

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

In the Matter of )  
 )  
Petition for Declaratory Ruling Filed by CTIA ) WT Docket No. 05-194  
Regarding Whether Early Termination Fees Are )  
“Rates Charged” Within 47 U.S.C. § 332(c)(3)(A) )  
\_\_\_\_\_ )

**SPRINT NEXTEL CORPORATION  
REPLY COMMENTS**

Luisa L. Lancetti  
Vice President  
Government Affairs - Wireless Regulatory  
Charles McKee  
General Attorney  
Christopher R. Day  
Counsel

Sprint Nextel Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20004  
202-585-1949

August 25, 2005

**Table of Contents**

Summary..... ii

I. The Overwhelming Majority of Consumers Prefer Term Rate Plans With ETFs..... 2

II. State Prohibitions on ETFs Will Eliminate Many Term Rate Plans, Nullify Scale Economies and Harm Consumers..... 5

III. It is Well Established Law that ETFs Constitute Both Rates and Rate Structures Under Section 332(c)(3)..... 12

IV. Preemption Is Necessary Even If the FCC Were to Now Reverse Prior Precedent and Determine that ETFs Are Not a Rate or Rate Structure ..... 13

    A. Congress Has Charged the FCC With Establishing a “Federal Regulatory Framework” for CMRS Because “State Regulation Can Be a Barrier to the Development of Competition” ..... 14

    B. State-by-State Regulation of Wireless ETFs Would Frustrate Federal Policies and Prevent the FCC From Discharging Its Mandate to Establish a Federal Regulatory Framework for CMRS..... 16

    C. The FCC Has Authority Over Intrastate CMRS Services..... 18

V. Point-of-Sale ETF Disclosure Requirements Should Be Considered in the Pending Truth-in-Billing Docket ..... 22

VI. Conclusion ..... 23

## Summary

1. The allegation that wireless customers are “profoundly dissatisfied” with term plans including early termination fees (“ETFs”) is inconsistent with the evidence. Despite the existence of many wireless price plan options, customers continue to choose term plans, that include an ETF, because they offer up-front equipment discounts and lower monthly service fees that cannot be made available as a practical economic matter in plans without ETFs.
2. State prohibitions on ETFs will eliminate many term rate plans, nullify scale economies and harm consumers. Term plans with ETFs almost always provide lower prices than more flexible plans without ETFs. Wireless carriers will not be able to offer the type of low-priced, term plans currently on the market if States begin to prohibit ETFs. State-by-State ETF regulation would decrease the choices available to consumers, put at risk the continued viability of national plans that have benefited customers through resulting economies of scale, and would increase the prices for wireless service.
3. ETFs constitute both rates and rate structures under Section 332(c)(3). State laws prohibiting cost recovery through ETFs clearly and directly affect carrier rates and rate structures as much as State prohibitions on line item surcharges, which the FCC has preempted. The FCC and the courts have already determined that ETFs are a part of rates and rate structure and the FCC should not overturn this well established precedent.
4. Preemption is necessary even if the FCC were to now reverse its prior precedent and determine that ETFs are not a rate or rate structure. Congress has explicitly charged the FCC with establishing “a Federal regulatory framework” for wireless service because it recognized that “State regulation can be a barrier to the development of competition in this market” and that “uniform national policy is necessary and in the public interest.” The FCC has repeatedly recognized its obligation to preempt State “other terms and conditions” regulation of intrastate wireless service when necessary to maintain a national framework that benefits consumers.
5. Point-of-sale ETF disclosure requirements should be considered in the pending *Truth-in-Billing* rulemaking, and not in this declaratory ruling proceeding. Sprint Nextel provides extensive disclosure of its ETF charges. However, this issue has already been briefed and should be decided in the pending Truth-in-Billing docket.

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

In the Matter of	)	
	)	
Petition for Declaratory Ruling Filed by CTIA	)	WT Docket No. 05-194
Regarding Whether Early Termination Fees Are	)	
“Rates Charged” Within 47 U.S.C. § 332(c)(3)(A)	)	
_____	)	

**SPRINT NEXTEL REPLY COMMENTS**

Sprint Nextel Corporation (“Sprint Nextel”)<sup>1</sup> hereby replies to the comments opposing the CTIA petition, which seeks a declaratory ruling confirming that early termination fees (“ETFs”) in commercial mobile radio service (“CMRS”) contracts are “rates charged” within the meaning of Section 332(c)(3) of the Communications Act.<sup>2</sup>

The initial comments in this proceeding detail the success of – and documented consumer preference for – current CMRS rate plans that offer customers substantial upfront equipment discounts and lower monthly service fees in exchange for a minimum service commitment that includes an ETF. These rate plans, combined with prepaid and other plans without ETFs, offer

---

<sup>1</sup> Sprint Corporation and Nextel Communications, Inc. filed separate initial comments in this proceeding. Thereafter, the FCC approved the application for transfer of control of Nextel’s licenses to Sprint. *See Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, File Nos. 0001031766, *et al.*, FCC 05-148 (Aug. 8, 2005). The merger was consummated on August 12, 2005. Accordingly, Sprint Nextel now files combined reply comments in this proceeding.

<sup>2</sup> Consistent with Sprint’s initial comments, Sprint Nextel does not attempt to assess the factual allegations made in the SunCom Operating Company L.L.C. Petition for Declaratory Ruling (filed Feb. 22,2005)(“SunCom Petition”). To the extent the legal issues raised in that docket are implicated in this proceeding, however, Sprint Nextel reiterates its opposition to the “list of declaratory rulings sought” in the Edwards Opposition and Cross-Petition for Declaratory Ruling (filed March 4, 2005).

consumers a wide range of choices so consumers can select the plan best suited to individual needs.

