded that such term agreements best serve their economic interest. In addition, the vast majority of consumers live up to their contractual obligations and a majority do not find the ETF even a salient consideration in deciding whether to remain with their existing carrier. Thus, the vast majority of consumers receive substantial benefits from the term contract model with the ETF. Perforce, these lawsuits would harm the bulk of wireless customers by eliminating a desirable rate structure in order to “protect” a small percentage of subscribers who wish to terminate.

This is a case where law and good policy converge and point firmly in the same direction—the Commission should declare that ETFs are “rates” within the meaning of 47 U.S.C. § 332(c)(3)(A) and further declare that any state cause of action that seeks to invalidate, modify, or condition the use or enforcement of ETFs based upon state equitable doctrines attacking the “reasonableness,” “fairness” or “cost basis” of an ETF is preempted by Section 332(c)(3)(A). The Commission should also make clear that state ETF regulation conflicts with national wireless policy as delineated in the Commission’s decisions to detariff wireless services and to rely upon competitive market forces to establish rate levels and rate structures.

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**REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS  
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**I. INTRODUCTION**

On March 15, 2005, the Cellular Telecommunications & Internet Association (“CTIA”) filed a Petition for an Expedited Declaratory Ruling with the Commission (“Petition”). The Petition seeks a declaratory ruling that: (1) early termination fees in wireless service contracts are “rates charged” for commercial mobile services within the meaning of Section 332(c)(3)(A) of the Communications Act and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, including to prohibit the use or enforcement of ETFs as unlawful “liquidated damages” or penalties, constitutes prohibited rate regulation and is therefore preempted by 47 U.S.C. § 332(c)(3)(A).

The record in this proceeding echoes Chairman Martin's conclusion that the wireless industry is "the poster child for the success of competition"<sup>5</sup> due in large part to a "hands-off" deregulatory policy implemented by Congress and the FCC at the national level. There can be no dispute that competition in this industry is "vigorous"<sup>6</sup> and that "competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."<sup>7</sup> Consumers can choose between a wide array of rate structures, including pre-paid, pay-as-you-go, and term contracts.<sup>8</sup> Notably, all consumers enjoy these benefits regardless of whether they live in the largest city in the nation or in rural areas. In short, higher penetration rates, increasing minutes of use, and decreasing consumer costs per minute of use all point to the success of federal wireless policy based on minimal regulation and national uniformity of any regulatory intervention.

Pending state class action lawsuits stand as a direct challenge to the success of the national wireless policy. They seek to override consumer preferences and a competitive market's response to those preferences by eliminating a rate structure that has been one of the primary engines of the growth of wireless services and the massive increases in use and reductions in price consumers have heretofore enjoyed. The vast majority of consumers choose

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<sup>5</sup> See Separate Statement of Commissioner Kevin J. Martin, *Applications of AT&T Wireless Services, Inc. and Cingular Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Order and Opinion, WT Docket No. 04-70 (Oct. 26, 2004).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Ninth Report, 19 FCC Record 20597, 20600, ¶ 3 (2004) ("*Ninth CMRS Competition Report*").

<sup>8</sup> *Id.* at 20614, ¶ 39 (noting that TracFone Wireless, a nationwide reseller of wireless services, has over 3 million subscribers on pre-paid plans); *id.* at 20615, ¶ 40 (noting Sprint's joint venture with Virgin Airlines with over 1.75 million pre-paid subscribers). TracFone now has over 4.8 million subscribers. See TracFone, Fact Sheet, *available at* <http://www.tracfone.com/about.jsp?task=about&currentView=factSheet> (last visited August 25, 2005).

term plans with ETFs over pre-paid or “pay as you go” plans. Similarly, the vast majority of consumers fulfill their contractual term and never pay an ETF.<sup>9</sup>

Notwithstanding these facts, a small group of plaintiffs (and their attorneys) seek to use state courts to outlaw term contracts containing ETFs and replace them with a new rate structure, dictated by state law. In their very submissions in this proceeding, representatives of the plaintiffs’ bar candidly concede that they seek to use state law and state courts to prohibit the use of a particular rate element in every wireless contract in the country. “CTIA is correct in asserting that pending ETF lawsuits seek to abolish the use of ETFs as an *unlawful penalty* under state laws that are nearly identical throughout the 50 states.” Wireless Consumer Alliance Initial Comments at 36 (“WCA”). This is nothing more or less than the naked prohibition of a rate element and an effective ban on the single most popular contractual rate structure in the United States.

But Commission precedent forbids this state court foray into wireless rate structures. Under Section 332(c)(3)(A), states “may not prescribe the rate elements for CMRS.”<sup>10</sup> Similarly, in its recent *Truth-in-Billing* ruling, the Commission found that any “state regulations requiring or prohibiting the use of line items – defined here to mean a discrete charge identified separately on an end user’s bill – constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act.”<sup>11</sup> No state has the authority to prohibit a particular rate element or adjudicate its “reasonableness” under some state law theory of “average cost” or “lost

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<sup>9</sup> Indeed, according to US PIRG’s own *ex parte* submission, less than 3% of wireless subscribers ever pay an ETF. Ex Parte Notice of US PIRG, *CTIA Petition for Declaratory Ruling*, WT Docket No. 05-194, at 14 (Aug. 18, 2005) (“US PIRG Aug. 18 Ex Parte”).

<sup>10</sup> *Southwestern Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907, ¶ 20 (1999) (“*Southwestern Bell*”).

<sup>11</sup> *Truth-in Billing*, 6462, ¶ 30.

revenue.” Indeed, the very determination that a particular rate element *should be based upon cost* is, in and of itself, rate regulation. These lawsuits fall into the heartland of the preemption of rate regulation under Section 332 and conflict with FCC policy embodied in the de-tariffed, deregulatory federal regulatory regime for all wireless services. The opposing comments cannot square their position with the text and purpose of Section 332(c)(3)(A) or FCC precedent. Instead, they ask the Commission to adopt an artificially narrow definition of “rates,” to interpret the word “other” out of the “other terms and conditions” in the exception clause of Section 332(c)(3)(A), and to violate a fundamental canon of statutory construction by allowing the exception to swallow the rule.

**II. THE OPPOSING COMMENTS’ ATTEMPT TO DEFINE THE ETF OUT OF THE OVERALL RATE AND RATE STRUCTURE IS CONTRARY TO ESTABLISHED FCC PRECEDENT.**

Several legal errors are endemic to the opposing comments’ attempt to demonstrate that ETFs are not wireless “rates” and that contractually agreed upon termination fees are not part of the “rate structure” of term wireless contracts. The central point – reflected in this Commission’s declaratory ruling in the *Truth-in-Billing* docket – is that the way rates are structured, the elements of payment, and how the payment is spread over time, are all integral parts of the area that Congress and this Commission have reserved to federal superintendence and federal regulation. The contractual promise to pay an ETF in the event of early termination is part of the consideration offered by the subscriber for the benefit of up-front subsidies and lower monthly rates.<sup>12</sup>

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<sup>12</sup> See generally 3 Samuel Williston & Richard A. Lord, Williston’s Treatise on the Law of Contracts § 7:6 (4th ed. 2004) (noting that “it should be observed that it is not essential in order for a promise to be consideration that its performance will certainly give rise to a benefit or a detriment. Rather, a conditional promise may serve as consideration”).

