

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF SUNCOM WIRELESS OPERATING COMPANY, L.L.C.

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SUMMARY

In their Petitions for Declaratory Ruling, SunCom and CTIA showed that the plain language of Section 332(c)(3)(A), its legislative history and regulatory background, and subsequent interpretive decisions by the Commission and the courts establish that early termination fees like those charged by SunCom and most, if not all, CMRS carriers are “rates charged” within the meaning of the statute. This is because early termination fees are part of the total financial arrangement under which CMRS carriers provide service to their customers and because they are an integral part of how CMRS providers structure their rates. SunCom and CTIA further showed that state courts should be precluded from entertaining challenges to early termination fees based on equitable doctrines like *quantum meruit*, unjust enrichment, and money had and received (and other doctrines that would require an analysis of the reasonableness of a particular early termination fee) because such claims would require state courts to exercise regulatory authority over wireless rates – a power that is denied to them by both express statutory preemption and conflict preemption with federal wireless policy.

In response, the parties filing in opposition to the SunCom and CTIA Petitions raise a hodgepodge of objections based on mischaracterizations of the Petitions, the facts surrounding carriers’ collection of early termination fees, and the law governing the Commission’s consideration of the Petitions. For her part, Edwards renews her inappropriate requests that the Commission undertake a detailed factual and legal analysis of her claims before the South Carolina courts in the case of *Edwards v. SunCom* and issue highly specific rulings on the merits of those claims. As SunCom explained in its comments, the Commission should reject these entreaties and instead issue the interpretations of federal law and federal regulatory policy that were requested by the South Carolina court in this docket and by CTIA in its Petition in the companion docket.

On these questions, the Opposing Commenters raise three principal arguments. First, they seek to portray the Commission and court precedent interpreting Section 332(c)(3)(A) as precluding a finding that early termination fees are “rates charged.” To the contrary, the Commission has read the prohibition on state regulation of rates broadly to bar states from regulating overall rate levels, any individual rate element, or the manner in which rates are structured through wireless service agreements. This interpretation is consistent with both Congressional and FCC policy, which is designed to allow the competitive marketplace to set and structure rates based on consumer demand. Accordingly, the Commission has barred state regulation of a wide range of CMRS rate practices, including charging in whole-minute increments and recovering costs through line-item billing charges. Under this precedent, any part of the economic exchange between the customer and the carrier for the provision of equipment and service is part of the “rate” for purposes of Section 332. The fact that the early termination fee is interdependent with other rate elements further demonstrates that it is both part of the price in certain term contracts and that it is a rate element within a coherent rate structure that evolved based upon revealed customer preferences.

Opposing Commenters’ attempts to portray relevant federal case law as requiring a finding that early termination fees are “other terms and conditions” are similarly unavailing. In this docket, the South Carolina court has asked for the views of the Commission, as the agency Congress charged with interpretation and enforcement of the Communications Act, including Section 332. As SunCom acknowledged in its Petition, court decisions addressing early termination fees have come to troublingly diverse conclusions. This should prompt the Commission to act, but the cases relied upon by Opposing Commenters should be rejected as inapposite because they typically address issues of federal removal jurisdiction and complete

preemption rather than the merits of the preemption question now clearly presented in both these dockets. Where courts have reached the substance of federal preemption, the better reasoned cases have found early termination fees to be rates charged, not terms and conditions. As discussed in detail below, the Commission should follow its own precedents and the more persuasive judicial decisions, not cursory examinations of the issue made in the context of declining to exercise federal jurisdiction.

The second argument raised by the Opposing Commenters is that federal preemption doctrine, the language of Section 332(c)(3)(A), and the legislative history of the statute demonstrate that early termination fees are “other terms and conditions” of CMRS service rather than “rates charged.” In particular, Opposing Commenters claim that the Commission’s consideration of whether early termination fees are “rates charged” is constrained by federal preemption doctrine, which requires a plain statement of congressional intent to preempt state law before preemption can be found. This argument fails for at least three reasons. First, determining that early termination fees are “rates charged” does not require the Commission to preempt anything. It simply requires the Commission to exercise its undoubted authority to administer and construe the Communications Act. Second, even to the extent that federal preemption principles should guide the Commission’s consideration, Congress’s intent to preempt state rate regulation of CMRS is clear and express, and encompasses the limited classes of claims against early termination fees described in the Petition. Third, the Supreme Court has recognized, and the Commission has often noted, that federal agencies have broad authority to preempt state law that interferes with a congressional design that the agency has been charged with effectuating. That clearly would be the case here because Congress intended there to be a

uniform nationwide market for CMRS rates and services, not a market balkanized by numerous different state regulatory schemes.

Opposing Commenters third argument is that Congress' references in the legislative history to state authority over the "bundling of services and equipment," "other consumer protection matters," and "matters generally understood to be 'terms and conditions'" shows that it intended states to have authority over early termination fees. None of these arguments are persuasive because nothing in the legislative history suggests that state authority extends to passing on the "reasonableness" or "cost basis" of any price term in a wireless contract. In any event, the legislative history cannot be used to override the statutory language and purpose, or the Commission's authority to interpret and apply the statute in light of federal regulatory policy in the wireless arena.

Finally, Opposing Commenters largely ignore SunCom's and CTIA's requests that the Commission confirm that state law claims requiring courts to examine the reasonableness of an early termination fee would involve that court in prohibited rate regulation. This ruling would be consistent with Commission precedent and would ensure that state law claims like *quantum meruit*, unjust enrichment, money had and received, and unlawful penalties will not allow courts to engage in back-door ratemaking. WCA's argument that the Commission should preserve claims that early termination fees are unlawful penalty clauses proves the point that all types of claims requiring a determination of reasonableness should be preempted. WCA flatly admits that the purpose of bringing these claims is to ensure that the use of early termination fees is abolished and their transparent argument that such claims do not require a determination of the reasonableness of early termination fees is simply untrue. Such claims unquestionably would

embroil state courts in precisely the type of evaluation of CMRS rates that Congress intended to prohibit in Section 332(c)(3)(A).

Because all canons of statutory construction and the factual record before the Commission demonstrate that the requested rulings should be granted, and the Opposing Commenters have failed to undermine that conclusion in any way, the Commission should grant the declaratory rulings that SunCom and CTIA seek.

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In the Matter of)	
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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))	WT Docket No. 05-193
)	
Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(C)(3)(A))	WT Docket No. 05-194

To: The Commission

REPLY COMMENTS OF SUNCOM WIRELESS OPERATING COMPANY, L.L.C.

SunCom Wireless Operating Company, L.L.C., f/k/a Triton PCS Operating Company, L.L.C. ("SunCom"), by its attorneys and pursuant to Section 1.415(c) of the Commission's rules,¹ hereby files these reply comments in response to comments opposing the above-captioned petitions for declaratory rulings filed by the National Association of State Utility Consumer Advocates ("NASUCA"), the American Association of Retired Persons ("AARP"), the Wireless Consumers Alliance, et al. ("WCA"), Consumers Union, et al. ("Consumers Union"), the U.S. Public Interest Research Group ("USPIRG"),² the Utility Consumers' Action Network

¹ 47 C.F.R. § 1.415(c).

² On August 16, 2005, USPIRG filed a lengthy *ex parte* presentation with the Commission. Much of USPIRG's submission advocates the elimination of early termination fees, an issue that is not before the Commission. USPIRG *Ex Parte* at 11-12, 23. SunCom briefly responds to

(“UCAN”), and Debra Edwards (“Edwards”) (collectively the “Opposing Commenters”). For the reasons set forth below, the Commission should reject the Opposing Commenters’ arguments, grant the requests for declaratory ruling of SunCom and the Cellular Telephone and Internet Association (“CTIA”) (the “Petitions”), and deny Edwards’ declaratory ruling requests.³

INTRODUCTION

As many Opposing Commenters concede, the issues before the Commission in this proceeding are primarily legal in nature. The SunCom and CTIA Petitions call upon the Commission to interpret a statutory provision in light of its manifest purpose, the regulatory background at the time of its enactment, and subsequent Congressional and FCC statements of federal regulatory policy regarding wireless service. Based on the record before it, the Commission should grant SunCom’s and CTIA’s declaratory ruling requests and find that: (1) CMRS carriers’ early termination fees are “rates charged” because they are part of the overall price for wireless service in term contracts and a rate element within a coherent and interdependent rate structure; (2) state court challenges to early termination fees that rely on equitable doctrines like *quantum meruit*, unjust enrichment, money had and received, state prohibitions on “liquidated damages,” and other theories that would require state courts to engage in exactly the kind of analysis of revenues and costs that Congress intended to forbid in

USPIRG’s late-filed submission below, but reserves the right to respond more fully at a later date if necessary.

³ SunCom filed Comments in response to Edwards’ Opposition to Petition for Declaratory Ruling and Cross-Petition for Declaratory Rulings (the “Cross-Petition”) on August 5, 2005 (the “SunCom Comments”). These reply comments generally respond only to the comments filed in opposition to SunCom’s and CTIA’s Petitions.

the wireless context; and (3) the early termination fees charged by SunCom in the South Carolina case of *Edwards v. SunCom*⁴ are “rates charged.”⁵

SunCom and the other CMRS industry commenters in this proceeding have demonstrated beyond any doubt that the termination fees they charge to customers that cancel service prior to the expiration of the terms established by their service agreements are an integral part of their rate structure and an important means of recovering the costs of initiating and continuing service to their customers. The terms of the statute, its legislative history, the regulatory background against which it was passed, and Commission and court precedent interpreting Section 332(c)(3)(A), all demonstrate that the Commission should grant the requested declaratory rulings.