Notwithstanding the popularity of these rate plans, however, certain class action attorneys and putative consumer advocates now seek to limit consumer choice through State prohibitions on the use of ETFs. If successful, these actions would eliminate many of the most competitively priced rate plans currently offered by CMRS providers and undermine the ability of carriers to offer the national plans and services popular with American consumers. Consumers will be further harmed as options they find attractive are eliminated and prices for service and equipment rise. Such a result would strike squarely at the FCC's plenary authority over rates and rate elements, would frustrate the FCC's ability to discharge the Congressional mandate to establish a "Federal regulatory framework" for CMRS, and would undermine the competitive CMRS market, all to the detriment of consumers.

**I. THE OVERWHELMING MAJORITY OF CONSUMERS PREFER TERM RATE PLANS WITH ETFs**

Certain class action plaintiffs and groups purporting to represent the interests of wireless customers claim that many customers are unhappy with the current "term" rate plans that include ETFs. The National Association of State Utility Consumer Advocates ("NASUCA"), for example, asserts that "[e]vidence shows wireless consumers are growing increasingly dissatisfied with . . . ETFs," although it recites no supporting "evidence" in its comments.<sup>3</sup> AARP similarly contends that wireless customers are "profoundly dissatisfied with ETFs," and in support, it notes that the number of wireless ETF complaints has increased from 1,860 in 2002 (when there were

---

<sup>3</sup> NASUCA Comments at 3.

139 million customers) to 3,958 in 2004 (when there were 181 million customers).<sup>4</sup> Notwithstanding the fact that this represents a small increase in a statistically insignificant complaint rate – from 0.001% to 0.002% of all customers – it is difficult to ascertain how wireless customer satisfaction would improve if courts and state legislatures were authorized to abolish term rate plans and the savings that these plans provide to consumers.

The allegations are, moreover, contradicted by market evidence. Each of this nation's 181+ million wireless customers makes a choice upon subscribing to wireless service (or when moving service to a competitor): whether to purchase a plan with an ETF or without an ETF. Over 90 percent of all wireless customers have chosen a term plan with an ETF, as opposed to plans without an ETF.<sup>5</sup> The primary reason consumers choose these plans is the very reason ETFs are part and parcel of carrier rates and rate structures – namely, term plans with an ETF provide a lower-priced alternative for customers. Specifically, consumers choose term plans that include an ETF because such plans offer up-front equipment discounts and lower monthly service fees than plans without ETFs.

---

<sup>4</sup> See AARP Comments at 4 and 24. During the first quarter of this year, ETF-related complaints constituted only 15 percent of all complaints filed against CMRS carriers, further undermining the suggestion that ETFs are a major concern of customers. See FCC News, *Quarterly Report on Informal Consumer Inquiries and Complaints Released*, at 9 (Aug. 12, 2005).

<sup>5</sup> See Sprint Comments at 2. Notwithstanding these facts, consumer groups continue to assert they “doubt whether consumers are pleased with such contracts” and that it is “debatable” whether consumers agree to ETFs. UCAN Comments at 6; NASUCA Comments at 28. Although UCAN repeatedly claims that ETFs “trap” customers (*see* Comments at 3, 4 and 5), it does not explain why customers at the end of their initial term, nevertheless choose overwhelmingly another term plan with an ETF (whether with their initial carrier or a different provider), as opposed to selecting a plan without an ETF.

U.S. PIRG recently released an opinion survey of 775 wireless customers in an effort to “quickly eliminate the use of early termination fees.”<sup>6</sup> In response to the question – “How do you feel about eliminating [ETFs]?” – 77 percent of the respondents stated they would support elimination of ETFs.<sup>7</sup> Importantly, however, U.S. PIRG did not ask these same respondents whether they would favor paying higher prices for their wireless service in exchange for eliminating ETFs. Nor did the survey ask whether, if given the choice, these respondents would favor a plan with higher up-front equipment costs and monthly service fees but no ETF, or a term plan with an ETF and service discounts. These questions were not asked in the U.S. PIRG survey, but the marketplace has answered them nonetheless – given that, as U.S. PIRG acknowledges, over 90 percent of all consumers have deliberately chosen a plan with an ETF, as opposed to a plan without ETFs and without discounts.<sup>8</sup>

The U.S. PIRG study simply demonstrates that consumers would like to receive more benefits for less money. While it is human nature to want something for nothing, it is not sound public or economic policy. It is hardly surprising that customers dislike paying ETFs or that complaints are filed when carriers attempt to enforce their agreements with customers.<sup>9</sup> The

---

<sup>6</sup> See U.S. PIRG, *Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers*, at 3 and 24 (Aug. 11, 2005), available at <http://www.uspirg.org/uspig.asp?id2=18538>.

<sup>7</sup> See *id.* at 26 (Question 8).

<sup>8</sup> See *id.* at 29 n.6. According to the survey, 63 percent of respondents believed that current rates were either “too high” or “somewhat high.” *Id.* at 24 (Question 2). The survey further found that 3 percent of all customers pay ETFs in a given year. See *id.* at 8. However, of this small group, 80 percent said that the benefits of switching to another carrier outweighed the costs of the ETF. See *id.* at 25 (Question 4). In other words, the wireless market is functioning as competitive markets are supposed to function.

<sup>9</sup> The Utility Consumers’ Action Network (“UCAN”), for example, cites alleged improper actions by Sprint in enforcing an ETF against Ms. Jan Wilberding. Sprint disputes almost all of key factual and legal allegations in that description. Specifically, based upon the documentation in Sprint’s files, Sprint disputes the claim that Ms. Wilberding did not enter a new contract con-

ETF, however, is an entirely legitimate means of recovering the costs of providing service and equipment when a customer chooses to terminate a contract early.