**A. ETFs Are Rate Elements That Form An Integral Part of the Overall Rate Charged.**

According to the opponents of preemption, the Commission should narrowly confine the definition of “rates” under Section 332 of the Act to “charges for service, measured by time or unit of service.” WCA at 2. This unprecedented “definition” would rewrite the Communications Act and decades of industry practice, and is contrary to both Commission and judicial precedent. Under the opponents’ definition, a wireless carrier’s unrestricted nationwide flat rate plan – a rate structure that the Commission has recognized as a centerpiece of increased wireless penetration<sup>13</sup> – is not a “rate” because there is no charge measured either by “time or unit of service.” Similarly, state and federal regulatory fees are undoubtedly part of wireless rates and are exempt from state regulation under Section 332. Yet, because they are not directly linked to units of service, they would no longer qualify for protection from state regulation under Section 332. Even more amazing, under the opponents’ definition, charges associated with a handset are not “rates” because there is no “time or unit of service” to measure. This contention conflicts with the plain language of the Act and settled judicial and Commission precedent, which make clear that the interpretation of “rate” in the Communications Act is “broad in scope” and includes every part of the agreed-upon compensation for equipment and service.<sup>14</sup> *See* Comments of SunCom Operating Co. at 6-9 (“SunCom”); Sprint Corp. Comments at 7-10 (“Sprint”); Comments of Cingular Wireless at 8-9 (“Cingular”); Comments of Verizon Wireless at 9-16 (“Verizon Wireless”); Comments of Nextel Communications, Inc. at 16-20 (“Nextel”);

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<sup>13</sup> “Today, all of the nationwide operators offer some version of [a] pricing plan in which customers can purchase a bucket of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges.” *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Notice of Inquiry, 19 FCC Rcd 5608, 5630, ¶ 65 (2004) (“*Ninth CMRS NOI*”).

<sup>14</sup> *Truth-in-Billing*, at 6462, ¶ 30; *see also* WCA at 2-3.

Comments of T-Mobile USA, Inc. at 4-7 (“T-Mobile”); Comments of the United States Cellular Corp. at 4-5 (“USCC”).

This Commission and the federal courts have taken pains to make clear that states may not superintend the reasonableness or cost-basis of any charge that forms part of the arms-length exchange between the customer and the carrier. The ETF is a contingent charge tied directly to the benefit of lower initial payments and lower monthly service fees. These lawsuits seek to reap the benefits of the term plans, while eliminating the ETF through a court-ordered rebate on an *ex post* basis. There can be no doubt that this constitutes a state decree that the same services shall be received for an overall price that is lower than that agreed to by the parties. That is the essence of rate regulation.

As this Commission has repeatedly noted, “it is the *substance*, not merely the form . . . that determines whether the state is engaging in rate regulation proscribed by section 332(c)(3)(A).”<sup>15</sup> Under whatever heading they are found in service contracts, an agreement to pay an ETF for early termination of service has value at the time the contract is struck and that value to the carrier is reflected in the reduction of other rate elements. In upholding a Commission decision that a wireline termination penalty was a “rate,” the D.C. Circuit noted that it “cannot gainsay the Commission’s determination that the Project Liability cancellation and discontinuance charges are part of the ‘rates’ established for voice grade facilities” because “rates are a means by which the carrier recovers its costs of service from its customers.”<sup>16</sup> As a result, “[p]art of [a carrier’s] cost of providing private-line service is the cost incurred from last-

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<sup>15</sup> *Truth-in-Billing*, at 6466, ¶ 34 (quoting *Wireless Consumers Alliance*, at 17037, ¶ 28) (emphasis added) (internal quotations omitted).

<sup>16</sup> *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987).

minute cancellation of orders and early termination of service.”<sup>17</sup> Both the FCC’s and the D.C. Circuit’s decisions holding that “early termination fees” were “rates” within the meaning of the Act were on the books when Congress passed OBRA in 1993. None of the opposing comments can explain how these decisions can be reconciled with the disposition they advocate in this docket, or why the interpretation of the word “rates” as used by Congress in 1993 should not be informed by the regulatory background of that term, including existing Commission and judicial precedent.<sup>18</sup>

Applying an artificially narrow definition of “rates,” the opponents of preemption contend that ETFs are not “rates” because: (1) ETFs “are charges imposed only upon the *termination* of service. They are charges for *not* receiving service”; WCA 2-3, 8; Comments of AARP at 9 (“AARP”); (2) ETFs do not appear on monthly bills, AARP at 9-10; Comments of NASUCA at 19-20 (“NASUCA”); (3) ETFs appear in the “terms and conditions” of the wireless contract; WCA at 9;<sup>19</sup> and (4) ETFs are contract remedies, and thus cannot be rates. WCA at 16.

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<sup>17</sup> *Id.*

<sup>18</sup> Accepting opponents’ arguments would require ignoring the “presumption that Congress is aware of ‘settled judicial and administrative interpretation[s]’ of terms when it enacts a statute.” *NCTA v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2706 (2005) (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986) (noting that “technical terms of art should be interpreted by reference to the trade or industry to which they apply”); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”).

<sup>19</sup> Some commenters try to score rhetorical points by suggesting that some carriers treat ETFs as terms and conditions in their wireless contracts rather than as rates. NASUCA at 30-31 (describing the notification provisions regarding ETFs in a Sprint contract and in promotional materials from Nextel and Verizon Wireless); WCA at 2, 9 (alleging that “all of the major carriers include their ETFs” in a particular part of their contract materials). These commenters place form over substance and disregard the fact that § 332’s savings clause only applies to *other* terms and conditions, *e.g.*, those unrelated to rates. *See, e.g., Truth-in-Billing*, at 6464, ¶ 32; *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000). The heading under which the ETF is found in carrier literature or contracts is irrelevant. What is relevant is that the ETF is linked to other price terms and is integral to how money is recovered for service over

Such claims have no merit. That an ETF is not a metered charge for service, that it is not actually imposed on every customer, or that it is designed in part to recover service payments avoided by the early termination, have never been identified by the FCC or the federal courts as criteria relevant to the question of what constitutes a “rate.” If carriers elected to create a separate line-item charge assessed on all customers to recover the costs generally imposed by early termination, there can be no dispute that states would be preempted from regulating that charge under the holding in *Truth-in-Billing*.<sup>20</sup> The fact that carriers have elected to instead recover these costs on a contingent basis *from the individuals who cause them* instead of from all customers does not make this any less a rate charged by the carrier. The D.C. Circuit has addressed this specific circumstance:

In the past, AT&T recovered [the costs stemming from last-minute cancellation and early termination] by raising its general rates for private-line service, thereby spreading the costs among all ratepayers. The Project Liability charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs. *This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service.*

*MCI Telecomms.*, 822 F.2d at 86 (emphasis added). Whether it is charged to all customers as a stand-alone line item, or unbundled and only assessed against customers who terminate early, an ETF is still part of the overall charge for the service and the way that charge is structured.

Furthermore, regulatory fees and state and local taxes are part of “rates” within the meaning of Section 332, but not every customer in every jurisdiction pays them, and they are not tied to any unit of service. Similarly, many carriers offer “unlimited” text messages and

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time. These are key elements of any rate structure. *See generally* Stephen G. Breyer, Regulation and its Reform 51-58 (1982) (discussing considerations that go into regulatory formulation of rate structure).

<sup>20</sup> *Truth-in-Billing*, at 6462, ¶ 30.