In response to the CMRS industry’s overwhelming showing on these points, the Opposing Commenters raise a hodgepodge of objections based on mischaracterizations of the Petitions, the facts surrounding carriers’ collection of early termination fees, and the law governing the Commission’s consideration of the Petitions. As described below, the Commission should reject each of these arguments and grant the Petitions.

⁴ *Debra Edwards v. SunCom*, No. 02-CP-26-3539 (S.C. Ct. of Common Pleas, filed May 25, 2004) (“*Edwards v. SunCom*”).

⁵ CTIA’s Petition requests only the first two of these rulings. As explained in SunCom’s Comments, the third requested ruling is included to comply with the terms of the court order under which SunCom filed its Petition. SunCom Comments at 5 n.7.

I. THE COMMISSION SHOULD REJECT EDWARDS' RENEWED REQUESTS THAT IT USURP THE SOUTH CAROLINA COURT'S ROLE BY MAKING INAPPROPRIATE FINDINGS OF FACT AND LAW IN THE CASE OF *EDWARDS V. SUNCOM*.

As SunCom explained in its comments, Edwards' Cross-Petition asked the Commission to make numerous findings of fact and law that properly are within the province of the South Carolina courts.⁶ SunCom further showed that Edwards' requests go far afield from the limited declaratory rulings that the South Carolina court directed SunCom to obtain.⁷ In her comments, Edwards renews these requests, asking the Commission to base its decision in this case on: (1) her construction of her customer contract – a matter that will be hotly contested in the underlying litigation; (2) her construction of the scope of her claims before the South Carolina trial court – a matter that should be decided by the South Carolina court; and (3) her view of how her claims will be evaluated under South Carolina law – a view that is demonstrably false, but in any event is a matter for the South Carolina courts.⁸ Moreover, Edwards explicitly renews her request that the Commission decide whether her claims before the South Carolina court are preempted by asking the Commission to find that her claims would be permissible even if the Commission finds that early termination fees are “rates charged” under the statute.⁹

⁶ SunCom Comments at 20-25.

⁷ *Edwards v. SunCom*, Supplemental Order Requiring Defendant to File Petition for Declaratory Ruling at the Federal Communications Commission and Staying Case Until Such Ruling Is Issued, attached as Exhibit A to the SunCom Petition.

⁸ Edwards Comments at 6-9; *see also* SunCom Comments at 24 (describing Edwards' inaccurate assertions regarding the evaluation of damages in *quantum meruit* cases under South Carolina law).

⁹ Edwards Comments at 37-42. *See also* Cross-Complaint at 47-55 and Appendix D (Declaratory Ruling request No. 8); *see also* SunCom Comments at 25.

There is no need for the Commission to wade into the morass into which Edwards has invited it. SunCom has requested three simple declaratory rulings that are supported by ample evidence and precedent as described below. These rulings will answer all of the questions that the South Carolina court has asked, and will not require the Commission to intrude into matters that will properly be decided by the South Carolina court. The trial court sought the Commission's expert judgment on an issue of federal law, in the area where the Commission has authority to interpret the statute in light of regulatory policy under *Chevron*.¹⁰ As the Commission has noted in the past, interpretations of state law are for the state courts, not the Commission.¹¹ Indeed, the CTIA petition presents the Commission with essentially the same legal questions as presented in this docket, namely: (1) whether early termination fees are rates within the meaning of Section 332(c)(3)(A); and (2) whether state causes of action that compare early termination fees to state-mandated cost recovery criteria constitute regulation of rates within the meaning of the statute.

Strangely, although Edwards continues to press the Commission to rely on her highly selective presentation of the facts in *Edwards v. SunCom* (which, with the exception of the fact that SunCom charged early termination fees, should be entirely irrelevant to this proceeding) to make numerous inappropriate findings of fact and law, and, ultimately, to decide the preemption issue, she also acknowledges that the issue of preemption ultimately should be decided by the South Carolina court.¹² SunCom wholeheartedly agrees with the latter sentiment and,

¹⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

¹¹ Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17021, 17037 ¶ 28 (2000) (“*Wireless Consumers Alliance*”); Sprint PCS and AT&T Corp., *Declaratory Ruling*, 17 FCC Rcd 13192, 13198 n.40 (2002)

¹² Edwards Comments at 10-12.

accordingly, the Commission should ignore Edwards' request that the Commission make the findings of fact and law that she has requested and reject her requests that the Commission decide that her claims before the South Carolina court are not preempted.

II. THE PLAIN LANGUAGE OF SECTION 332(C)(3)(A), COUPLED WITH COMMISSION PRECEDENT AND THE BEST-REASONED FEDERAL CASE LAW, COMPELS A FINDING THAT EARLY TERMINATION FEES ARE “RATES CHARGED” UNDER SECTION 332(C)(3)(A).

SunCom and CTIA demonstrated in their Petitions that the plain language of Section 332(c)(3)(A) and compelling Commission and federal court precedent interpreting the statute require a Commission finding that early termination fees are “rates charged” within the plain meaning of Section 332(c)(3)(A). The Opposing Commenters seek to demonstrate that Commission and federal court case law precludes a finding that early termination fees are “rates charged” within the plain meaning of Section 332(c)(3)(A). As demonstrated below, these efforts plainly fail.

A. Commission Precedent Amply Supports The Conclusion That Early Termination Fees Are “Rates Charged.”

Opposing Commenters claim that the Commission has not defined the term “rates charged” under Section 332(c)(3)(A) broadly enough to encompass early termination fees. This misreading of the Commission's case law ignores reality. As SunCom and CTIA have explained, the Commission has recognized that the statute insulates from state regulation both the rates that CMRS carriers charge and the manner in which they structure those rates.¹³ Moreover, the Commission's discussions of early termination fees in various contexts have left

¹³ Southwestern Bell Mobile Sys., Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19906-07 ¶ 20 (1999) (“*SWBT Mobile*”); Wireless Consumers Alliance, 15 FCC Rcd at 17028 ¶ 13; Truth-in-Billing and Billing Format, *Second Report And Order, Declaratory Ruling*,

no doubt that the Commission considers early termination fees to be legitimate cost recovery mechanisms that can be used as a rate component to recover discounted service and equipment costs from early terminating customers.¹⁴

First, as the Commission has recognized, Section 332(c)(3)(A)'s ban on state regulation of CMRS rates "bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers."¹⁵ Under Congress' framework, no state regulatory entity, including state courts, may impose controls on either "rate levels" or "rate structures for CMRS," and states may not "prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."¹⁶ The Commission has found that Section 332(c)(3)(A) bars claims regarding wireless billing practices like incremental billing and rounding up because such claims would require states to improperly regulate the rates and rate structures employed by CMRS carriers.¹⁷ The Commission further has recognized that any claim that requires courts to determine the reasonableness of a CMRS carriers' rates or rate

And Second Further Notice Of Proposed Rulemaking, 20 FCC Rcd 6448, 6464-6467 ¶¶ 32-36 (2005) ("*Second Truth-In-Billing Order*").

¹⁴ SunCom Petition at 17-18 (citing Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 ¶ 15 (2003) ("[c]arriers may include provisions in their customer contracts on issues such as early termination and credit worthiness."); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17400 ¶ 692 (2003) (subsequent history omitted); *Ryder Communications, Inc. v. AT&T Corp.*, *Memorandum Opinion and Order*, 18 FCC Rcd 13603 (2003)).

¹⁵ *Wireless Consumers Alliance*, 15 FCC Rcd at 17028 ¶ 13.

¹⁶ *SWBT Mobile*, 14 FCC Rcd at 19906-07 ¶ 20 (emphasis added).

¹⁷ *Id.*

structures would be preempted, even if the claim itself were the type of breach of contract or consumer protection claim that otherwise might be permissible.¹⁸

Second, the Commission has determined that: (1) early termination fees are rates; and (2) they are legitimate cost-recovery and revenue-ensuring components of charges for service. The Commission's finding that liability imposed for early termination was part of a carrier's rates when they served a discernable cost-recovery role was affirmed by the District of Columbia Circuit in *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987). Moreover, the Commission repeatedly has recognized that early termination fees generally play precisely this cost-recovery role:

In approving [early termination fee] provisions, the Commission recognized implicitly that they were a valid *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long term service arrangements with their customers.¹⁹

This type of analysis of the cost-recovery role of early termination fees has been upheld by the District of Columbia Circuit.²⁰

¹⁸ *Wireless Consumers Alliance*, 15 FCC Rcd at 17041 ¶ 39 (finding that “a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective rate for services.”).

¹⁹ *Ryder Communications*, 18 FCC Rcd at 13617 ¶ 33 (2003).

²⁰ *Equip. Distributions' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987).