## **II. STATE PROHIBITIONS ON ETFs WILL ELIMINATE MANY TERM RATE PLANS, NULLIFY SCALE ECONOMIES AND HARM CONSUMERS**

The objective of certain commenters is apparent. The Utility Consumers' Action Network ("UCAN"), for example, claims that ETFs are "presumptively void," and it calls on the FCC to exclude ETFs from the definition of "rates charged" under Section 332(c)(3) in order to provide "additional incentives to minimize the use of regressive and often inappropriately applied fees."<sup>10</sup> AARP urges the FCC to rule that ETFs "are anti-competitive" and "unenforceable."<sup>11</sup> The Wireless Consumers Alliance ("WCA") and 11 class action plaintiffs are the most direct: "CTIA is correct in asserting that pending ETF lawsuits seek to abolish the use of ETFs."<sup>12</sup> In other words, these plaintiffs and interest groups want the Commission to permit States to eliminate the very rate plans that over 160 million wireless customers have chosen and use today in their daily lives.

While certain plaintiffs/interest groups attack ETFs in general, they never discuss the impact that a State-by-State ban on ETFs would have on customers. Indeed, according to some of these groups, it is "irrelevant" and does "not matter . . . whether monthly rates would go up or

---

taining an ETF or that Sprint was merely relying on an "automatic" extension of her prior contract. According to Sprint's records, Ms. Wilberding expressly agreed to a new contract and was informed of the ETF. Such factual disputes demonstrate the problems associated with many financial transactions, not that ETFs are "presumptively void."

<sup>10</sup> UCAN Comments at 2 and 5.

<sup>11</sup> AARP Comments at 12 and 25.

<sup>12</sup> WCA Comments at 36. Eleven plaintiffs in a California class action lawsuit have joined in WCA's comments.

handset subsidies would vanish without” ETFs or that national/regional pricing plans would be “less uniform.”<sup>13</sup>

The plaintiff/interest groups’ claim –there is “no evidence” that rates would increase if ETFs are eliminated<sup>14</sup> – is rebutted by a cursory review of the plans currently available to the American public. Term contracts with ETFs almost always provide lower prices (whether for equipment and/or service) than more flexible plans without ETFs. Much like volume discount plans, where the price is lower as the purchaser buys more of a product, so too a term agreement comes at a discounted price as the customer chooses to “buy” more and more “time.”

CMRS providers are able to lower up-front equipment costs and lower monthly fees because term plans provide a carrier with a degree of certainty as to how long a customer will use a carrier’s network, and provide an alternate method of performance, i.e., paying the ETF, should the customer terminate early.<sup>15</sup> Thus, if the ETF component is removed from term service agreements, there would no longer be “mutuality” on both sides of the contract, and customers could terminate term contracts early – after receiving substantial up-front benefits – and make no alternate performance through an ETF. Under these conditions, it would be economically irrational for CMRS carriers to offer the type of low-priced, term rate plans that are currently on the market. Instead, carriers would be forced to offer only service plans with higher up-front costs and higher monthly service fees. Such a result denies customers choice and is not in the public interest.

---

<sup>13</sup> WCA Comments at 2 and 38; NASUCA Comments at 2.

<sup>14</sup> WCA Comments at 2.

<sup>15</sup> *See generally* Nextel Comments at 4-7.

The Commission should not only compare prices for plans with ETFs and without ETFs, but also compare the U.S. market with markets in other countries. The Commission observed only last year that the U.S. CMRS market is “more competitive” than CMRS markets elsewhere.<sup>16</sup> Average prices in the U.S. are 63 percent less than in the E.U. and 68 percent less than in Japan;<sup>17</sup> average usage in the U.S. is over four times higher than in the E.U.<sup>18</sup> The Commission has noted that the American consumer enjoys such favorable conditions because of the “much greater prevalence” in the U.S. of term contract, bucket plans.<sup>19</sup>

NASUCA suggests that the price increases resulting from the elimination of ETFs would not be that great, stating that there is “little difference between the up-front cost of handsets and accessories between fixed-term CMRS providers and prepaid wireless carriers, except that prepaid carrier’s handsets appear to be less expensive”:

For example, Virgin Mobile’s (prepaid) handsets range from \$40 to \$170. Fixed-term providers’ handsets cost the same, if not more: Sprint’s handsets cost the same, if not more: Sprint’s handsets range from \$150 to \$600 (though it typically provides a \$150 rebate.<sup>20</sup>

NASUCA’s analysis is flawed on several levels. First, a comparison of stated “retail” prices does not disclose the amount of subsidy in a handset. It is a common misperception by consumers and consumer advocates that the listed “retail” price of a handset is the “cost” to the carrier. This is simply not the case. Phones may in fact cost much more than a retail price and carriers frequently subsidize these retail numbers to reach a price point acceptable to consumers.

---

<sup>16</sup> *Ninth Annual CMRS Competition Report*, 19 FCC Rcd 20597, 20678 ¶ 204 (2004).

<sup>17</sup> *Id.* at ¶¶ 202-03.

<sup>18</sup> *Id.* at ¶ 201.

<sup>19</sup> *Id.* at ¶ 204.

<sup>20</sup> NASUCA Comments at 32.

Secondly, different carriers select different handsets with different underlying costs based upon their respective business plans. Thus, Virgin Mobile purchases less expensive handsets precisely because it caters to a prepaid market. Sprint Nextel, on the other hand, is well known for offering more feature-rich phones with the latest technologies, but which are significantly more expensive to purchase. For example, Virgin Mobile offers a Nokia handset (the Nokia 2115i) for the “retail” price of \$59.99. Sprint Nextel offers the Nokia 6016i at the “retail” price of \$149.99. The Sprint Nextel CDMA Nokia phone, however, is a tri-mode phone capable of working on multiple networks (as compared to the Virgin Nokia which is a single mode phone), has a color display (as compared to black and white), a headset jack, a USB port, supports JAVA and has longer standby time. Moreover, with a term contract and the associated ETF, a customer can receive this significantly more feature rich phone with a \$149.99 discount, or a total cost of \$0. In comparison, the Virgin customer purchasing the Virgin Nokia handset receives a “discount” of \$20, or a total cost of \$39.99.