“unlimited” nights and weekend calls for a fixed rate that is not tied to usage. In addition, directory assistance charges, “roaming charges,” and per-minute charges for exceeding allotted monthly minutes under a rate plan are “contingent” charges. Not every subscriber ends up paying them, but the agreement to pay them under the terms specified in the service agreement is part of the exchange of value between the customer and carrier and therefore part of the overall “rate” for the service provided.<sup>21</sup>

The argument made by some commenters that ETFs are not “rates” because carriers may elect to describe them in the “terms and conditions” section of the contract represents the ultimate elevation of form over substance. Defining what constitutes a “rate” under Section 332 is not simply a matter of looking to see where an item appears on a bill or in a contract.<sup>22</sup> Even if it were, the opposing comments’ presentation is highly selective.<sup>23</sup>

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<sup>21</sup> See *Truth-In-Billing*, at 6462, ¶ 30 (finding that “state regulations requiring or prohibiting the use of line items - defined here to mean a discrete charge identified separately on an end user’s bill - constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act”); Brief for the FCC as Amicus Curiae, *Cellco Partnership v. Hatch*, No. 04-3198, at 17-18 (8th Cir. Nov. 12, 2004) (arguing that state-imposed 60-day waiting period before CMRS carriers make any substantive changes is preempted under Section 332).

<sup>22</sup> Ironically, the opponents admit that the ETFs are a “charge” assessed because the cost of the rate plan and handset would have been higher absent the customer agreement for the ETF. See WCA at 15 (“The charge is not imposed unless the subscriber breaches the contract and the agreement is terminated before its expiration date, and it is explicitly designed to pay the carrier for harm or losses suffered upon early termination.”). The inescapable truth is the customer had the choice between a plan with or without an ETF. Having chosen lower up-front payments and monthly rates *with an ETF*, plaintiffs would simply jettison the ETF through injunction or rebate, giving the customer the flexibility of a month-to-month or prepaid plan without its costs.

<sup>23</sup> T-Mobile, for example, on its website advises customers of the existence of the ETF in the same pop-up that contains the “Regulatory Programs Fee” charge of 86 cents per line per month, the charge of 35 cents to 40 cents per additional minute of voice service, and the charge of 5 cents per additional text message, all of which are inarguably “rates.” See [http://www.t-mobile.com/info/inc\\_services/importantinfopopup.asp](http://www.t-mobile.com/info/inc_services/importantinfopopup.asp) (last visited Aug. 25, 2005). In any event, accepting opposing commenters’ argument would lead to the nonsensical conclusion that changing headings in the service agreement or moving all references to ETFs from a “terms and conditions” section to a “rates” section in the agreement would affect the outcome of this docket.

Finally, WCA contends that an ETF cannot be part of the overall “rate” or a “rate element” because they are instead “contract remedies.” WCA at 16 (“If ETFs are contract remedies, they cannot be ‘rates charged.’”). This is absurd. As this Commission has repeatedly recognized, in a world where the filing of tariffs is prohibited, *every wireless rate is enforceable only through state contract law.*<sup>24</sup> Of course, most customers pay the prescribed rate, including ETFs, without the necessity for the filing of an action for breach of contract. But the fact that a rate can be collected in litigation, as a “contractual remedy” does not render it any less a “rate” for goods and services provided in the past.

**B. Because ETFs Are Directly Tied to Other Rate Elements, They Are Also A Key Component of CMRS Carriers’ Rate Structures.**

In addition to claiming that ETFs are not “rates,” opponents of preemption have tried to assert that ETFs are not part of certain interdependent rate structures by characterizing the fees as unfair or liquidated damages clauses unrelated to any service or monthly charge.<sup>25</sup> For example, NASUCA has maintained that “ETFs are purely ancillary to the services the carriers provide to customers”<sup>26</sup> and has cited to a number of district court decisions purportedly reaching a similar

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<sup>24</sup> *Sprint PCS Declaratory Ruling*, at 13197, ¶ 10 (noting that in detariffed, competitive environment “a contract is beneficial to both the carrier and the customer because it makes clear the rights and obligations of both parties”); *Wireless Consumers Alliance*, at 17035, ¶¶ 26-27 (noting that lawsuits that “present a question of whether a CMRS service had indeed been provided in accordance with the terms and conditions of a contract” are not preempted, provided that such lawsuits do not require a state court to “rule on the reasonableness of the CMRS carrier’s charges”).

<sup>25</sup> WCA at 14-16; NASUCA at 16-17; AARP at 16. These commenters also allege that the uniformity of an ETF throughout a contract term undermines the carriers’ argument that ETFs allow them to recover expended costs. AARP at 11-12, 21-23; NASUCA at 22, 31-32. But requiring a prorated ETF is obviously a form of “rate regulation.” Even in traditional ratemaking, not every rate must be strictly cost based, and the decision to impose a particular cost-basis is itself a form of “rate regulation.” That said, some carriers have voluntarily adopted pro-rated ETFs and thus market forces may give consumers a choice even as to this element of rate structure. *See* Comments of Dobson Communications Corp., at 3 n.6 (“Dobson”).

<sup>26</sup> NASUCA at 22.

conclusion.<sup>27</sup> In so doing, opponents disregard: (1) the essential role of ETFs – namely, to provide a predictable revenue stream, making possible the recovery of costs of initiating and providing services to customers; (2) the relationship between ETFs and the rates charged to consumers and how altering an ETF will directly impact a consumer’s monthly service rate; (3) the Commission’s Second Report and Order in the *Truth-In-Billing* proceeding that defined “rate structure” to include the even listing of rate elements on a monthly bill; and (4) federal court opinions that correctly interpret “rates” to include all consideration on both sides of the contract—including contingent promises to pay. As demonstrated below, analyzing the aforementioned factors conclusively establishes that ETFs are an integral part of a wireless carrier’s rate structure and thus are preempted under Section 332.

First, the Commission has found that subsidizing wireless phones through cost-shifting mechanisms “is an efficient promotional device which reduces barriers to new customers” and thus yields “significant public interest benefits.”<sup>28</sup> The same is true for the term rate structures that rely on ETFs.<sup>29</sup> Carriers use ETFs to provide consumers with a choice in paying for the equipment and services provided to them. The consumer may pay the costs for the equipment up-front and incur no term commitment or may agree to pay them over an extended period of

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<sup>27</sup> See notes 41-42, *infra*.

<sup>28</sup> *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, 4030, ¶ 19 (1992).

<sup>29</sup> In *Local Number Portability Order*, the FCC implicitly endorsed wireless early termination fees as legitimate contractual provisions. *Telephone Number Portability*, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20976, ¶ 14 (2003) (“Although we prevent carriers from imposing restrictions on porting beyond necessary customer validation procedures, this does not in any way invalidate provisions in carrier contracts pertaining to minimum contract terms, early termination fees, credit requirements, or other similar provisions.”) (“*Local Number Portability Order*”).

time as part of a multi-year contract. In essence, carriers use ETFs as one tool to increase the range of equipment options and service plans available to the consumer.<sup>30</sup>

Second, as shown in Verizon Wireless's comments, a substantial difference exists between the retail prices of wireless equipment and the prices of equipment offered as part of a bundled service plan.<sup>31</sup> Carriers expend more than equipment subsidies to attract and retain customers, however. These additional costs include advertising, activation, network improvements, software improvements, data collection, and the like. *See* Sprint at 3; Verizon Wireless at 11; Nextel at 4, 18. Recovering a portion of these costs through a carefully calibrated service and equipment contract is essential to the ability of carriers to offer these plans and ETFs are an integral part of this term rate structure. Indeed, AARP – one of the opponents of preemption – offers its members three different wireless plans very similar to the plans it challenges herein: (1) a prepaid with no ETF; (2) a post-paid with no ETF with a 5 percent

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<sup>30</sup> Commenters who assert that ETFs actually *restrict* consumers' choices, WCA at 6 ("ETFs are, in their essential nature, anticompetitive."); Comments of Utility Consumers' Action Network at 4-5 ("UCAN"), focus on the wrong point in time in the carrier-customer relationship. ETFs work to give consumers multiple options *at the time they select* a carrier, a handset, and a plan. Provided a carrier has disclosed the existence of the ETF (and no commenter has alleged otherwise), the consumer understands her obligations at the time she enters into the contract. *Truth-In-Billing*, at 6477, ¶ 56 (noting the Commission's "pro-competition goal of enabling consumers to make informed comparisons of different carriers' plans before subscribing"). These commenters' views also contradict the D.C. Circuit's affirmance of a Commission order holding that ETFs are not anticompetitive. *Equip. Distribs.' Coal., Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987) (affirming *Termination Charge Order*, 100 FCC 2d 1298 (1985)).