In addition to the authorities SunCom previously has cited, the Commission recently reviewed its previous interpretations of Section 332(c)(3)(A) in its *Second Truth-In-Billing Order* and concluded that it “consistently has interpreted the rate regulation provision of the statute to be broad in scope.”²¹ In that case, the Commission found that state actions that prohibit CMRS providers from recovering their costs of providing service through individualized line-item charges would run afoul of Section 332(c)(3)(A)’s ban on state rate regulation. Specifically, the Commission found that state regulations cannot “*prohibit* a CMRS carrier from recovering certain costs through” rate structures of their choosing.²² As the Commission noted, that result was compelled by its prior interpretations of Section 332(c)(3)(A) to protect CMRS providers from state regulation that seeks to: (1) prescribe the services for which CMRS providers are permitted to charge customers to recover the costs of providing service; or (2) control the manner in which CMRS providers structure their rates to recover these costs.²³

Opposing Commenters’ efforts to distinguish early termination fees from the rates and rate structures that the Commission has found to be “rates charged” are unavailing. First, Opposing Commenters claim that the relief requested by SunCom and CTIA is barred by the Commission’s holding in *Wireless Consumers Alliance* that Section 332(c)(3)(A) does not prohibit all awards of monetary relief resulting from claims against wireless carriers.²⁴ Similarly, WCA cites *Pittencreiff Communications* for the proposition that restrictions on early

²¹ *Second Truth-In-Billing Order*, 20 FCC Rcd 6462-63 ¶ 30.

²² *Id.* at 6463 ¶ 31 (emphasis in original).

²³ *Id.* at 6462-6464 ¶¶ 30-31 (citing *SWBT Mobile*, 14 FCC Rcd at 19906-07, ¶¶ 18-20; *Wireless Consumers Alliance*, 15 FCC Rcd at 17027 ¶ 12)

²⁴ WCA Comments at 33-34; Consumers Union Comments at 8; Edwards Comments at 33-34.

termination fees would not regulate rates, but would merely “increase the cost of doing business” for CMRS carriers, which they claim is not sufficient to constitute rate regulation under Section 332(c)(3)(A).²⁵ Those cases, however, stand only for the proposition that Section 332(c)(3)(A) does not preempt all monetary damage awards simply because the increased costs could lead indirectly to higher rates. That principle says nothing about whether claims against early termination fees are “rates charged” and it does not support Opposing Commenters’ position because the impact of restricting early termination fees would be to directly control the actual rates paid by each customer with a term contract.²⁶ Indeed, Opposing Commenters completely ignore the fact that barring CMRS providers from collecting early termination fees would materially alter the price that early-terminating customers would pay for service, allowing them to pay a lower effective rate than other customers that have actually fulfilled the terms of their service contracts. Moreover, state regulatory or court action would effectively prohibit CMRS carriers from recovering their costs of providing service to their early-terminating customers. These are clearly “rates charged” issues as the Commission has analyzed them.

Second, while NASUCA disingenuously claims that it “does not question the Commission’s definition of ‘rates’ to include the price” of CMRS service,²⁷ permitting state

²⁵ WCA Comments at 31 (citing *Pittencreiff Communications, Inc.*, 13 FCC Rcd 1735 (1997)).

²⁶ WCA is simply wrong when it complains that SunCom and CTIA have asked the Commission to “abandon its holding in *Wireless Consumers Alliance* and instead . . . adopt a rule that § 332 preempts the award of damages or other monetary relief pursuant to state contract and consumer fraud law.” WCA Comments at 34. The requested declaratory rulings would do no such thing. Declaring early termination fees to be “rates charged” would simply give guidance to trial courts and allow them to make an informed determination of whether claims against early termination fees are preempted.

²⁷ NASUCA Comments at 21 (citing *SWBT Mobile*, 14 FCC Rcd at 19906-07, 19908 ¶¶ 18, 19, 20, 23).

regulation of and state court actions challenging early termination fees would function as a direct control on how CMRS carriers structure their rates. Under the Commission's precedent interpreting Section 332(c)(3)(A), that means that early termination fees must be considered "rates charged."

Third, WCA also is wrong when it claims that attempting to further the important goal of nationwide rate uniformity for wireless carriers should not be part of the Commission's purpose in this proceeding.²⁸ As the Commission always has recognized, that policy is the one established by Congress and it must govern every decision the Commission makes in interpreting Section 332(c)(3)(A).²⁹ Thus, considerations of policy are not only appropriate in this proceeding, they are mandated by Congress. As described in the Petitions and the comments, these policies will be furthered dramatically by granting the requested declaratory rulings.³⁰

Therefore, under *SWBT Mobile*, *Wireless Consumers Alliance*, and the *Second Truth-In-Billing Order*, the term "rates charged" in Section 332(c)(3)(A) must, at a minimum, include all charges levied on customers by CMRS providers that are part of the customer's promised consideration for reductions in other rate elements in the context of post-paid term contracts.

B. The Record Demonstrates That Early Termination Fees Satisfy The Standard For Rates Charged Established By Commission Precedent.

The record in this proceeding conclusively demonstrates that early termination fees are "rates charged" under well-settled Commission precedent because they are: (1) a charge levied

²⁸ WCA Comments at 37-38.

²⁹ *Wireless Consumers Alliance*, 15 FCC Rcd at 17032-33, ¶¶ 20-21; *Second Truth-In-Billing Order*, 20 FCC Rcd 6448, 6466-67 ¶ 35.

³⁰ CTIA Petition at 29-31; SunCom Petition at 19-23. Comments of Nextel Communications, Inc. at 9-15; Comments of United States Cellular Corporation at 3-4.

for the provision of equipment and service; and (2) an integral part of the manner in which CMRS providers structure their rates in order to reduce initial costs to the consumer, while at the same time ensuring a minimum revenue stream to cover up-front subsidies provided by the carrier and the ongoing costs of providing service, *i.e.* full cost recovery. As SunCom and CTIA showed in their Petitions, early termination fees are “rates charged” within the meaning of Section 332(c)(3)(a) because they are part of the overall financial arrangement CMRS providers enter into with customers in exchange for the service they provide.

SunCom also provided the Commission with detailed evidence of the integral role that early termination fees play in its ability to recover the costs of providing CMRS service and to forecast future revenues so that the company is able to maintain its network and provide service to customers at a reasonable profit.³¹ As SunCom demonstrated:

SunCom designs its rates and rate structures to provide a competitive rate to its customers, while enabling SunCom to recover over the contract term its costs and to realize a return on its investment in providing service. Of course, SunCom’s ability to continue providing service is dependent on the revenue that its customers provide, so it is important to SunCom that it be able to make reasonably accurate projections regarding the revenue that its existing customers will produce. . . . To provide this stability that allows for [these projections], SunCom offers its service at a low initial price (often with a free or discounted handset) and with discounted monthly charges in exchange for a subscriber’s commitment to purchase SunCom’s service for a minimum length of time, most commonly 12 or 24 months. In establishing these rates, SunCom assumes that customers will take service for the term defined in the service contract each customer signs, and sets its rates accordingly to provide a competitively priced service, while still enabling SunCom to recover its costs and to allow SunCom to realize a return on its investment over the length of the contractual term.³²

³¹ SunCom Petition at 4-9 and Declaration of Charles Kallenbach at ¶¶ 10-13.

³² Kallenbach Decl. at ¶¶ 7-8.

This is standard industry practice and commenters supporting SunCom's and CTIA's Petitions provided ample supporting evidence both that current CMRS rate structures depend upon early termination fees to ensure cost recovery and that customers overwhelmingly prefer rate plans with long terms, low-priced handsets, low monthly service charges, and early termination fees.³³

Opposing Commenters argue that early termination fees cannot be a "charge for service" designed to recover the costs of providing service because they are only charged when a customer discontinues service before the end of the contract term or because they do not appear on monthly billing statements.³⁴ The record before the Commission shows, however, that early termination fees do constitute a "fee for service" because the existence of the early termination provision enables a customer with a long-term service contract to secure discounted equipment and a low monthly service charge.³⁵

³³ CTIA Petition at 1-2, 12-18; Nextel Comments at 4-7; US Cellular Comments at 3-4; Sprint Comments at 2-6; Cingular Comments at 2-3. AARP attempts to undermine this showing by relating stories about supposed admissions by CMRS company employees in litigation across the country that early termination fees are not designed to recover the costs of service. AARP Comments at 10-12. While AARP provides no actual evidence of these alleged admissions, the affidavit of Michael Attiyeh, Director of Consumer Product Management for AT&T Wireless Services, attached as Exhibit G to WCA's Comments clearly demonstrates the cost-recovery function that early termination fees perform.

³⁴ WCA Comments at 8; NASUCA Comments at 21; AARP Comments at 3, 9-10, 13; Consumers Union Comments at 6-7, 9-10. NASUCA is also wrong to claim that early termination fees are not a "rate charged" because they are not sensitive to "usage or calling activity." NASUCA Comments at 21. As the Commission well knows, most cellular rate plans entitle a user to a certain number of minutes of use per month for a specified rate. Customers pay the same rate, however, regardless of whether they actually use those minutes. If NASUCA's analysis were correct, then basic service charges would not be "rates charged" either, and the protections of Section 332(c)(3)(A) would become a dead letter.