Thirdly, NASUCA fails to compare service plans of Sprint Nextel and Virgin Mobile.<sup>21</sup> Virgin’s plans offer customers maximum flexibility, as its prepaid plans include no ETF, and for \$30 monthly, a customer can receive 150 anytime minutes and 150 night/weekend minutes. In contrast, with Sprint Nextel’s term “Fair & Flexible” CDMA plan secured by an ETF, customers pay \$35 monthly for 300 anytime minutes and unlimited night/evening minutes.<sup>22</sup> This difference in pricing exemplifies the discussion above. While Sprint Nextel’s CDMA plan provides

---

<sup>21</sup> The data in these paragraphs is based on plans available on Sprint Nextel’s and Virgin Mobile’s web pages on August 20, 2005.

<sup>22</sup> For an extra \$10 monthly, a Virgin customer receives an additional 100 anytime minutes. In contrast, for an extra \$10 monthly, a Sprint customer would receive 200 additional anytime minutes.

substantially more minutes of use for a rate very similar to that of Virgin, Sprint Nextel's CDMA plan is also subject to an ETF.<sup>23</sup>

Indeed, it is notable that Virgin, which is a virtual network operator/reseller of the Sprint Nextel CDMA network, serves over three million customers.<sup>24</sup> Furthermore, Boost Mobile – the prepaid subsidiary of the Sprint Nextel IDEN network – serves over 1.5 million customers.<sup>25</sup> The success of these plans demonstrates that there are a sizable number of consumers who will pay a premium for maximum, “pay as you go” flexibility. The important point is that government regulators have allowed CMRS providers to develop plans that meet the needs of consumers. The result: the consumer today has many choices in equipment and service plans – including the choice of purchasing a term plan with an ETF or a plan without an ETF.

Consumers have benefited from the national rate plans developed by wireless carriers and would be harmed if States were permitted to regulate ETFs on a state-by-state basis and thus undermine the current national structure of wireless rate plans. One set of uniform rules permits carriers to achieve sizable economies of scale, and as Chairman Martin has recognized, the resulting lower costs are passed through to customers in the form of lower prices.<sup>26</sup> State-by-State regulation of ETFs would put at real risk the continued viability of these national service plans and the benefits they provide to consumers.<sup>27</sup> It is important that the Commission understand

---

<sup>23</sup> See also Nextel Comments at 6-7 (comparison of Nextel prices with prices offered through its Boost operations).

<sup>24</sup> See *By the Numbers, MVNO/Resellers*, RCR Wireless, July 25, 2005, at 12.

<sup>25</sup> See *id.*

<sup>26</sup> See Martin Dow-Lohnes Presentation at 6.

<sup>27</sup> For example, WCA and certain class action plaintiffs contend that States should be permitted to ban current ETFs (uniformly applied to all customers) in favor of an approach whereby a carrier would be required to calculate its “actual damages.” WCA Comments at 37 (underscor-

that the elimination of an ETF in one State will adversely affect customers in other States.<sup>28</sup> It is also important to note that States are beginning to recognize that consumers benefit when national carriers that provide services that “by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure,”<sup>29</sup> are subject to one set of rules that apply throughout the nation.<sup>30</sup>

The Commission itself has recognized the need for uniform national rules and is currently addressing questions regarding the scope and extent of those rules in the Truth-in-Billing docket. As both Sprint and Nextel noted in those proceedings, one rational set of rules which establishes a regulatory ceiling is consistent with the FCC’s congressional directive. “Permitting states to adopt additional billing or point of sale requirements would upset the “reasonable balance” the

---

ing in original). Such case-by-case ratemaking would be prohibitively expensive as an administrative matter.

<sup>28</sup> This extra-territorial effect could occur in one of two ways. One, a carrier may attempt to maintain national plans even though one or two States ban ETFs. But in this scenario, all customers, including customers residing in States that permit ETFs, would pay the increased costs imposed by the one or two States. (This approach, however, has the perverse effect of encouraging additional regulation in other States, because customers in other States would subsidize much of the costs of one State’s regulation.)

The alternative would be to convert national plans into regional plans (*e.g.*, one plan for States with ETFs and different plan for States without ETFs). However, even with this arrangement, customers in States with ETFs would still pay more than they do today, because there would be reduced scale economies, and those economies would be then shared among fewer customers.

<sup>29</sup> H.R. REP. NO. 103-111, 103d Cong., 1<sup>st</sup> Sess., at 260 (1993).

<sup>30</sup> For example, last year, 32 States entered into an Assurance of Voluntary Compliance (“AVC”) with the three largest wireless carriers that adopts national, uniform rules pertaining to billing and point-of-sale disclosures. *See generally* Sprint Truth-in-Billing Reply Comments, CG Docket No. 04-208, at 4-7 (July 25, 2005)(AVC summarized).

Commission strikes “between the needs of consumers for access to accurate and truthful information . . . and any burden or cost such requirements may impose on carriers.”<sup>31</sup>

Eleven years ago, in implementing Congress’ directive to “establish a Federal regulatory framework for all” CMRS, the Commission adopted a largely deregulatory Federal framework for CMRS:

Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs – and not by strategies in the regulatory arena.<sup>32</sup>

The result of this decision has been “an amazing story.”<sup>33</sup> The CMRS market has evolved from a “niche,” “expensive,” “primarily local” service, into a “more of a national service” that today is “the poster child of competition.”<sup>34</sup> And, as now Chairman Martin has correctly recognized, wireless could develop in this manner “because of a consistent regulatory treatment throughout the country.”<sup>35</sup>

Certain class action plaintiffs and consumer advocacy groups now want the Commission to dismantle this successful regime which permitted carriers to develop service plans that met the changing demands of consumers and benefited consumers tremendously. These parties advocate for such change even though they acknowledge that “monthly rates would go up or handset sub-

---

<sup>31</sup> Comments of Nextel Communications, Inc. and Nextel Partners, Inc., *In the Matter of Truth in Billing and Billing Format*, CC Docket No. 98-170 (June 25, 2005), citing *First Report and Order*, 14 FCC Rcd. At 7530 ¶¶ 59.