<sup>31</sup> Verizon Wireless at 11 n.46 (noting that Verizon Wireless offers a Motorola handset for \$120 below its retail cost when the handset is included as part of a term contract). There are numerous such examples: (i) a Verizon Wireless customer could currently pay \$299 for a Treo 650 smartphone handset in the context of a new service agreement, but pay \$519 for the same wireless telephone without a term contract or an ETF; (ii) a Cingular Wireless customer could currently pay \$299 for the Treo 650 smartphone handset in the context of a new service agreement, but pay \$549 for the same wireless telephone without a term contract or an ETF; and (iii) a Sprint customer could currently pay \$349 for the Treo 650 smartphone handset in the context of a new service agreement, but pay \$599 for the same wireless telephone without a term contract or an ETF. *See* [http://web.palm.com/products/communicators/config/zip\\_entry.jhtml?categoryId=30025](http://web.palm.com/products/communicators/config/zip_entry.jhtml?categoryId=30025) (last visited August 25, 2005).

discount; and (2) a post-paid plan with an ETF and, in exchange, the AARP member receives a 10% discount.<sup>32</sup>

The Commission recognized that ETFs are part of rates and rate structure within the meaning of Section 332(c)(3)(A) over ten years ago when it denied the California Public Utilities Commission's request to retain state regulatory authority over the rates for intrastate CMRS:

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).<sup>33</sup>

Tellingly, even NASUCA – an opponent of preemption – concedes that a change in ETFs will likely cause a corresponding change in the consumers' month-to-month rates. NASUCA at 8 (discussing “the fact that wireless carriers might have to alter their rates or rate structures if state laws curtail or even prohibit their use of ETFs”). Numerous courts likewise have recognized that ETFs have a direct impact on the rates charged to the customer.<sup>34</sup> As a prominent economist has noted before the Commission, the abolition or regulation of ETFs will prompt an immediate and direct increase in the rates of every wireless consumer's term contract or force consumers to pay significantly higher initial prices for equipment and service activation

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<sup>32</sup> See [http://www.aarp.org/aarp\\_benefits/offer\\_phone/wirefly\\_wireless.html](http://www.aarp.org/aarp_benefits/offer_phone/wirefly_wireless.html) (last visited August 18, 2005).

<sup>33</sup> *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, ¶ 112 (1995) (emphasis added).

<sup>34</sup> See, e.g., *MCI Telecomms. Corp.*, 822 F.2d at 86 (stating that charges associated with terminating a wireline account “are designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs”); *Chandler v. AT&T Wireless Servs. Inc.*, No. 04-180, 2004 US. Dist. LEXIS 14884, at \*5 (S.D. Ill. July 21, 2004) (noting that “AT&T offers lower monthly rates on term plans because such plans include” an ETF).

fees.<sup>35</sup> This relationship between ETFs and other wireless rate elements demonstrates that the ERF is itself a “rate element” and thus falls squarely within the preemptive language of Section 332.

Third, in its recent *Truth-In-Billing* decision, the Commission relied on Section 332 to preempt state regulation of line item charges on a CMRS bill. In so doing, the Commission concluded that the itemization and placement of a contractual charge on a consumer’s wireless bill amounted to a rate structure: “State regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates.”<sup>36</sup> That is, Section 332 preempts a regulation that targets the itemization and delineation of rate elements rather than the overall rate itself. The instant Petition presents a far easier question, as it seeks the preemption of regulations targeting both the rate structure and the overall rate through substantive state regulation.

The opponents do not even acknowledge or address *Truth-in-Billing*, for good reason. It cannot be, as the opponents suggest, that states are free to regulate the legality, size and ability of carriers to *charge* and collect an ETF but cannot regulate the *placement* of the ETF on the consumer’s bill. The Commission’s definition of “rate structure” in the *Truth-In-Billing Order* logically must include the substantive components of a carrier’s charges.

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<sup>35</sup> Cingular at 11 n.25 (“limiting the use of early termination fees would . . . limit the workings of competition itself and would undermine long-term contracting. . . . One likely consequence of undermining long-term contracts is that carriers would no longer subsidize handsets and might charge their customers relatively large set-up fees to cover account start-up costs.”) (quoting M. Katz, “Measuring Competition Effectively,” ¶ 45 & n.20 (May 10, 2004) (internal quotations omitted)).

<sup>36</sup> *Truth-In-Billing*, at 6466, ¶ 34.

Fourth, as CTIA showed in its Petition, a large number of district courts<sup>37</sup> and all of the appellate courts<sup>38</sup> to consider this issue have read “rates” to include more than the monthly price in a service plan.<sup>39</sup> Opponents of preemption, AARP at 15-18; NASUCA at 14-18; WCA at 4 n.4, 17-23; Comments of Consumers Union, National Association of State PIRGs, National Consumer Law Center at 7-8 (“Consumers Union”), have responded by citing district court cases from Illinois,<sup>40</sup> Iowa,<sup>41</sup> and Texas<sup>42</sup> that have reached a different conclusion. Opponents have not offered any opinions from the courts of appeals, all but one of their district court opinions are unpublished, and the judge who wrote the Illinois opinion later changed his mind to hold that an ETF was part of a carrier’s rate and was covered under Section 332.<sup>43</sup> Nevertheless, *the very existence* of these conflicting and even self-contradictory judicial opinions regarding the nature of ETFs illustrates the need for expeditious resolution of this Petition by the Commission. Both

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<sup>37</sup> *Chandler*, 2004 U.S. Dist. LEXIS 14884; *Redfern v. AT&T Wireless Servs. Inc.*, No. 03-206, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003); *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Sup. 2d 916 (N.D. Ill. 2001); *Simons v. GTE Mobilnet Inc.*, No. 95-5169 (S.D. Tex. Apr. 11, 1996).

<sup>38</sup> *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004); *Bastien*, 205 F.3d 983.

<sup>39</sup> Commenters supporting preemption have likewise echoed CTIA’s analysis. *See, e.g.*, Verizon Wireless at 9-17; Sprint at 6-10; Nextel at 16-20; SunCom at 4-18; and Cingular at 10-16.

<sup>40</sup> *Kinkel v. Cingular Wireless*, No. 02-999 (S.D. Ill. Nov. 8, 2002).

<sup>41</sup> *Phillips v. AT&T Wireless*, No. 04-40240, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004); *Iowa v. United States Cellular Corp.*, No. 00-90197, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa Aug. 7, 2000).

<sup>42</sup> *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713, 715-16 (S.D. Texas 1996).

<sup>43</sup> Compare *Kinkel, supra*, (granting motion to remand and holding that “a cellular provider could fashion an [ETF] that is indisputably an integral part of its rate structure [but concluding] that is not the case here”) (Murphy, G.), with *Redfern*, 2003 U.S. Dist. LEXIS 25745, at \*2 (denying plaintiff’s motion to remand and “agree[ing] with Defendant that the early termination fee affects the rates charged for mobile service”) (Murphy, G.).

carriers and subscribers deserve nationwide certainty about the viability of term service plans and the ETF's that are part of the foundation of that rate structure.