³⁵ SunCom Petition at 4-6; CTIA Petition at 12-18; Nextel Comments at 5-6; Cingular Comments at 10-11. There is simply no merit to AARP's contention that the Commission cannot issue the requested declaratory rulings because facts remain in dispute. AARP Comments

The evidence further shows that CMRS providers give customers the choice of service plans that feature higher equipment costs and higher monthly service charges without early termination fees, and that customers consistently choose the plans that include early termination fees.³⁶ As SunCom explained:

the early termination fee component of SunCom's rates provides the customer a choice of how to pay for SunCom's service. The customer can fulfill his contractual obligations and enjoy discounted rates over the life of the contract, he can select a non-term service option and pay higher service rates on a monthly or prepaid basis, or he can terminate service before the term of his contract expires and pay for a portion of SunCom's costs and lost revenue in a lump-sum payment.³⁷

This shows that customers recognize and appreciate the discounted services they receive and that they are willing to trade the possibility that they will have to pay an early termination fee if they terminate service early for lower rates from another provider.³⁸ All of these facts refute the

at 18-19. Although the Opposing Commenters have *alleged* that early termination fees serve no valid cost recovery purpose, the *actual evidence* before the Commission demonstrates that they do. Therefore, there is no basis for considering this a disputed issue that forecloses the relief sought.

³⁶ SunCom Petition at 7-8 and Kallenbach Decl. at ¶16; Sprint Comments at 2-3; Nextel Comments at 6-7; CTIA Petition at 17-18.

³⁷ Kallenbach Decl. at ¶ 17.

³⁸ USPIRG's claims that early termination fees stifle customer choice ring hollow. USPIRG *Ex Parte* at 6-7. As the record in this proceeding shows, CMRS carriers typically offer their customers both term and non-term options for service. Because term-plan service generally is cheaper to obtain, customers often choose that option. While USPIRG chooses to view consumers that have exercised their free choice to select among carriers and rate plans as "captive customers," a more accurate appellation would be "market-driven consumers." Moreover, USPIRG's view that competition would increase if early termination fees were no longer charged is simply not credible on the record before the Commission. *Id.* at 7-8, 11-12. As the record shows, CMRS customers already have non-termination fee prepaid service options but, overwhelmingly, they choose term plans with early termination fees. Moreover, even if USPIRG were right, this would not be a basis for state courts to exercise authority over wireless rates. Rather, the issue would be one for the Commission under Section 201 and 202 of the Act.

Opposing Commenters assertion that early termination fees are not a rate because they do not correspond to the service provided to consumers.³⁹

Opposing Commenters also contend that early termination fees cannot be a cost-recovery mechanism because they remain constant throughout the life of the contract and are not prorated based on the length of time the customer has been receiving service.⁴⁰ This argument surely demonstrates how far down the prohibited road of rate regulation Opposing Commenters are willing to take state regulation of early termination fees. As SunCom and CTIA explained in their Petitions, early termination fees are set at the level necessary to facilitate “carriers’ overall program for attempting to recover the costs of providing service,” and are necessary to “preserve the economic viability of rate plans based upon term contracts.”⁴¹ SunCom showed that if it

were unable to collect early termination fees, it would be forced to raise its prices on its term plans or eliminate them altogether. SunCom would no longer have a rate mechanism that would allow it to recover some of the costs of providing discounted start-up and service rates to long-term customers or to recover some of the revenue that it would have obtained from those customers had they not terminated before the end of the contract term. This would deprive customers of the ability to realize long-term discounted

³⁹ WCA attempts to make much of the fact that if a customer completes their service term, they pay no early termination fee. WCA Comments at 9. But this is only natural because the intended effect of the early termination fee is to increase the rate paid by the early terminating customer for service the CMRS provider already has rendered and to recover at least a portion of the equipment discount and lower monthly rates that the CMRS carrier already has provided. In essence, the early termination fee is an alternative means of paying for the equipment and the service, selected by the customer through early termination of the contract. There is no reason to adjust the rate paid by a customer that had fulfilled the terms of its service contract and thereby paid in full for its equipment and service.

⁴⁰ Consumers Union Comments at 10-11; AARP Comments at 3, 12, 22; UCAN Comments at 4.

⁴¹ CTIA Petition at 14, 17; *see also* SunCom Petition at 5, 8.

CMRS rates and raise barriers to customer entry into CMRS service.⁴²

Thus, the economic reality is that early termination fees are part of the consideration paid by the subscribers to enjoy lower up-front costs and lower monthly rates. That the early termination fee is a contingent or alternative rate does not make it any less a rate. Charges for text messaging, roaming, or exceeding a monthly allotment of minutes of use are all “contingent” in the sense that not every customer pays them, but they promise to pay them if they are triggered by customer conduct is part of the consideration for the carrier’s provision of equipment and service, and when they are paid, they clearly are a rate element.

Just like any other rate, early termination fees are not customer-specific; they are instead placed at a level and charged in such a way that they maximize the likelihood that early terminating customers will not negatively impact revenue certainty, maintenance of the carriers’ network, and continuation of service.⁴³ The reality of rate setting is that some customers cost more than others, but uniform rates are set for all customers at a rate that enables the service provider to recover all their costs. Whether early termination fees recover costs best when they are prorated or flat-rated is precisely the type of cost-recovery question that should be determined according to CMRS carriers’ business judgment and the demands of the market. That is the framework established by Section 332(c)(3)(A).

⁴² Kallenbach Decl. at ¶ 18.

⁴³ WCA and Consumers Union acknowledge that Cingular charges a prorated early termination fee in portions of its service area. WCA Comments at 39; Consumer Union Comments at 10 & n.29. As one would expect, when costs are recovered through a prorated early termination fee, customers that terminate earlier in their service contracts pay a larger early termination fee than customers in the states where Cingular offers a flat termination fee for all early terminations. From the consumer’s standpoint, therefore, there is no particular reason to

Accordingly, there can be no doubt that CMRS early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A) as the Commission has interpreted it.⁴⁴ Likewise, given the explicit evidence that SunCom provided on these points regarding its own operations, there also is no doubt that the Commission should grant SunCom’s request for a declaration that the early termination fees subject to challenge in *Edwards v. SunCom* are “rates charged” as well.

C. The Best-Reasoned Federal Court Cases Also Support A Finding That Early Termination Fees Are “Rates Charged.”

Opposing Commenters also are unsuccessful in arguing that relevant court cases should persuade the Commission not to classify early termination fees as “rates charged.” As an initial matter, it is the Commission, not the state or federal courts, that Congress has charged with administration and interpretation of the Communications Act. Judicial decisions (outside of those rendered by the Supreme Court of the United States) are but suggestive authority. In any event, as SunCom has noted, the best-reasoned federal court decisions have recognized that early termination fees constitute “rates charged” because, among other reasons, they are an essential

prefer the prorated model over the cost-spreading flat-rated model other than individual preference.

⁴⁴ There is no merit to WCA’s assertion that the Commission cannot find that early termination fees are “rates charged” in every case because each service contract must be individually evaluated. WCA Comments at 27. The record in this proceeding does not indicate any significant variation among the early termination fees charged by CMRS providers. As a general rule, term contracts have early termination fees and non-term contracts do not. Kallenbach Decl. at ¶¶ 14-19. This fact is so apparent, the Commission should simply take official notice of it. In any case, WCA’s argument provides no support for denying SunCom’s request for a declaratory ruling that the early termination fees it charges are “rates charged” under the facts before the Commission, because SunCom provided specific evidence that the early termination fee offered to Edwards was in exchange for the service provided to her and was designed to recover the costs of providing that service. *Id.*

part of the overall rate level and rate structures of commercial mobile radio service providers.⁴⁵

For example, the United States District Court for the Southern District of Illinois found in *Chandler* and *Redfern* that challenges to wireless early termination fees are barred by Section 332(c)(3)(A). As the court explained in *Chandler*:

the defendant explained that lower rates are offered on term plans because the early termination fee accounts for planned future earnings. On the other hand, plans with no expiration date charge higher rates because there is no early termination fee.

It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such fees is preempted by federal law . . .⁴⁶

⁴⁵ See *Chandler v. AT&T Wireless Servs., Inc.*, No. 04-180-GPM, 2004 U.S. Dist. LEXIS 14884, at *4 (S.D. Ill. July 21, 2004) (“It seems clear that the [early termination fee] is directly connected to the rates charged for mobile services, and any challenge to such a fee is preempted by federal law.”); *Redfern v. AT&T Wireless Servs., Inc.*, No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745, at *2 (S.D. Ill. June 16, 2003) (“the early termination fee affects the rates charged for mobile services,” precluding challenges to those fees under state law); *Aubrey v. Ameritech Mobile Commc’ns, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918, at *12 (E.D. Mich. June 14, 2002) (“[B]y alleging that the rates which AMC charged for terminating a subscriber’s service were exorbitant, it is clear that the Plaintiff is challenging the rates charged by AMC for its wireless services.”); *Simons v. GTE Mobilnet, Inc.*, No. H-95-5169, slip op. at 6 (S.D. Tex. Apr. 11, 1996) (dismissing plaintiff’s challenges to a wireless provider’s early termination fee and holding that such challenges were completely preempted by Section 332(c)(3)(A)); *Consumer Justice Found. v. Pac. Bell*, No. BC 214554, at *4 (Cal. Sup. Ct. July 29, 2002) (finding that early termination fee was “inextricably linked to the rates charged . . . for providing . . . wireless services”). See also *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (The challenge to “corporate account administrative fee” “necessarily raises the issue of whether plaintiff received adequate services in return for the Fee. It also raises the question of whether the Fee was unjust.”).