<sup>32</sup> *Second CMRS Order*, 9 FCC Rcd 1411. 1420 ¶ 19 (1994).

<sup>33</sup> Presentation of Commissioner Kevin J. Martin, *Wireless and Broadband: Trends and Challenges*, Dow Lohnes-Comm Daily Speaker Series, at 1 (Oct. 15, 2004)(“Martin Dow Lohnes Presentation”).

<sup>34</sup> *Id.* at 1, 2 and 5.

<sup>35</sup> *Id.* at 6.

sidies would vanish without” ETFs.<sup>36</sup> Sprint Nextel suggests that the vast majority of the existing 181+ million wireless subscribers would not support such a result and urges the Commission to take prompt action to preserve maximum consumer choice by confirming that ETFs are “rates” pursuant to Section 332(c)(3).

### **III. IT IS WELL ESTABLISHED LAW THAT ETFs CONSTITUTE BOTH RATES AND RATE STRUCTURES UNDER SECTION 332(C)(3)**

Section 332(c)(3) provides unequivocally that “no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service.” An ETF is a “rate charged by [a] commercial mobile service” that a customer contractually agrees to purchase, and thus, ETFs fall squarely within the express preemption provision of this statute.

Plaintiff/consumer group commenters assert that ETFs are not a rate, but only “affect rates.”<sup>37</sup> The elimination of ETFs certainly would affect other rates for wireless equipment and service. But the fact remains that an ETF is also a “rate charged by [a] commercial mobile service” provider, and any attempt to prohibit or otherwise regulate ETFs would constitute the very kind of rate regulation that Congress explicitly took away from the States.<sup>38</sup>

Moreover, preemption would be necessary even if the FCC accepts the proposition that ETFs “affect rates” but are “not *rates*” themselves.<sup>39</sup> If this is the case, then ETFs necessarily are part of a carrier’s rate structure, which the Commission has confirmed is encompassed within Section 332(c)(3)’s rate prohibition. The FCC held recently, “State regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost

---

<sup>36</sup> WCA Comments at 2.

<sup>37</sup> See, e.g., AARP Comments at 20; NASUCA Comments at 8; WCA Comments at 2.

<sup>38</sup> See Nextel Comments at 18-20.

<sup>39</sup> AARP Comments at 20 (emphasis in original).

recovery only through an undifferentiated charge for service,” are preempted because such rules “clearly and directly affect the manner in which the CMRS carrier structures its rates.”<sup>40</sup> As Verizon Wireless explains, State laws prohibiting cost recovery through ETFs “clearly and directly” affect carrier rates and rate structures as much as State prohibitions on line item surcharges, which the FCC has preempted.<sup>41</sup>

#### **IV. PREEMPTION IS NECESSARY EVEN IF THE FCC WERE TO NOW REVERSE PRIOR PRECEDENT AND DETERMINE THAT ETFs ARE NOT A RATE OR RATE STRUCTURE**

Preemption of State regulation of ETFs is necessary even if the Commission changes course and now determines that ETFs are not a rate or rate structure. State ETF prohibitions would conflict with the FCC’s determination that rate plan diversity, including plans with ETFs, promote consumer choice and lower prices, would conflict with the FCC’s policy that market forces rather than regulation should govern wireless services, and would frustrate the FCC’s ability to discharge the Congressional mandate that it “establish a Federal regulatory framework for all commercial mobile services.”<sup>42</sup>

---

<sup>40</sup> *Truth-in-Billing Order*, 20 FCC Rcd 6448, 6463 ¶ 31 (2005)(emphasis in original).

<sup>41</sup> *See* Verizon Wireless Comments at 16. Indeed, the nature of ETFs as a form of rate structure is demonstrated by the fact that wireless carriers could replace their ETFs with an upfront service activation fee in the same amount. The Plaintiff/Consumer Groups could hardly contend that such an upfront activation fee was not a rate or rate structure within Section 332(c)(3).

<sup>42</sup> H.R. CONF. REP. NO. 103-213, 103d Cong., 1<sup>st</sup> Sess., at 490 (1993).

**A. CONGRESS HAS CHARGED THE FCC WITH ESTABLISHING A “FEDERAL REGULATORY FRAMEWORK” FOR CMRS BECAUSE “STATE REGULATION CAN BE A BARRIER TO THE DEVELOPMENT OF COMPETITION”**

The class action plaintiff and consumer group comments assume that State regulation (including State class action lawsuits) is immune from federal preemption if ETFs are classified as “other terms and conditions”:

Congress’s intent was to exclude from federal preemption consumer claims like this one. ETFs fall within the “other terms and conditions” provision in § 332(c)(3)(A).<sup>43</sup>

In support, these commenters cite to a May 1993 House Report, which states that it is “the intent of the [House Budget] Committee that the states still would be able to regulate the terms and conditions of these [wireless] services.”<sup>44</sup>

But these plaintiffs and consumer advocates neglect to note that the full Congress in enacting Section 332 adopted the House bill “with some modifications.”<sup>45</sup> Specifically, the Conference bill enacted, unlike the House bill, included an amendment to Section 2(b) to expand FCC authority to include regulation of intrastate wireless services.<sup>46</sup> In addition, the full Congress stated unequivocally with respect to the Conference bill ultimately enacted into law:

The intent of this provision, as modified, is to establish a *Federal regulatory framework* to govern the offering of all commercial mobile radio services.<sup>47</sup>

---

<sup>43</sup> WCA Comments at 13. *See also* AARP Comments at 6; Consumers Union Comments at 4; NASUCA Comments at 11. As noted above, 11 class action plaintiffs join in the WCA Comments.

<sup>44</sup> H.R. REP. NO. 103-111, 103d Cong., 1<sup>st</sup> Sess., at 261 (May 25, 1993).