Finally, two commenters mistakenly claim that the Commission should reject CTIA's Petition because the Commission does not have authority to regulate the actions of CMRS carriers' authorized agents. Consumers Union at 10-11; UCAN at 3. These arguments are unfounded and ignore the plain language of the statute, which squarely addresses the treatment of agents. *See* 47 U.S.C. § 217 ("In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.").

UCAN also challenges the reasonableness of ETFs imposed by some authorized agents. *See* UCAN at 15 ("Agents made a practice of tacking on additional termination penalties to the \$150 penalty established by Cingular."). UCAN's argument is simply another attack on the reasonableness of an ETF and does not alter the legal analysis that ETFs are "rates" under the Act.<sup>44</sup> And, in any event, UCAN's argument ignores the fact that this is a competitive market and the customer has the *choice* of purchasing wireless service either from an agent or directly from the carrier. If the customer purchases directly from a carrier and if the customer selects a postpaid plan, the customer has no interaction with an agent and thus has no contractual agreement with the agent. UCAN's claim also incorrectly assumes that authorized agents incur no costs in obtaining the customer. This not true: agents have customer acquisition costs and may offer their own incentives on handsets to attract customers similar to those offered by carriers. Like carriers, agents may use an ETF as insurance against an early termination that

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<sup>44</sup> CTIA reiterates that the proper forum for customers to challenge the reasonableness of an ETF is under Sections 201 and 202 of the Act; not through state litigation.

would leave them “holding the bag” for a large, up-front subsidy on the handset.<sup>45</sup> At the same time, the carriers incur acquisition costs, including agent commissions, even where the consumer purchases the handset from an agent.

**C. ETFs Cannot Plausibly Be Classified as “Terms And Conditions” Other Than Rates.**

Ironically, opponents of preemption cite to a committee report<sup>46</sup> accompanying the 1993 amendments to Section 332 to argue that Congress intended to include ETFs as “other terms and conditions.”<sup>47</sup> AARP at 6; NASUCA at 11; WCA at 13; Consumers Union at 4. For example, WCA asserts that “[s]tate-law provisions regarding contracts, liquidated damages and consumer fraud” fall within the committee report’s statement that “terms and conditions” includes “such other matters as fall within a state’s lawful authority.” WCA at 13.

Contrary to the opponents’ claims, the committee report actually confirms by omission that Congress did not intend to leave the regulation of rate elements like ETFs to the states. While the committee report cited by the opponents contains a list of examples of “terms and conditions,” such a list does not include *any* reference to ETFs specifically or fees charged generally. Indeed, the *Truth-in-Billing Order* confirms that the report’s reference to “billing practices” does not include the line item charges on a CMRS bill. If the manner in which

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<sup>45</sup> In many cases, early termination could cost the agent some or all of its sales commission from the wireless carrier.

<sup>46</sup> H.R. Rep. No. 103-111, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588: “It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. By ‘terms and conditions,’ the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under ‘terms and conditions.’”

<sup>47</sup> 47 U.S.C. § 332(c)(3)(A) (stating that “this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services”).

charges are segregated and placed on a bill is not a “billing practice,” *a fortiori* the calculation of charges themselves cannot be classified as a “billing practice.” Indeed, any other reading would render Section 332’s preemptive effect a nullity because the level of every “rate” could be claimed to be part of a “billing practice.”

### **III. THE EQUITABLE CLAIMS AT ISSUE IN THIS PETITION REQUIRE A STATE COURT TO ASSESS REASONABLENESS UNDER “COST” OR “REVENUE” CRITERIA DICTATED BY STATE LAW.**

In arguing against the preemption of these state lawsuits, some commenters, without substantiation, assert that CTIA seeks a ruling that will free its members *entirely* from federal and state regulation and enable them to impose whatever ETF they desire. AARP at 8; WCA at 40 (claiming that, if the Commission preempts, “a business might be free to impose liquidated damages of \$1 million for a breach of a \$100 contract”). CTIA has never made such a broad argument. Rather, the Petition seeks preemption of *only those lawsuits that prescribe, set, or determine the reasonableness of rates, rate elements, or rate structures.*

State courts would retain their authority to compel performance under the terms of the contract and police outright fraud or deception. Furthermore, consumers would continue to be able to challenge the reasonableness of an ETF under Sections 201 and 202 of the Act by filing a complaint at the Commission. With preemption, the only difference is that the Commission – not a patchwork of states – will render a uniform, nationwide decision.

The state class actions cited by CTIA in its Petition seek to eliminate ETFs entirely by asking courts (and juries) to pass on the reasonableness of the fees – indeed, *the complaints in two of the state actions explicitly require a reasonableness determination.* Consequently, the suits directly regulate “rates” and are subject to federal preemption.<sup>48</sup>

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<sup>48</sup> Furthermore, as the Commission has noted, *see, e.g., Southwestern Bell*, at 19903, ¶ 10; *Wireless Consumers Alliance*, at 17034-35, ¶ 24, consumers have the right to enforce breach of

**A. Commenters Cannot Avoid The Fact That The Suits At Issue In This Petition Directly Challenge The Existence And Reasonableness of ETFs And Are Thus Preempted By Section 332.**

WCA, an opponent of preemption, acknowledges that “markets, not regulators, are supposed to determine what business and pricing strategies carriers should adopt.” WCA at 5. As the Commission has noted, market forces have spurred competition in both rates and rate structures as carriers “experiment with varying pricing levels and structures[] for varying service packages.”<sup>49</sup> Ironically, WCA admits that it seeks to replace consumer preference with state regulatory fiat, by asking state courts to “abolish[] ETFs or mak[e] them less onerous.” WCA at 38.<sup>50</sup> These lawsuits seek to undo one of the greatest deregulatory successes in the telecommunications arena.

The Commission has made clear that state courts are precluded from judging the reasonableness of a wireless rate, rate element, or rate structure:

If a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court

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contract and false advertising claims in state court, so long as those claims do not require the Court to examine the reasonableness of the provider’s rates. *Id.* at 17041, ¶ 39. No commenter has alleged that any carrier has breached any contract or engaged in deceptive or fraudulent advertising with respect to ETFs. Additionally, a federal role remains to ensure that CMRS providers charge reasonable and nondiscriminatory rates for their services pursuant to Sections 201(b) and 202(a) of the Act.

<sup>49</sup> *Ninth CMRS NOI*, at 5630 ¶ 65. The opponents’ claim that ETFs “are anti-competitive in motivation and effect” contradicts the evidence of a competitive wireless marketplace and Commission decisions on this matter. *Id.* Consumers may select pricing plans with ETFs and higher-priced plans that do not contain ETFs. *See, e.g.*, Sprint at 2-3; T-Mobile at 4-7; Dobson at 2-3; and Nextel at 4-6.

<sup>50</sup> As evidence of the need to reduce this alleged ETF “burden,” opponents cite to the number of complaints filed against wireless carriers. Setting aside the fact that the existence of a complaint is not dependent on whether or not the complainant has subscribed to a service plan that includes an ETF and “does not necessarily indicate wrongdoing by the company,” such complaints represent only 0.002 percent of all wireless consumers. Sprint at 4 n.13 (“[T]his constitutes a complaint rate of 0.002 percent – or one complaint for every 45,500 wireless customers.”). More fundamentally, the existence of these complaints shows that the federal mechanism of ensuring that ETFs are just and reasonable under Sections 201 and 202 of the Act is effective and that additional state regulation is unnecessary.

would be preempted from doing so by Section 332. Likewise, if a state court were to set a prospective price for CMRS service, this action would also be preempted by Section 332.<sup>51</sup>

The D.C. Circuit and other Courts of Appeals similarly have held that “state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service.”<sup>52</sup> As shown below, plaintiffs in the cases at issue acknowledge that their suits require “an outright determination of whether a price charged . . . was unreasonable.”