⁴⁶ *Chandler*, 2004 U.S. Dist. LEXIS 14884 at *3-4. NASUCA unsuccessfully attempts to attack cases like *Chandler* by claiming that they rely on discredited reasoning from the earlier Seventh Circuit Court of Appeals case of *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000). The Commission already has harmonized *Bastien* with its own case law. *Wireless Consumers Alliance*, 15 FCC Rcd 17021, ¶28 (“we read *Bastien* as standing for the more general proposition, with which we agree, that state law claims may, in specific cases, be preempted by Section 332”). *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004), provides no reason to think that the Commission’s reading of *Bastien* was incorrect. In any

As described above, Commission precedent confirms that the test laid out in *Chandler* comports with the Commission’s view of the statute.⁴⁷

In its Petition, SunCom demonstrated that the manner in which it structures its rates conforms to the test for “rates charged” laid out in *Chandler*. For example, SunCom showed that it offers both term and non-term rate plans, charging early termination fees only on those plans under which SunCom was entitled to rely on its customers’ taking service for a fixed period of time.⁴⁸ Moreover, SunCom detailed the role that assumption plays in the methodologies SunCom uses for structuring its rates and establishing the monthly service charges called for in its customer contracts.⁴⁹ Thus, clearly SunCom’s early termination fees are rates charged within the persuasive reasoning of the *Chandler* court.

The Opposing Commenters’ efforts to marshal federal court case law in support of their claims that early termination fees cannot be considered “rates charged” are utterly unsuccessful. First, in the main, the Opposing Commenters cite the same set of inapposite cases that Edwards

event, the more specific rationale of *Chandler* and *Redfern* discussed above was not even addressed in *Bastien*.

⁴⁷ AARP and WCA attempt to cast doubt on the reasoning of *Chandler* and *Redfern* by citation to three other inapposite cases decided by the same court that in no way undermine the conclusion that early termination fees are “rates charged.” See ARP Comments at 16 (citing *Kinkel v. Cingular Wireless*, No. 02-999-GPM, slip. op. at 3-4 (S.D. Ill. Nov. 8, 2002); *Zobrist v. Verizon Wireless*, No. 02-CV-1000-DRN, slip. op. at 4-5 (S.D. Ill. Dec. 6, 2002); *Votava v. Sprint Spectrum*, No. 02-CV-0932-DRH, slip op. at 4-5 (S.D. Ill. Dec. 10, 2002)); WCA Comments at 20, 25-28. In *Kinkel*, *Zobrist*, and *Votava*, the courts’ conclusion was based on evidence before the court indicating that customers paid an early termination fee regardless of whether or not they had signed a term contract. When the CMRS providers in *Chandler* and *Redfern* gave evidence that term contracts have early termination fees, while non-term contracts do not, the court reversed itself and recognized that early termination fees function as an integral part of CMRS carriers’ rate structure.

⁴⁸ Kallenbach Decl. at ¶¶ 15-16.

⁴⁹ *Id.* at ¶¶ 10-13.

relied upon in her Cross-Petition. Most of these cases involve CMRS practices other than early termination fees and address the question of whether the Communications Act “completely preempts” state law challenges to those practices, creating federal removal jurisdiction over those claims.⁵⁰ SunCom fully addressed these cases in its comments and will not do so again here.⁵¹ These cases generally contribute nothing to the discussion of whether early termination fees are “rates charged” or whether equitable claims like *quantum meruit*, unjust enrichment, or money had and received (or other theories that would require an analysis of the reasonableness of an early termination fee) should be preempted.

Second, Opposing Commenters cite a few poorly-reasoned, inapposite cases that purport to address the question of whether early termination fees are rates charged.⁵² However, these

⁵⁰ WCA Comments at 22-23 (citing *Brown v. Washington/Baltimore Cellular Ltd. Ptp.*, 109 F. Supp. 2d 421 (D. Md. 2000); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004); *Gatton v. T-Mobile*, 2003 WL 21530185 (C.D. Cal. April 18, 2003)); NASUCA Comments at 17-18 (citing *Brown*); Edwards Comments at 31-33.

⁵¹ See SunCom Comments at 16-17. AARP cites three additional complete preemption cases. *Corbett v. Sprint PCS*, Case No. 04-14142 (S.D. Fla. Aug. 24, 2002); *Waldman v. Cingular Wireless*, Case No. 04-80537-CIV (S.D. Fla. Sept. 14, 2004); *Cherry v. AT&T Wireless Serv., Inc.*, Case No. 8:04-cv-1356-T-26MSS (M.D. Fla. July 27, 2004). AARP Comments at n.36. WCA cites another: *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S.D. Fla. Sept. 23, 2004). WCA Comments at 20-21 & Exh. A. These cases typify complete preemption analysis because they concentrate not on the question of whether early termination fees are rates charged, but rather on whether Section 332(c)(3)(A) completely preempts state claims. Indeed, in *Corbett* the court noted that the state court would be responsible for addressing the defendant’s claims that Section 332(c)(3)(A) preempts the plaintiff’s claims. Slip op. at 7. See *Esquivel v. Southwestern Bell Mobile Sys.*, 920 F. Supp 713, 714 (S.D. Tex. 1996) (indicating that claims may be preempted even if doctrine of complete preemption does not apply). As SunCom explained in its comments, these “complete preemption” cases are irrelevant to the questions presented in this case because the question before the courts in those cases was whether the federal court has jurisdiction to hear a case, not whether state law claims are federally preempted.

⁵² NASUCA Comments at 13-16 (citing *Phillips v. AT&T Wireless*, No. 04-40240, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa July 29, 2004); *Iowa v. United States Cellular Corp.*, No. 4-00-90197, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa Aug. 7, 2000); *Cedar Rapids Cellular Tel.*,

cases turn on the complete preemption question, and therefore whatever language in dicta appears to reflect those courts' musing on whether early termination fees are "rates charged" should be ignored. Moreover, these poorly reasoned cases do not give appropriate weight to the critical distinction set forth in *Chandler* and *Redfern*: the dichotomy between term and non-term rate-plans and how that dichotomy demonstrates that early termination fees are part of CMRS carriers' rate structures. These cases also do not take proper account of the Commission's pronouncements in *Wireless Consumers Alliance* and the *Second Truth-In-Billing Order* regarding the breadth of the term "rates charged" in protecting from state regulation both the rates and rate structures of CMRS carriers.⁵³

For example, AARP and NASUCA rely heavily on *Cedar Rapids Cellular*.⁵⁴ This case is distinguishable because it involved an assessment of federal subject matter jurisdiction under the complete preemption doctrine not the question of whether individual claims should be found to be preempted by state courts.⁵⁵ Moreover, in that case the court declined to find that early termination fees were "rates charged" because it reasoned that invalidating early termination fees

L.P. v. Miller, No. 00-58, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa Sept. 15, 2000); *Esquivel*, 920 F. Supp. 713); WCA comments at 17-20 (same); Edwards Comments 31-33 (same); AARP Comments at 16-18. WCA also cites a hand-written order that apparently was rendered on a pre-answer motion to dismiss in the case of *Hall v. Sprint*, No. 04L113 (3d Jud. Cir. Ill. Aug. 10, 2004). WCA Comments at 21 & Exh. B. As that case apparently was rendered on no factual record and contains no reasoning whatsoever, it can only stand for the proposition that courts across the country are coming to widely divergent outcomes on this issue. Thus, prompt Commission action granting the Petitions is required.

⁵³ Indeed, with the exception of *Phillips*, each of the cases relied upon for this purpose by Opposing Commenters was decided before the Commission decided *Wireless Consumers Alliance*, and *Phillips* preceded the Commission's further explanation of its policies in the *Second Truth-In-Billing-Order*.

⁵⁴ NASUCA Comments at 14; AARP Comments at 17; UCAN Comments at 2.

⁵⁵ *Cedar Rapids Cellular*, 2000 U.S. Dist. LEXIS 22624 at *11-21.

would not require CMRS carriers to lower their rates, but only to restructure them.⁵⁶ This reasoning flies in the face of the Commission’s holdings in *SWBT Mobile*, *Wireless Consumers Alliance*, and the *Second Truth-In-Billing Order* that Section 332(c)(3)(a) protects not only the rates CMRS providers charge but also the way in which carriers structure their rates.

Similarly, Opposing Commenters’ reliance on *Phillips* is misplaced.⁵⁷ Here again, *Phillips* is inapposite because it arose in the context of a motion to remand a federal claim to state court based on the claim that the Communications Act does not completely preempt all state claims under Section 332(c)(3)(A).⁵⁸ The *Phillips* court found that the Communications Act does not have that level of preemptive force with respect to claims against early termination fees,⁵⁹ but that conclusion still leaves the ultimate question of whether a specific claim is preempted in the hands of the state court that received the remand. Commenting on the merits of the “rates charged” issue, the *Phillips* court noted that the argument that early termination fees are “rates charged” because they are “an integral part of its rate structure” was “compelling.”⁶⁰ Nonetheless, the Court concluded that early termination fees were not “rates charged” because it was convinced that the term “‘rate’ must be narrowly defined,” based in part on its reading of the Commission’s decisions in *Wireless Consumers Alliance* and *SWBT Mobile* that not every claim

⁵⁶ *Id.* at *20-*21.

⁵⁷ WCA Comments at 14, 17-19; NASUCA Comments at 16-17; Edwards Comments at 31-32.