<sup>45</sup> H.R. CONF. REP. NO. 103-213, 103d Cong., 1<sup>st</sup> Sess., at 490 (Aug. 4, 1993).

<sup>46</sup> *Id.* at 497 (“The Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act to clarify that the Commission has the authority to regulate commercial mobile services.”).

<sup>47</sup> H.R. CONF. REP. NO. 103-213 at 490.

Congress further recognized that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market”:

[B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such [wireless] services, and because providers of such services do not exercise market power vis-à-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.<sup>48</sup>

As the Commission has correctly recognized, this legislative history “makes plain” that Congress sought to “establish a *national* regulatory policy for CMRS, not a policy that is balkanized state-by-state.”<sup>49</sup>

Thus, State “other terms and conditions” regulation still remains subject to general conflicts preemption principles when such State regulation would inhibit or otherwise frustrate the FCC’s ability to establish a Federal regulatory framework for all CMRS.<sup>50</sup> The Commission recognized this point in implementing the 1993 Budget Act, when it held that preemption of State “other terms and conditions” regulation is appropriate “where the State regulation thwarts

---

<sup>48</sup> Senate Bill 1134, § 402(13) (June 22, 1993)(emphasis added). The Conference Committee expressly “incorporated herein by reference” this finding. See H.R. CONF. REP. NO. 103-213 at 481.

<sup>49</sup> *Connecticut CMRS Rate Denial Petition Order*, 10 FCC Rcd 7025, 7034 ¶ 14 (1995)(emphasis in original), *aff’d Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

<sup>50</sup> The absence of express preemption language in a statute does not, as some commenters assert, mean that a federal agency lacks authority to preempt States. See NASUCA Comments at 6. Agencies like the FCC have the power to preempt even without an “explicit congressional authorization to displace state law.” *City of New York v. FCC*, 486 U.S. 56, 63-64 (1988)(An agency “acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.”). See also *Geier v. American Honda Motor*, 529 U.S. 861, 869 (2000)(“[T]he savings clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”)(emphasis in original).

or impedes a valid Federal policy.”<sup>51</sup> And the FCC reaffirmed this same point earlier this year, holding that State “other terms and conditions” regulation may be preempted when such State regulation “conflict[s] with established federal policies”:

It 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>52</sup>

Given the explicit Congressional directives to the Commission, there is no basis to the class action plaintiff/consumer advocacy group position that the FCC should defer to each State – and no basis to the suggestion that the FCC should defer to State courts regarding the circumstances under which ETFs may be used with wireless service.<sup>53</sup>

**B. STATE-BY-STATE REGULATION OF WIRELESS ETFs WOULD FRUSTRATE FEDERAL POLICIES AND PREVENT THE FCC FROM DISCHARGING ITS MANDATE TO ESTABLISH A FEDERAL REGULATORY FRAMEWORK FOR CMRS**

The class action plaintiff and consumer advocate commenters do not claim that State-by-State regulation of wireless ETFs would be consistent with established federal policies and the explicit mandate that Congress has imposed on the FCC, nor could they given that:

- State prohibitions of wireless ETFs would conflict with the FCC’s long-standing policy that ETFs are not only lawful, but promote customer welfare because they are the “principal component of the exchange for reduced rates;”<sup>54</sup>
- State prohibitions of wireless ETFs would conflict with the FCC’s long-standing policy that “forbearance [from rate regulation] will foster competition which will expand consumer benefits” because “[c]arriers will be moti-

---

<sup>51</sup> *Second CMRS Order*, 9 FCC Rcd 1411, 1507 n.515 (1994). *See also id.* n.517.

<sup>52</sup> *Truth-in-Billing Order*, 20 FCC Rcd 6448, 6466-67 ¶ 35 (2005)(internal citations omitted).

<sup>53</sup> *See WCA Comments* at 4 (“The Commission should defer to . . . state and federal trial courts.”).

<sup>54</sup> *Sprint Comments* at 8-9 and 15-16 (internal citations omitted).

vated to win customers by offering the best, most economic service packages;”<sup>55</sup> and

- State-by-State regulation of wireless ETFs would frustrate the FCC’s very ability to discharge the Congressional mandate that it “establish a Federal regulatory framework for all commercial mobile services.”<sup>56</sup>

The class action plaintiff assertion that in this preemption proceeding – “policy arguments are improper” and that it does “not matter” whether “ETFs are good or bad, or whether monthly rates would go up or handset subsidies would vanish without them”<sup>57</sup> – is simply incorrect. The Commission’s primary mission is to preserve and promote the public interest (consumer welfare), and Congress has determined that because “State regulation can be a barrier to the development of competition in this [wireless] market, uniform nation policy is necessary and in the public interest.”<sup>58</sup>

As demonstrated in settled law, state disruption of federal regulatory policy is an entirely valid basis for preemptive action. In *Geier v. America Honda Motors*, 529 U.S. 861 (2000), the Department of Transportation (“DOT”) required auto manufacturers to equip some, but not all, of their vehicles with passive restraints (*e.g.*, airbags, seat belts). DOT also decided that a gradual phase-in was appropriate, further determining that manufacturers should be given the flexibility to install “a mix of several different passive restraint systems,” in part so consumers could decide which system best meets their needs.<sup>59</sup> A person injured in an accident filed suit, alleging that under State tort law, Honda was required to install an airbag, even though federal law gave

---

<sup>55</sup> *Id.* at 13 (internal citations omitted).

<sup>56</sup> *Id.* at 11 (internal citations omitted).

<sup>57</sup> WCA Comments at 2 and 37.

<sup>58</sup> Senate Bill 1134, § 402(13) (June 22, 1993). The Conference Committee expressly “incorporated herein by reference” this finding. *See* H.R. CONF. REP. NO. 103-213 at 481.

<sup>59</sup> *See id.* at 867-79.