Opponents of preemption cite the Commission’s decisions in *Wireless Consumers Alliance*, *Southwestern Bell*, and *Pittencrieff*<sup>53</sup> for the proposition that Section 332 does not preempt state law challenges to ETFs such as those at issue in this Petition. *See, e.g.*, WCA at 30-34; NASUCA at 21. These commenters assert that lawsuits challenging ETFs arise out of common law and are animated by the state’s traditional role of consumer protection. *See, e.g.*, WCA at 3 (arguing that “state-law contract, tort or consumer fraud actions arising from ETFs do

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<sup>51</sup> *Wireless Consumers Alliance*, at 17035 ¶ 25; *see also Southwestern Bell*, at 19901, ¶ 7 (“Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates or rate structures of CMRS providers.”).

<sup>52</sup> *Fedor*, 355 F.3d at 1073; *see also AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (noting that “state courts may not determine the reasonableness of a prior rate or set a prospective charge for service”); *Bastien*, 205 F.3d at 988 (“In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service.”). NASUCA argues that *Bastien* does not apply to this proceeding, as the panel’s language applied in the context of the filed tariff doctrine and as *Fedor* allegedly limited *Bastien*. NASUCA at 23. As to the first objection, *Bastien* spoke generally in terms of rates and the effect of litigation on those rates, as AT&T Wireless’s rates were established by contract, rather than by tariff. Such language certainly applies in this setting. With respect to the second objection, *Fedor* does not purport to limit *Bastien*; indeed, *Bastien* is binding circuit precedent and its holding could only be altered by the *en banc* Seventh Circuit or the Supreme Court. In any event, the issue is immaterial here, because under either *Bastien* or *Fedor* a state cause of action that challenges the reasonableness of any charge for wireless service is preempted. *Fedor*, 355 F.3d at 1073.

<sup>53</sup> *Petition of Pittencrieff Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 1735 (1997) (“*Pittencrieff*”).

not constitute the ‘regulation’ of ‘rates’”). Such an argument not only ignores the plain language of the Act, but also grossly mischaracterize the Commission’s holdings in those proceedings.

WCA cites *Wireless Consumers Alliance* and *Southwestern Bell* for the unexceptional proposition that Section 332 does not globally preempt the “neutral application of state contractual or consumer fraud laws.”<sup>54</sup> WCA at 31-33. From this it attempts to make the unsupported leap to the proposition that laws of general applicability are *never* preempted by Section 332.

In particular, WCA contends that suits that require a court to rule on the reasonableness or lawfulness of an ETF fall within the rubric of “state contractual or consumer fraud laws.” This contention *directly conflicts with the FCC decisions WCA cites*. In both *Wireless Consumers Alliance* and *Southwestern Bell*, the Commission stated that state courts may *not* “make an outright determination of whether a price charged for a CMRS service was unreasonable.”<sup>55</sup> The Commission contrasted contract enforcement and consumer fraud laws with a direct examination of the lawfulness of the rate itself, and found that the latter fall on the preempted side of the line. The increase in rates that would follow the elimination of ETFs is neither “indirect” nor “uncertain,” as may be the case with a general damages award for conduct extrinsic to the rates themselves.<sup>56</sup>

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<sup>54</sup> *Southwestern Bell*, at 19903, ¶ 10; *Wireless Consumers Alliance*, at 17034, ¶ 24 (“It follows that, if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts.”).

<sup>55</sup> *Wireless Consumers Alliance*, at 17035, ¶ 25; *Southwestern Bell*, at 19901-02, ¶ 7.

<sup>56</sup> *Wireless Consumers Alliance*, at 17034, ¶ 23 (“[I]f a company is found monetarily liable for false advertising, it will presumably alter its advertising. The impact on its prices and other behavior, however, is uncertain.”).

Likewise, *Pittencrieff* does not support the opponents' position. The fact that *Pittencrieff* references Section 332's power to preempt regulations that prescribe, set, or fix rates<sup>57</sup> does not mean that Section 332 *only* preempts these kinds of regulations. Moreover, in *Pittencrieff*, the Commission simply considered whether Section 332 preempted a state statute requiring contributions to a universal service fund – a determination quite different from direct challenges to ETFs. In addition, the portions quoted from *Wireless Consumers Alliance* and *Southwestern Bell* that foreclose state courts from making reasonableness evaluations speak more directly to the issue of this Petition and were written after *Pittencrieff*.

In its Petition, CTIA discussed class actions filed in three states – California, Florida, and Illinois – which require that state courts determine the reasonableness of ETFs and, as a consequence, impermissibly regulate rates in violation of Section 332. Petition at 3-7. The California complaint, for example, baldly charges that the “early termination penalty contained in defendant’s Service Contract *is unreasonably favorable* to defendant, and unduly harsh with respect to defendant’s subscribers, *and therefore, is substantively unconscionable.*”<sup>58</sup> Similarly, the Florida complaint alleges that “[t]he *termination penalty is not a reasonable measure* of the anticipated or actual loss.”<sup>59</sup>

The opposing comments’ attempt to read “reasonableness” out of these causes of action actually highlights why they must be preempted. As WCA helpfully points out, under California law, the court must assess whether “actual damage” is ascertainable, and whether any ETF is

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<sup>57</sup> *Pittencrieff*, at 1745 ¶ 20.

<sup>58</sup> Third Consolidated Amended Complaint, *In re Cellphone Termination Fee Cases*, No. RG04137699, at 13, ¶ 57 (Cal. Super. Ct. June 24, 2005) (emphasis added).

<sup>59</sup> Class Action Complaint For Damages And Demand For Jury Trial, *Carver Ranches Washington Park v. Nextel South Corp.*, No. 50-2004-CA-005062, at 7, ¶ 23 (Fla. Cir. Ct. May 17, 2004) (emphasis added) (attached as Ex. H to WCA).

“fair average compensation for any loss that may be sustained.” WCA at 35. This is ratemaking – arriving at a theory of “cost,” applying that theory to a service provided to a group of customers over time, and imposing an average “regulatory price” on each transaction. Indeed, in defining the term “actual damage”, the California courts must choose between various recovery measures (*e.g.*, lost revenues, unrecovered costs, or lost profits) – all policy determinations normally made by a rate-setting body.<sup>60</sup> Similarly, in calculating any monetary relief, a California court applies the same “actual damage” metric to determine whether the defendant is entitled to any “compensation” at all.<sup>61</sup> In the market for CMRS, such an inquiry is not only preempted, it is also unnecessary as a policy matter, because competition forecloses wireless carriers from imposing “unreasonable” rates.

In addition, the comments of Verizon Wireless demonstrate that every one of the equitable doctrines that a plaintiff *might* use to challenge an ETF – unconscionability, illegal penalties, and quasi-contract – force a court to evaluate the reasonableness of the ETF itself. Verizon Wireless at 18-21. Statutory causes of action used to invalidate an ETF would require a the same impermissible analysis. Consequently, any suit that “challeng[es] the reasonableness or lawfulness *per se*”<sup>62</sup> of an ETF runs afoul of *Southwestern Bell* and other decisions of the Commission and the courts.

#### **B. Commenters Misapply The Presumption Against Preemption.**

Commenters also inaccurately assert that Congress intended to create a dual federal-state regime with respect to most elements of wireless regulation. NASUCA at 10 (“Construing

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<sup>60</sup> *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467 (2002) (discussing the history of agency rate-making).

<sup>61</sup> *See Hitz v. First Interstate Bank*, 38 Cal. App. 4th 274, 288 (1995).

<sup>62</sup> *Southwestern Bell*, at 19901, ¶ 7.