⁵⁸ *Phillips*, U.S. Dist. LEXIS 14544 at *23-25.

⁵⁹ *Id.* at *37.

⁶⁰ *Phillips*, U.S. Dist. LEXIS 14544 at *36.

that “indirectly induce[s] rate increases” is a challenge to “rates charged.”⁶¹ Obviously the Commission rejected that view in the *Second Truth-In-Billing Order*, noting instead that the term rate should be given a broad construction and include the manner in which carriers structure their customer charges to ensure the success of Congress’ plan for a unified national market for CMRS.⁶²

None of the cases cited by Opposing Commenters found that Section 332(c)(3)(A) unambiguously excludes early termination fees from the category of “rates charged.” Given the myriad flaws in the procedural posture and reasoning of cases Opposing Commenters cite, there is no reason for the Commission to give them any persuasive weight. Instead, the Commission should adhere to its holdings in *SWBT Mobile*, *Wireless Consumers Alliance*, and the *Second Truth-In-Billing Order*, acknowledge that the analysis in those cases matches the analysis performed in the cases cited by SunCom and CTIA, and find that early termination fees are “rates charged” within the meaning of Section 332(c)(3)(A).

III. THE OPPOSING COMMENTERS’ ATTEMPTS TO SHOW THAT EARLY TERMINATION FEES ARE “OTHER TERMS AND CONDITIONS” FAIL BOTH AS A MATTER OF LAW AND AS A MATTER OF FACT.

The Opposing Commenters raise several arguments in an attempt to show that early termination fees are among the “other terms and conditions” over which state governments retain some authority. First, they argue that the doctrine of federal preemption requires the Commission to construe the term “rates charged” narrowly and “other terms and conditions” broadly to preserve state authority. Second, they argue that the legislative history requires a

⁶¹ *Id.* at *24-*25, *36.

⁶² *Second Truth-In-Billing Order*, 20 FCC Rcd at 6462-63 ¶ 30.

finding that claims against early termination fees are within state courts' authority because such fees: (1) present a "service and equipment bundling" issue; (2) implicate states' interests in "consumer protection;" and (3) are "generally understood" to be "terms and conditions." Third, Opposing Commenters claim that early termination fees must be contractual "terms and conditions" because: (1) they are "liquidated damages" provisions; and (2) they are presented in customer contracts in a portion of the contract labeled "terms and conditions." Each of these arguments is defective and should be rejected.

A. Principles Of Federal Preemption Do Not Suggest A Finding That Early Termination Fees Are "Other Terms And Conditions" Under Section 332(c)(3)(A).

Opposing Commenters claim that the Commission is barred from granting the Petitions by principles of federal preemption, particularly by the Supreme Court's "plain statement rule."⁶³ Essentially, Opposing Commenters argue that because Section 332(c)(3)(A) does not contain the words "early termination fees," the Commission must ensure that state law claims challenging those fees are not preempted.

This spurious argument is based in part on the false claim that SunCom and CTIA have requested that the Commission preempt "all state-law challenges, of any kind or character, to termination fees that wireless carriers impose when a subscriber's service is terminated before its expiration date."⁶⁴ This is a blatant mischaracterization of the relief that SunCom and CTIA have requested. SunCom and CTIA have sought a declaration that early termination fees are

⁶³ WCA Comments at 8, 10-11; NASUCA Comments at 4-7; Edwards Comments at 13-31.

⁶⁴ WCA Comments at 1, 7; NASUCA Comments at 3-7. In a similar vein, AARP claims that SunCom and CTIA have sought to eliminate the application of all state statutory and common law of contracts to wireless service. AARP Comments at 4-5. This is pure hyperbole.

“rates charged” and that state courts may not superimpose any equitable principles to adjudicate the “reasonableness” “fairness” or “cost-basis” of this wireless rate element.⁶⁵ This is, in essence, the ruling that the South Carolina courts directed SunCom to seek,⁶⁶ and the requested ruling comports with Commission precedent that places the ultimate question of preemption in most cases in the hands of individual courts.⁶⁷ This request does not require the Commission to preempt *anything*. Instead, it is simply a request that the Commission exercise its undoubted authority to administer and construe an important provision of the Communications Act.⁶⁸

In any case, Opposing Commenters badly misconstrue the effect that federal preemption principles should have on the Commission’s evaluation of the Petitions. Supreme Court precedent does not require the Commission to construe the term “rates charged” narrowly to preserve state law claims against early termination fees for two reasons.

SunCom and CTIA seek only declarations that would cabin the application of state contract law to CMRS “rates charged” within the limitations set by Congress.

⁶⁵ The wisdom of the approach advocated by SunCom and CTIA is demonstrated by the Opposing Commenters’ repeated citation to particular state statutes that they assert could not be preempted. NASUCA Comments at 25-26 (Iowa consumer protection statutes); WCA Comments at 14, 40 (California Uniform Commercial Code, California penalty clause statute); UCAN Comments at 5-6 (California law). The Commission is in no position to assess whether particular claims under these statutes should be preempted and the Petitions do not require the Commission to make any such ruling.

⁶⁶ See n.7, *supra*.

⁶⁷ *Wireless Consumers Alliance*, 15 FCC Rcd at 17036 (2000) (“the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by the state trial court based on the specific claims before it”).

⁶⁸ Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act [] and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act.” See *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2699 (2005) (citing 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377-78 (1999)).

First, the Opposing Commenters are wrong when they claim that the Commission is bound to choose the definition of “rates charged” that results in the least preemptive effect.⁶⁹ The Supreme Court’s “plain statement rule” requires only that Congress clearly indicate its intention to preempt state law in the language of the statute.⁷⁰ That “plain statement” test obviously is satisfied here because the Congress directed that:

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, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.⁷¹

Thus, Congress unambiguously stated its intention that CMRS providers remain free of state rate regulation.

Opposing Commenters argue that this statement cannot unambiguously include early termination fees because the phrase “early termination fees” is not specifically mentioned, but the Supreme Court has recognized that a “statute can be unambiguous” for the purposes of preemption analysis “without addressing every interpretive theory” conceivable.⁷² In addition, as the agency charged with administering the statute, the FCC can and should inform its statutory interpretation with its prior decisions and federal regulatory policy. Therefore, the “plain statement rule” does not in any way preclude the Commission from finding that early termination

⁶⁹ Edwards Comments at 14-19; NASUCA Comments at 4-6; Consumer Union Comments at 4-6.

⁷⁰ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁷¹ 47 U.S.C. § 332(c)(3)(A).

⁷² *Salinas v. United States*, 522 U.S. 52, 60 (1997). To satisfy the plain statement rule, a statute’s meaning “need only be ‘plain to anyone reading’” the statute. *Id.*; see *United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (“The fact that §371 has been applied to agreements

fees are “rates charged” under Section 332(c)(3)(A) and from finding that the statute preempts state court challenges to those fees under equitable doctrines like *quantum meruit*, unjust enrichment, and money had and received.⁷³

Second, the Supreme Court has noted that administrative agencies have wide latitude to preempt state law when doing so is necessary to ensure that independent state action does not intrude upon a carefully crafted federal regulatory scheme.⁷⁴ As the Court noted:

[W]e have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a narrow focus on Congress’ intent to supersede state law is misdirected, for a pre-emptive regulation’s force does not depend on express congressional authorization to displace state law. Instead the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empt any state efforts to regulate in the forbidden area.⁷⁵

Therefore, the “presumption against preemption” that the Opposing Commenters assert simply does not exist in cases like this one.

The Commission recently recognized this principle in its *Second Truth-In-Billing Order*, finding that Section 332(c)(3)(A) granted it broad authority to preempt state laws that conflict

not expressly anticipated by Congress nor specifically articulated in the statute does not demonstrate ambiguity . . .”).

⁷³ In addition, under *United States v. Locke*, 529 U.S. 89, 108 (2000), no plain statement rule or presumption against preemption can apply to an area of “significant federal presence” such as the regulation of interstate communications by radio.

⁷⁴ *New York v. FCC*, 486 U.S. 57 (1988).

⁷⁵ *Id.* at 64.

with Congress' goal of a uniform national market for CMRS services free of state rate regulation.⁷⁶ In that case, the Commission found that proposed state regulatory actions that would prohibit line-item charges on customer bills would directly impact CMRS carriers' ability to structure their rates as they choose on a nationwide basis, potentially disrupting Section 332(c)(3)(A)'s aim of creating nationwide uniformity.⁷⁷ As SunCom and CTIA pointed out in their Petitions, divergent case law on the issue of whether early termination fees are "rates charged" and confusion on the part of some courts as to the extent of Section 332(c)(3)(A)'s preemptive scope poses the same threats to national uniformity as the Commission faced in the *Second Truth-In-Billing Order*. As in that case, principles of federal preemption place no obstacle in the Commission's path to achieving Congress' goal of nationwide uniformity in the regulation of CMRS providers' rate structures in general and their early termination fees, specifically.⁷⁸

Accordingly, Opposing Commenters have failed to provide any reason why the Commission should not adopt the interpretation of the term "rates charged" that best suits the language and history of the statute and the federal policies that underlie it. As described above, that conclusion clearly must be that early termination fees are "rates charged" rather than "other terms and conditions."

⁷⁶ *Second Truth-In-Billing Order*, 20 FCC Rcd at 6464-67 ¶¶ 32-36 (2005).