Honda the discretion to use airbags or seat belts. The Supreme Court affirmed the lower courts' rulings that the State law claim was preempted by the DOT's rules:

Such a state law – *i.e.*, a rule of state tort law imposing such a duty – by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. . . . It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. . . . Because the rule of law for which petitioners contend would have stood “as an obstacle to the accomplishment and execution of” the important means-related federal objectives that we have just discussed, it is preempted.<sup>60</sup>

State prohibitions of wireless ETFs would have the very same effect on consumers: reduce the number of options that federal law was promoting.

Earlier this year, the Commission confirmed that States are preempted from regulating wireless carrier line item surcharges:

Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus 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.<sup>61</sup>

Sprint Nextel submits that the same analysis applies to State-by-State regulation of wireless ETFs.

### **C. THE FCC HAS AUTHORITY OVER INTRASTATE CMRS SERVICES**

Under the Communications Act, the FCC has exclusive regulatory authority over interstate services, including interstate wireless services.<sup>62</sup> NASUCA concedes, as it must, that the

---

<sup>60</sup> *Id.* at 881 (internal citations omitted).

<sup>61</sup> *Second Truth-in-Billing Order*, 20 FCC Rcd 6448, 6467 ¶ 35 (2005).

<sup>62</sup> *See* 47 U.S.C. §§ 1, 2(a). Federal courts have uniformly held that the FCC has “exclusive jurisdiction” over interstate communications and that as a result, “states are precluded from act-

FCC also possesses exclusive authority over intrastate wireless rate and entry.<sup>63</sup> However, NASUCA then asserts that the FCC possesses no other authority over intrastate wireless services. Specifically, it claims that the FCC cannot preempt State regulation of wireless intrastate services:

[T]he Commission is prohibited from superseding state laws governing intrastate telecommunications service, no matter whether the Commission considers those laws to be uneconomical or inconsistent with its preferred policy approach.<sup>64</sup>

NASUCA relies on *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986), for the proposition that the FCC “is prohibited” from preempting State “other terms and conditions” regulation of intrastate wireless service.<sup>65</sup> In fact, the Supreme Court explicitly recognized in this very case that the FCC may preempt State regulation when “the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.”<sup>66</sup> In this regard, as noted above, the FCC has repeatedly recognized that preemption of State “other terms and condi-

---

ing in this area.” *Ivy Broadcasting v. AT&T*, 391 F.2d 486, 491 (2d Cir. 1968). *See also Crockett Telephone v. FCC*, 963 F.2d 1564, 1565 (D.C. Cir. 1992); *New York Telephone v. FCC*, 831 F.2d 1059, 1064-66 (2d Cir. 1980); *North Carolina Utilities Comm'n v. FCC*, 552 F.3d 1036, 1050 (4<sup>th</sup> Cir.), *cert. denied*, 434 U.S. 874 (1977); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Vaigneur v. Western Union*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940)(“The effect of the [Communications Act] is to bring all interstate communications under [its] coverage to the exclusion of local statutes or decisions.”).

<sup>63</sup> See NASUCA Comments at 8.

<sup>64</sup> *Id.* at 7.

<sup>65</sup> See *id.* at 7 n.25. NASUCA’s additional reliance on the Section 414 savings clause (*see id.* at 7 and 10), lacks merit, as Sprint Nextel has previously discussed. See Nextel Comments at 21-22; Sprint Comments at 18-21.

<sup>66</sup> *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 368-69. See also *Geier*, 529 U.S. at 881 (State law tort suits are properly preempted when such litigation would have “stood as an obstacle to” DOT regulations and would have precluded “the variety and mix of devices that the federal regulation sought.”); *Second CMRS Order*, 9 FCC Rcd 1411, 1506 n.515 (1994) (“[F]ederal courts have held that . . . state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy.”).

tions” regulation of intrastate wireless service is necessary when such State regulation frustrates federal policies.<sup>67</sup>

Indeed, NASUCA’s argument is incompatible with the statute upon which it relies. Congress made explicitly clear in Section 332(c)(3) that the FCC is not prohibited from preempting State “other terms and conditions” regulation. The statute provides that “*this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*”<sup>68</sup> Thus, while Section 332(c)(3) does not itself preempt State regulation of “other terms and conditions,” neither does it bar the FCC from preempting such State regulation under its general implied (or conflicts) preemption authority.<sup>69</sup> Indeed, the Commission recognized in implementing the 1993 Budget Act that it possesses the authority to preempt State regulation of “other terms and conditions” if the State regulation “thwarts or impedes a valid Federal policy.”<sup>70</sup> And, given the Congressional directive discussed above, the Commission is required to preempt State “other terms and conditions” regulation when such regulation undermines consumer choice and a Federal regulatory framework.

Also without merit is NASUCA’s suggestion that “the Commission’s authority over intrastate CMRS extends only to ‘entry’ and ‘rates.’”<sup>71</sup> In fact, the FCC has already rejected this

---

<sup>67</sup> See Part IV.A *supra*.

<sup>68</sup> 47 U.S.C. § 332(c)(3)(A)(emphasis added). In addition, the very legislative history upon which NASUCA relies (see Comments at 11) explicitly states that “nothing *here* [*i.e.*, § 332(c)(3)] shall preclude a state from regulating the other terms and conditions of commercial mobile service.” H.R. REP. NO. 103-111 at 261 (emphasis added).

<sup>69</sup> In contrast, other provisions of the Act are expressly designed to preserve State authority from preemption by the FCC more broadly. See, *e.g.*, 47 U.S.C. §§ 227(e)(1), 332(c)(7), and 532(g).

<sup>70</sup> *Second CMRS Order*, 9 FCC Rcd 1411, 1506 nn. 515, 517 (1994).