Sections 2(b) and 332(c)(3) together, it is clear that the 1993 amendments did not, as CTIA asserts, ‘exempt wireless services from the system of dual state and federal regulations that governs traditional wireline telephone services.’”) (quoting Petition at 8); WCA at 10-11. Rather, Congress evidenced a clear intent in the language of Section 332 to preempt state regulations affecting the rate or entry of wireless service.<sup>63</sup>

Opponents also incorrectly cite and apply the presumption against preemption. *See, e.g.*, NASUCA at 5, 8-10; WCA at 10-11, 39-40; and Consumers Union at 3, 4-6. Although courts employ a presumption against federal preemption when construing some statutes,<sup>64</sup> such a presumption does not apply to the instant matter for two reasons. First, Congress has expressly shown its intent through the plain language of § 332(c)(3)(A): “no State or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.”<sup>65</sup> Second, the presumption does not apply when “the State regulates in an area where there has been a history of significant federal presence.”<sup>66</sup> The federal government has closely involved itself in the field of wireless and cellular since the invention of these technologies and this close involvement has continued throughout the development and expansion of wireless technology and service. CTIA’s Petition focuses merely on the relationship between the Commission and the carriers whom it regulates. Consequently,

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<sup>63</sup> Section 332 explicitly provides that “no State . . . shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.” 47 U.S.C. § 332(c)(3)(A) (emphasis added). Congress also explicitly exempted wireless regulation from the general dual regulatory framework articulated in Section 2(b) of the Act. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, n.21 (8<sup>th</sup> Cir. 1997)(“[W]e believe that the Commission has the authority to issue the rules of special concern to the CMRS providers.”).

<sup>64</sup> *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996).

<sup>65</sup> 47 U.S.C. § 332(c)(3)(A) (emphases added).

<sup>66</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

the Commission may look to the statute and accompanying materials without having to overcome any obstacles to preemption.

**C. Opposing Commenters' Reliance Upon The General Savings Clause In Section 414 Is Similarly Unavailing.**

In a further effort to shield state lawsuits from preemption, WCA and AARP mistakenly claim that Section 414 of the Act<sup>67</sup> “confirms that state law claims challenging the legality of early termination fees as a penalty are not subject to federal preemption.” AARP at 7 n.8; WCA at 12. These commenters’ interpretation of Section 414 runs afoul of Supreme Court and Commission precedent, which clearly establish that preemption under Section 332 is fully consistent with Section 414.

Notably, courts have refused to read Section 414 in the broad manner that these commenters suggest. In rejecting an argument that Section 414 prevented preemption of state common law breach of contract and tort claims, the Supreme Court took pains to emphasize that it has “long held” that “Section 414 . . . preserves only those rights that are not inconsistent with the statut[e].”<sup>68</sup> In particular, the Court confirmed that any state law claim “that directly conflict[s]” with the Act “cannot be ‘saved’ under § 414.”<sup>69</sup> The Court also explained that such result is the only proper construction of the clause because “the act cannot be held to destroy itself.”<sup>70</sup> Courts thus have “refused to read the [Section 414] savings clause to nullify the

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<sup>67</sup> See 47 U.S.C. § 414 (“Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”).

<sup>68</sup> *AT&T v. Cent. Office Tel.*, 524 U.S. 214, 233 (1998); see also *In Re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193, 1205 (E.D. Pa. 1996); Sprint at 19-20.

<sup>69</sup> *Cent. Office Tel.*, 524 U.S. at 236.

<sup>70</sup> *Id.* (quoting *Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

provisions of the Communications Act, despite the clause’s admittedly expansive wording”<sup>71</sup> as WCA and AARP urge the Commission to do.

Additionally, the Commission has long made clear that Section 414 does not prevent preemption of state causes of action, noting that a broad reading of Section 414 could “strip[]” the Act “of any meaningful function.”<sup>72</sup> It is thus settled that “Section 414 of the Act . . . does not foreclose . . . preemptive action here. Such ‘savings clauses’ do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.”<sup>73</sup>

#### **IV. STATE REGULATION OF ETFs IS PREEMPTED INDEPENDENT OF SECTION 332(C)(3)(A) UNDER ESTABLISHED PRINCIPLES OF CONFLICT PREEMPTION.**

Regardless of whether ETFs are “rates” under Section 332, state regulation of these charges poses a direct threat to the clearly articulated goals of Congress and the FCC to minimize regulation and develop a consistent, national regulatory structure. Sprint at 16-18. For this reason alone, the FCC can and should take swift action to preempt state regulation of ETFs.

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<sup>71</sup> *Bastien*, 205 F.3d at 988. *Bastien* also confirms that Section 414 does not prevent preemption of state causes of action involving “the entry of or the rates charged by any commercial mobile service” because such areas are within the exclusive “province of federal regulators and courts.” *Id.* at 986. Indeed, the court emphasized that “[t]o read [Section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create.” *Id.* at 987.

<sup>72</sup> *Midwestern Relay Co. Revisions to Tariff FCC No. 1*, Memorandum Opinion and Order, 69 FCC 2d 409, 415-16, ¶ 12 (1978); *see also id.* n.25 (“Section 414 does not give rise to actions based on preexisting duties which have been modified by the Act...”).

<sup>73</sup> *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act*, Declaratory Ruling, 6 FCC Rcd 7511, 7513, ¶ 20 (1991).

**A. Allowing these Suits to Proceed Will Frustrate FCC and Congressional Wireless Policy.**

As noted above, the Petition outlined examples of state class actions lawsuits that directly challenge the legitimacy of ETFs. Petition at 3-7. If plaintiffs in these class actions are successful, states will be regulating ETFs.<sup>74</sup> Indeed, the plaintiffs in Florida and California seek damages and injunctions barring the use of ETFs. These plaintiffs are already pursuing, through the auspices of state court authority, both “fact” and “expert” discovery. They are obtaining and analyzing data on wireless carriers’ cost structure, revenues, and profits in a proceeding that bears all the indicia of a traditional cost of service ratemaking proceeding. This state regulation of ETFs—or outright state bans on ETFs in wireless contracts – directly conflicts with and frustrates two central goals of federal wireless regulation.

*First*, success by the plaintiffs in these cases will inject unnecessary and injurious state regulation into an already deregulated, competitive market. Congress’s goal in enacting Section 332 was to spur the rapid development of a competitive wireless marketplace, and the market has in fact developed into a robustly competitive example of the benefits of deregulation. *Ninth CMRS Competition Report*, at 22600, ¶ 2. In rebuffing every attempt by states to continue to impose rate regulation on CMRS carriers, the FCC has explained that Congress favored market forces and demanded a light regulatory touch. *See, e.g., Connecticut DPUC Petition*, at 7031-32, ¶ 10 (“Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.”). The dramatic success of Congress and the FCC in advancing competition in the CMRS

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<sup>74</sup> It is well established that “judicial action can constitute state regulatory action for purposes of Section 332.” *Wireless Consumers Alliance*, at 17027, ¶ 12.

market is inarguable: “The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers.” *Truth-in-Billing*, at 6466, ¶ 35.

Indeed, as the FCC stated in its *1994 CMRS Forbearance Order*: “[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.”<sup>75</sup> State regulation of ETFs stands in direct contradiction of this federal regulatory policy.

Allowing state courts to pass on the reasonableness of ETFs would turn back the clock to a time when regulation was favored over competition, and would go against at least a dozen years of Congressional and FCC preference for allowing competitive markets to develop. Indeed, such state regulation conflicts directly with the FCC’s decision to forbid wireless tariffs and its finding that competitive market forces create presumptively “just and reasonable” rates in the national market for wireless services. Moreover, it would be patently unnecessary. No commenter in this proceeding has been able to identify any market failure that would lead to a need for regulatory intervention.<sup>76</sup> In fact, ETFs exist because customers prefer them in the vast

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<sup>75</sup> *In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1478, ¶ 173 (1994); see also *Wireless Consumers Alliance*, at 17033, ¶ 21 (noting that the FCC relies “on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination.”).