⁷⁷ *Id.* at 6466-67 ¶¶ 35-36.

⁷⁸ Similarly, as SunCom explained in its Petition, Opposing Commenters' argument that the general savings clause in 47 U.S.C. §414 should preserve claims against early termination fees is meritless. Edwards Comments at 26-31; WCA Comments at 12; NASUCA Comments at 9-10. To the extent the Commission decides that the specific provisions of Section 332(c)(3)(A) treat early termination fees as "rates charged," they are not preserved by the savings clause. SunCom Comments at 34-35.

B. Regulation of Early Termination Fees Is Not Part of The States' Residual Authority To Enact Limited Regulation Of Service/Equipment Bundling.

Opposing Commenters claim that the House Committee's passing reference in the legislative history to "service and equipment bundling" as an example of the types of CMRS practices over which states retain their traditional authority was expressly aimed at recognizing state authority over the levying and collection of early termination fees.⁷⁹ This specious argument is based on the Opposing Commenters' misconception of the Commission's recognition in its 1992 *CMRS Bundling Order* that offering customers discounted equipment in exchange for three-month to one-year contractual commitments is beneficial to consumers⁸⁰ (and on SunCom's and CTIA's representations that early termination fees are justified, in part, by the need to recoup the costs of providing discounted handsets when customers establish service). WCA claims that Congress' presumed knowledge of the Commission's ruling in the *CMRS Bundling Order* shows that Congress intended to include early termination fees within the ambit of the state authority that it preserved over the "bundling of service and equipment."

This argument fails for two reasons. First, the mere fact that CMRS carriers use early termination fees, among other things, to recover some of the cost of providing discounted equipment is not enough to delimit those fees as part of the "practice of bundling equipment and service." If that were the case, then CMRS carriers' basic service rates, which also are designed to recoup a portion of the costs of providing service and equipment, also would not be subject to

⁷⁹ Consumers Union Comments at 3-4 (citing H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. At 261 (1993), *reprinted in* U.S.C.C.A.N. 378, 588); NASUCA Comments at 11-12 (same).

⁸⁰ Bundling of Cellular Customer Premises Equipment and Cellular Service, *Report and Order*, 7 FCC Rcd 4028, 4030 (1992) (the "*CMRS Bundling Order*").

preemption as “other terms and conditions.” Obviously, Congress did not intend for CMRS rates to be regulated through creative interpretations of the “other terms and conditions language” included in the statute, and the Commission should not ascribe to Congress this absurd intent.

Second, this argument fails on its own terms because the Commission never mentioned early termination fees in the *CMRS Bundling Order*. In that case, the Commission was chiefly concerned with the potential anticompetitive effects on the wireless service and cellular customer premises equipment (“CPE”) markets of allowing CMRS carriers to bundle service with CPE; it was not concerned with the impact of bundling on consumer contracts. In the process of examining the potential anticompetitive effects of service and CPE bundling, the Commission noted in passing that allowing carriers to bundle services and equipment had reduced costs to consumers. The Commission explained that the long-term service commitments that such agreements required were not anticompetitive because they did not allow one or a small number of carriers to dominate any market for service or CPE.⁸¹ The Commission never mentioned early termination fees, however, and it never suggested that states might combat anticompetitive conduct by regulating those fees.

Presuming, as the Commission should, that Congress was aware of the *CMRS Bundling Order* when it mentioned state authority over “bundling of services and equipment,” the obvious conclusion to draw is that Congress intended to recognize the states’ authority to combat market concentration and domination of cellular service and CPE markets by one or a few carriers. Such authority is entirely unrelated to empowering states to regulate the collection or amounts of

⁸¹ *Id.* at 4029 ¶ 12.

early termination fees as “other terms and conditions” of service, and ascribing that intent to Congress based on the *CMRS Bundling Order* would be entirely arbitrary.⁸²

C. Regulation of Early Termination Fees Is Not Part Of States’ Limited Authority Over “Consumer Protection Matters.”

The Opposing Commenters also claim that Congress’s mention in the legislative history of its intent to preserve state authority over “other consumer protection matters” shows Congress’ intent to include early termination fees among “other terms and conditions.”⁸³ This argument fails for at least two reasons. *First, any consumer complaint about “rates charged” can be characterized as a “consumer protection matter.”* So, if the Commission were to find that early termination fees are subject to challenge in state court for this reason, every CMRS rate practice could become fair game for state court challenge. Although SunCom does not contest that generally applicable state consumer protection law may be applied to CMRS carriers’ business practices under certain circumstances,⁸⁴ the point of Section 332(c)(3)(A) is to insulate “rates charged” from state rate regulation. The interpretation Opposing Commenters suggest would create a massive “other terms and conditions” loophole through which state authorities could engage in back-door rate regulation. It would be completely irrational to find that Congress intended to obliterate its protection of “rates charged” from state rate regulation through a brief mention of “other consumer protection matters” in the legislative history.

⁸² This is particularly the case here because as SunCom showed in its Comments, the Commission itself had recognized that termination liability was a part of telephone carriers’ rates long before Congress enacted Section 332(c)(3)(A). SunCom Comments at 9-11.

⁸³ WCA Comments at 14; NASUCA Comments at 12-18.

⁸⁴ *SWBT Mobile*, 14 FCC Rcd at 19908 ¶ 23; *Wireless Consumers Alliance*, 15 FCC Rcd at 17021 ¶ 27; *Second Truth-In-Billing Order*, 20 FCC Rcd at 6465-66 ¶ 33.

Second, the Commission also should reject Opposing Commenters' argument that it should preserve claims against early termination fees under states' authority over "other consumer protection matters" based on the supposed rise in consumer complaints about early termination fees.⁸⁵ As Sprint noted in its comments, only two one-thousandths of a percent of CMRS customers complained to the Commission about early termination of their contract.⁸⁶ Thus even presuming the unlikely fact that every single one of those complaints included a complaint about an early termination fee, only one in 45,000 CMRS customers had any such complaint.⁸⁷ This is hardly a justification for the vast expansion of state authority over CMRS rates advocated by Opposing Commenters. Moreover, as CTIA pointed out in its Petition, consumer claims are not one the rise; they are declining.⁸⁸ Accordingly, there is simply no reason to stretch the definition of "terms and conditions" to include early termination fee provisions because there is simply no evidence that they present a serious consumer protection concern.

D. Early Termination Fees Never Have Been "Generally Understood" To Be "Terms And Conditions" Of Service Rather Than "Rates Charged."

The Opposing Commenters also try to shoehorn early termination fees into the category of "other matters generally understood to fall under terms and conditions" mentioned in the legislative history. This argument, however finds no support from the various sources Opposing

⁸⁵ AARP Comments at 24; WCA Comments at 38 & n.17; *see also* Cross Petition at 55-58.

⁸⁶ Sprint Comments at 4.

⁸⁷ *Id.*

⁸⁸ CTIA Petition at n.6.

Commenters cite.⁸⁹ To the contrary, SunCom and CTIA have provided ample evidence of the Commission’s recognition that early termination fees were within the ambit of “rates charged” prior to enactment of Section 332(c)(3)(A).⁹⁰ Accordingly, Congress cannot have been presumed to have thought that early termination fees were “other terms and conditions,” but instead should be presumed to have regarded those fees as “rates charged.”⁹¹ The Opposing Commenters have provided no contemporaneous evidence that Congress would have considered early termination fees to be “other terms and conditions” when it enacted the statute in 1993.⁹²

Indeed, even the post-1993 “evidence” that Opposing Commenters use to demonstrate the supposedly “common” understanding that early termination fees are “terms and conditions” demonstrates no such thing. As Sprint points out, the Commission case most heavily relied upon by the Opposing Commenters on this point, the *CPUC Preemption Order* actually recognizes

⁸⁹ NASUCA Comments at 18-20; WCA Comments at 9, 11.

⁹⁰ SunCom Comments at 9-11; CTIA Petition at 18-19.

⁹¹ SunCom Comments at 9 (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well”) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978); *Goodyear Atomic Corp v. Miller*, 486 US 174, 184 (1988) (Congress is “presum[ed] knowledgeable about existing law pertinent to the legislation it enacts”).

⁹² Plainly the *CMRS Bundling Order* discussed above would be inadequate to serve this purpose since it did not even mention early termination fees.

that “termination charges” are a “component of cellular prices.”⁹³ This clearly rebuts any contention of a “general” understanding that early termination fees are “terms and conditions.”⁹⁴

For these reasons,, the Commission should reject Opposing Commenters’ argument that early termination fees are “generally understood to fall under ‘terms and conditions.’”

E. Regulation Of Early Termination Fees Is Not Part Of The States’ Residual Authority To Enact Limited Regulation Of “Other Terms And Conditions” Merely Because Opposing Commenters Prefer To Portray Them As Liquidated Damages Or Penalty Clauses.

Opposing Commenters’ efforts to characterize early termination fees as “liquidated damages” clauses do not automatically transform those provisions into “terms and conditions” that can be regulated by the states.⁹⁵ For example, WCA argues that the wording of early termination fee clauses in CMRS customer contracts typically is drafted to comply with state laws that ban contractual penalty clauses, and therefore they must be considered “contract remedies” rather than “rates charged.”⁹⁶ As CTIA pointed out in its Petition, however:

It is immaterial for purposes of the analysis of the ETF as a part of wireless carriers’ rate structure whether, as matter of contract law, the ETF is viewed as a conditional payment for the handset or services, as a reasonable approximation of lost profits, as reliance damages of the carrier or as some other proper measure of contract

⁹³ Sprint Comments at n.33.