<sup>71</sup> NASUCA Comments at 10.

position, noting that the “1993 Budget Act significantly changed the regulatory framework for CMRS” by, among other things, “add[ing] an exception to section 2(b)” that historically fenced off FCC authority over intrastate wireless services.<sup>72</sup>

The FCC and States thus share jurisdiction over “other terms and conditions” regulation of intrastate wireless service. The difference is that Congress has charged the FCC, not the States, with establishing a “Federal regulatory framework” for CMRS that contains the “appropriate level of regulation”:<sup>73</sup>

In place of traditional public utility regulation, the 1993 Budget Act sought to establish a *competitive nationwide market* for commercial mobile radio services with limited regulation.<sup>74</sup>

Congress has explicitly charged the FCC with establishing “a Federal regulatory framework over all commercial mobile services.” The Commission would be unable to implement this mandate if, as NASUCA claims, the FCC possesses no regulatory authority over intrastate wireless services (other than rates and entry) and cannot preempt State regulation.

NASUCA is correct on one point: “the intent of Congress, whether to preempt state law or to allow it to operate, is the ‘ultimate touchstone’ in preemption analysis.”<sup>75</sup> As Sprint Nextel demonstrates above, the Congressional intent concerning wireless service is unequivocal: a “uniform national policy is necessary and in the public interest” and the FCC shall establish a “Fed-

---

<sup>72</sup> *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9510, 9640 ¶ 84 (2001). Given this amendment to Section 2(b), the Consumers Union reliance on traditional principles of federalism (*see* Comments at 3) is misplaced.

<sup>73</sup> *Second CMRS Order*, 9 FCC Rcd 1411, 1418 ¶ 14 (1994).

<sup>74</sup> *Unified Intercarrier Compensation*, 16 FCC Rcd at 9640 ¶ 84 (emphasis added).

<sup>75</sup> NASUCA Comments at 5.

eral regulatory framework” for CMRS because “State regulation can be a barrier to the development of competition in this market.”<sup>76</sup>

**V. POINT-OF-SALE ETF DISCLOSURE REQUIREMENTS SHOULD BE CONSIDERED IN THE PENDING TRUTH-IN-BILLING DOCKET**

UCAN asserts that ETFs are “rarely discussed” at the point of sale,<sup>77</sup> although it does not provide evidence to support this sweeping assertion. The disclosure rules pertaining to ETFs are not properly addressed in this declaratory ruling docket, but in the pending *Truth-in-Billing* rulemaking docket that is already examining disclosure requirements for wireless services.<sup>78</sup>

Sprint Nextel is compelled, however, to respond briefly to NASUCA’s assertion that Sprint and Nextel “bury their ETFs in their marketing materials.”<sup>79</sup> This allegation, to the extent it suggests that customers are unaware of ETFs before service is activated, lacks merit. For example, wireless service plans offered under the Sprint brand have numerous “end-to-end” ETF disclosures, including:

- Notices in price advertisements (*e.g.*, print, TV, radio, in-store materials) that an offer is contingent upon agreement to an ETF;
- Disclosure of the existence of an ETF to a customer in a number of different ways before a customer commits to any agreement (*e.g.*, electronic signature pads in Sprint stores, IVR scripts in telephone sales); and finally,
- The customer contract, including discussion of ETFs, is included in the welcome package that Sprint mails to new customers. Upon receipt of this letter, the customer may change their mind regarding their decision to agree to an

---

<sup>76</sup> See Part IV.A *supra*.

<sup>77</sup> UCAN Comments at 3.

<sup>78</sup> See *Truth-in Billing and Billing Practices*, CG Docket No. 04-206, *Second Further Notice of Proposed Rulemaking*, FCC 05-66, 20 FCC Rcd 6448 (March 10, 2005). This rulemaking proceeding likewise addresses the responsibilities of sales agents.

<sup>79</sup> NASUCA Comments at 30.

ETF and cancel service without any penalty within the 14-day cancellation period.

Wireless service plans offered under the Nextel brand also have numerous end-to-end ETF disclosures, including:

- Notice in all print advertising, and other price advertising where possible (e.g., TV and radio), that a “\$200 early termination” fee applies (after a 15-day trial period) in cases where a customer cancels a service agreement before a term expires;
- “Pop-up” notices on the Nextel service website alerting customers shopping for a rate plan with a ETF component to the fact that a “\$200 early termination fee applies, after a 15-day trial period;”
- Disclosure of ETF policies through other sales channels such as retail outlets (through customer representative training) and telephone sales (through IVR scripts);
- Two notices in the actual service contract. First, the terms of the subscriber agreement state that Nextel rate plans have an ETF and that early termination of the agreement will result in a \$200 ETF. Second, prior to actually signing a Nextel service agreement, each customer must read and “check-off” an “Expectation Checklist.” One of the checklist provisions – which must be checked prior to entering a service agreement – expressly verifies that the customer was provided “guidance or information “ on “Nextel’s policy governing early termination of all or a part of your service and the associated \$200 termination fee per number terminated.”

Through these disclosures, consumers are informed of the ETF provisions in Sprint Nextel rate plans at numerous points during the sales process. Accordingly, the Commission should reject the contentions made by NASUCA that Sprint Nextel somehow “hides” the existence of ETFs in rate plan offerings. Finally, it should also be noted that to the extent consumers object to carrier disclosure practices, state consumer protection laws already exist that would subject carriers to liability for deceptive trade practices.

## **VI. CONCLUSION**

Class action litigation and potentially inconsistent court decisions has inserted uncertainty in an area that has previously been considered settled law. This uncertainty threatens to undermine the national rate plans and cost savings that have benefited the American consumer and

driven the success of the wireless industry. For the foregoing reasons, Sprint Nextel respectfully requests that the Commission expeditiously grant the declaratory ruling petition filed by CTIA.

Respectfully submitted,

**SPRINT NEXTEL CORPORATION**

*/s/ Luisa L. Lancetti*

---

Luisa L. Lancetti  
Vice President  
Government Affairs - Wireless Regulatory  
Charles McKee  
General Attorney  
Christopher R. Day  
Counsel

Sprint Nextel Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20004  
202-585-1949

August 25, 2005