<sup>76</sup> Some commenters argue that the ETF should be graduated or prorated over the life of the service contract and point to the alleged unfairness to consumers who terminate or wish to terminate in the final months of a term contract. Consumers Union at 10 n.29; AARP at 11-12. Putting aside the fact that mandating that a charge vary over time to reflect revenue expectations is obviously “rate regulation,” there is no unfairness where, as here, the ETF is properly disclosed to the subscriber. Having one fixed ETF substantially reduces transaction costs (including litigation costs) for all customers and thus reduces the overall cost of wireless service. This is so because establishing “actual damages” in the case of any individual subscriber is a

majority of instances,<sup>77</sup> and the competitive nature of the market works to keep the ETFs in check. For a carrier facing three or four competitors, adopting an unreasonable or unconscionable ETF would be economically suicidal.

*Second*, allowing cases such as these to proceed would thwart Congress’s clear intent “to establish a *national* regulatory policy for [wireless communications], not a policy that is

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complex and extremely costly endeavor, requiring analysis of usage patterns and extrapolation of lost revenues. Indeed, most carriers maintain that the majority of their subscribers would pay *more in actual damages* than they are charged under the ETF. The ETF is thus no different than situations where the Commission itself has adopted a clear, fixed rule that may appear too harsh (or too lenient) when marginal cases are examined in isolation. “As the Commission has recognized in the past, and as courts have agreed, our selection of specific criteria is not an exact science, and the Commission may exercise line-drawing discretion when rendering determinations based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.” *Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2627, ¶ 169 (2005).

<sup>77</sup> Subsequent to deadline for the filing of initial comments in this docket, US PIRG submitted a “study” purporting to show that ETFs are both anti-competitive and unpopular. US PIRG Aug. 18 Ex Parte. CTIA is reviewing this “study” and reserves the right to submit a subsequent *ex parte* addressing some of the economic and statistical flaws that run through its analysis. Two obvious and fundamental flaws of the US PIRG submission bear mention here. First, US PIRG asked consumers whether they had ever wanted to switch carriers but were dissuaded from doing so by ETFs. This question provides no insight into consumer preference, which must be established by asking the consumer how much they would pay in additional handset costs or monthly rates to “purchase” an unlimited option to terminate service without an ETF. Indeed, the most illuminating aspect of US PIRG’s study is not that some consumers consider breaking their contracts early, but rather that only about one third of customers fall into that category. Second, US PIRG claims that the fact that all major wireless providers charge ETFs on their non-prepaid plans is evidence of a lack of competition in the industry. *Id.* at 7. However, as the Commission has repeatedly recognized, “competition is robust” in the wireless sector. *See, e.g., Ninth CMRS Competition Report*, at 20600, ¶ 2. In a highly competitive market such as that for CMRS, the fact that term service agreements with ETFs are vastly more popular than non-ETF plans is strong evidence that customers are generally unwilling to pay a premium to be able to change service providers at any time. US PIRG offers no evidence to the contrary—the poll asked customers whether they would like to have ETFs eliminated, but, crucially, did not ask what customers would be willing to pay, if anything, in terms of higher rates in order to eliminate these charges. US PIRG Aug. 8 Ex Parte, at 8. Nor did the study ask customers why they chose contracts with ETFs in the first instance, given the numerous other rate structures available. *Id.*

balkanized state-by-state.”<sup>78</sup> This balkanization is already occurring, highlighting the urgent need for Commission action. In the California litigation, for example, the court declined to stay the case in light of the carriers’ assertion of this Commission’s primary jurisdiction. While acknowledging that the FCC “is in a better position than this Court to make the policy decision about how to characterize ETFs”, the court nonetheless refused to stay much of the action pending this Commission’s ruling.<sup>79</sup> That same court also intimated that this Commission’s interpretation of Section 332 may only be suggestive authority.<sup>80</sup> Given that all such state class actions turn on whether ETFs violate state law, allowing any element of the case to proceed increases the likelihood that there will be inconsistent state decisions and unlawful regulation of CMRS rates.

Absent immediate Commission action, it is likely that other courts will issue orders that are tantamount to state regulation of ETFs. Indeed, without the Commission’s clarification that ETFs are rates, there is a risk that courts may render inconsistent and unpredictable judgments in determining the preemptive force of Section 332 and the reasonableness of ETFs.<sup>81</sup>

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<sup>78</sup> *Petition of the Conn. Dep’t of Pub. Util. Control to Retain Regulatory Control of Wholesale Cellular Serv. Providers*, 10 FCC Rcd 7025, 7034 (1995).

<sup>79</sup> *In re Cellphone Termination Fee Cases*, Order, No. RG04137699, slip op. at 2 (Cal. Super. Ct. June 16, 2005) (granting in part and denying in part motion to stay pending resolution of FCC proceedings under the primary jurisdiction doctrine).

<sup>80</sup> *Id.* (“The Court will wait for the FCC’s decision so that the Court can give it appropriate deference (consideration), but the Court will not defer (postpone) these proceedings in the meantime.”).

<sup>81</sup> It is clear that the Commission has the authority to clarify that ETFs are “rates” under the Act and that any decision the Commission renders is entitled to *Chevron* deference. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) (“*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”).

## **B. The FCC Should Preempt Based on Conflict Preemption.**

As Sprint makes clear, even if the Commission, *arguendo*, does not find that ETFs are “rates” under Section 332, it can and should nonetheless preempt state regulation of ETFs because state law would conflict with federal law, by thwarting Congress’s objectives in creating a national federal wireless framework. Sprint at 16-18. In the *Truth-in-Billing* decision, for example, the Commission found that even if it did not preempt state truth-in-billing laws under Section 332, permitting state regulation:

would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans.

*Truth-in-Billing Order*, ¶ 35.

The same finding is warranted here. As the Commission noted, “[i]t is recognized widely that federal law preempts state law where, as here, the state law would ‘stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ or of federal regulations.”<sup>82</sup> Similarly, state law is “pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal,”<sup>83</sup> or where the “somewhat delicate balance of

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<sup>82</sup> *Id.* ¶ 35 (citing *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)) (footnote omitted); *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

<sup>83</sup> *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (citing *Mich. Cannery & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984)).

statutory objectives” could “be skewed by allowing” state law claims.<sup>84</sup> Because state regulation of ETFs would stand as an obstacle to and frustrate FCC and Congressional objectives in promoting competition and establishing a consistent, nationwide regulatory framework, the Commission should take expeditious action to preempt such regulation regardless of whether ETFs are “rates” under Section 332.

## V. CONCLUSION

For these reasons and for the reasons articulated in its Petition, CTIA respectfully urges the Commission to grant its Petition and find that: (1) early termination fees in wireless service contracts are “rates charged” for commercial mobile services within the meaning of Section 332(c)(3)(A) of the Communications Act and FCC precedent; and (2) any application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF, or to prohibit the use or enforcement of ETFs as unlawful “liquidated damages” or penalties, constitutes prohibited rate regulation and is therefore preempted by 47 U.S.C. § 332(c)(3)(A).

Respectfully submitted,

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August 25, 2005

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<sup>84</sup> *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 348 (2001); *see also Edgar v. Mite Corp.*, 457 U.S. 624, 634 (1982) (state law preempted by federal law where it “upset the careful balance struck by Congress”).