⁹⁴ In attempting to demonstrate that early termination fees are “terms and conditions,” NASUCA asserts at length, but without any support whatsoever, that “[i]n the . . . commercial context, matters that do not directly deal with the price or quantity of goods or services being contracted for are generally understood to be other ‘terms and conditions’ of the contract.” NASUCA Comments at 19. Even if it NASUCA were correct, the distinction it draws between matters that do and do not “directly deal with the price . . . of services,” would not apply to early termination fees, which do have a significant impact on and “directly deal with” the rates ultimately charged to CMRS term customers.

⁹⁵ WCA Comments at 9, 13-16, 35-37, 40-41; Consumers Union Comments at 9-11; AARP Comments at 14-15; NASUCA Comments at 25.

⁹⁶ WCA Comments at 13-16.

damages to make the carrier whole for services and goods delivered and acceptable by the subscriber.⁹⁷

This is because from the perspective of analyzing whether a charge is a “rate charged,” the relevant considerations are whether the fee is charged in exchange for services rendered and whether it has a cost-recovery function. State law may refer to early termination fees as “liquidated damages,” but that does not change the fact that early termination fees are rate elements designed to help carriers’ recover their costs of providing service.

WCA also alleges that because early termination fee clauses provide CMRS carriers with “contract remedies” under state law regarding liquidated damages, consumers should have a concurrent right to challenge the imposition of such fees in state court.⁹⁸ The implication of this argument is that consumers will be unfairly deprived of a remedy for wrongful carrier conduct. This effort at misdirection fails, however, because consumer challenges to “rates charged” can be brought before the Commission under Sections 201, 207, and 208 of the Act, so consumers will not be deprived of a remedy in cases of wrongful carrier action.⁹⁹ On the other hand, failure of a customer to pay an early termination fee does not raise any issue of federal law, so the proper forum for such a complaint is in state court.

USPIRG’s attempts to inject ‘empirical data’ that customers view early termination fees as penalties rather than rates also provides no support for the position that those fees are “terms

⁹⁷ CTIA Petition at n.41.

⁹⁸ *Id.*

⁹⁹ SunCom Comments at 35. *See* 47 U.S.C. §§ 201(b), 207, 208. *See also Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 924 (N.D. Ill. 2001). There is thus no merit to AARP’s claim that CMRS carriers are claiming insulation from both state and federal law. AARP Comments at 6-8. SunCom never has contested that claims against early termination fees could be brought before the Commission in accordance with the Commission’s procedures.

and conditions” rather than “rates charged.”¹⁰⁰ USPIRG’s data consists of a push-poll of wireless customers that essentially asks “If you could receive cheaper wireless service, would you accept it?” Unsurprisingly, consumers answered that they would. Of course, the issue in this case is not whether customers view early termination fees as penalties or whether they would prefer that such fees not be charged. The issue is whether Congress intended that charging such fees should be regulated by state governments when those fees are an essential part of CMRS rate structures. Public opinion on early termination fees sheds no light on that question.

F. Early Termination Fees Are Not “Terms And Conditions” By Virtue Of Where They Appear In the Service Agreement.

The Opposing Commenters also claim that early termination fees are “terms and conditions” because generally CMRS carriers include these fees in the “terms and conditions” portion of customer contracts.¹⁰¹ This absurd argument hardly merits a response.

First, the notion that early termination fees must be “terms and conditions” within the meaning of Section 332(c)(3)(A) because they are included in the “terms and conditions” portion of customer contracts is ridiculous. The Opposing Commenters formulation would require every matter discussed in a customer service contract under the heading “terms and conditions,” including basic rates, to automatically become assailable in any state regulatory forum. Clearly, Congress intended the Commission to take a substantive look at particular claims and carrier practices before determining whether regulation of such practices is preempted.¹⁰² The function

¹⁰⁰ USPIRG *Ex Parte* at 16.

¹⁰¹ WCA Comments at 9-10, 11-12; NASUCA Comments at 21, 27-28; AARP Comments at 13.

¹⁰² *Wireless Consumers Alliance*, 15 FCC Rcd at 17037 (“it is the substance, not merely the form” of state law claims that determines whether a regulation is preempted under Section 332(c)(3)(A)).

of the “terms and conditions” portion of the customer contract is not to distinguish which portions of the contract pertain to “rates” and which to “terms and conditions” within the meaning of Section 332(c)(3)(A), rather it is simply to set forth the conditions that generally apply to the services offered by the carrier.¹⁰³ Nextel, for example, includes a provision in its terms and conditions entitled “Rates, Charges, and Payment.”¹⁰⁴ Under Opposing Commenters theory, this provision of Nextel’s customer agreement renders Nextel’s rates susceptible to state rate regulation.

Second, much of the evidence provided by the Opposing Commenters contradicts the claim that CMRS early termination fees are “buried” among the terms and conditions of their contracts. For example, SunCom’s Customer Services Agreement at issue in *Edwards v. SunCom* includes an explanation of the early termination fees both in the terms and conditions portion of the contract and in the portion of the contract that sets forth the elements of the customer’s rate plan.¹⁰⁵ Indeed, SunCom’s contract even required Edwards to initial the late-fee provision, which is adjacent to the monthly service charge provision. It is hard to imagine a more explicit notice to the customer that the early termination fee is part of the customer’s rate.¹⁰⁶

¹⁰³ E.g., AARP Comments at Exhibit 1 (Sprint PCS Terms and Conditions) (distinguishing between “terms” contained in individual service plan and standard “terms and conditions” governing several different service plans).

¹⁰⁴ See AARP Comments at Exhibit 1 (Nextel Terms and Conditions).

¹⁰⁵ Edwards Cross Petition at Appendix B.

¹⁰⁶ Similarly, the AT&T Wireless materials included by WCA show that AT&T includes an explanation of its early termination fee in at least both the “Explanation of Rates and Charges” section and the “Terms and Conditions” section of its customer contracts. WCA Petition at Exhibit E. Verizon Wireless includes its explanation of its early termination fees in the first paragraph of a portion of its service contract entitled “Verizon Wireless Customer Agreement.”

Third, to the extent that Opposing Commenters irrelevantly seek to insinuate that CMRS carriers are seeking to hide their early termination fees from their customers by “burying” them in fine print “terms and conditions,” they clearly are misrepresenting the facts. For example, nearly every customer contract the Opposing Commenters present included the relevant information regarding early termination fees either in the first paragraph of the terms and conditions (T-Mobile), boldface type (Sprint PCS, Verizon Wireless, Nextel) or both (T-Mobile).¹⁰⁷ Moreover, the Opposing Commenters do not even include a copy of the portion of the contract that customers actually sign or approve for any carriers. SunCom’s Customer Service Agreement is the only one before the Commission and it shows that each customer is required to separately acknowledge the early termination fees when signing a service agreement. Accordingly, there is simply no basis for any claim that customers are not fully informed about CMRS providers’ early termination fees.¹⁰⁸

IV. CLAIMS THAT WOULD REQUIRE COURTS TO EXAMINE THE REASONABLENESS OF EARLY TERMINATION FEES ARE BARRED BY COMMISSION PRECEDENT.

SunCom and CTIA showed in their Petitions that because early termination fees are “rates charged,” Section 332(c)(3)(A) preempts state law claims like *quantum meruit*, unjust

AARP Comments at Exhibit 1. Thus, there is simply no support for Opposing Commenters’ claim that CMRS carriers always “bury” their early termination fees in their “terms and conditions.”

¹⁰⁷ WCA Comments at Exhibit D. Nextel’s Comments also include a “Customer Expectation Checklist” that guarantees that every customer is asked whether they understand Nextel’s \$200 early termination fee. Nextel Comments at Exhibit 1.

¹⁰⁸ Nextel’s inclusion of testimony from a plaintiff in a California early termination fee case clearly demonstrates customers are told about early termination fees at the time they sign their service contracts. Nextel Comments at Exhibit 2 (Videotaped Deposition of Bertram Bowe Taken on Behalf of the Defendant (Jan. 25, 2005) in *Carver Ranches Washington Park, Inc. v.*

enrichment, money had and received and other such claims that would require courts to engage in an analysis of the reasonableness of particular early termination fees.¹⁰⁹ The Opposing Commenters generally do not address this declaratory ruling request.

The one exception is WCA's attempt to argue that early termination fees should be subject to state-court invalidation as unlawful penalty clauses.¹¹⁰ Although WCA bases this claim on the idea that state courts could find an early termination fee to be an unlawful penalty without finding that clause to be "unreasonable," it also recites the standard for such a finding, which expressly requires a court to consider the reasonableness of the fee before finding a contractual clause to be a penalty.¹¹¹ Moreover, WCA admits that the intent of pending lawsuits alleging that early termination fees are penalties is to eliminate the use of early termination fees nationwide.¹¹²

Ironically, WCA's attempt to preserve unlawful penalty claims from preemption shows clearly why such claims *must* be preempted along with all other claims that require courts to analyze the reasonableness of "rates charged" like early termination fees. First, despite WCA's claims, the very test that WCA cites shows that entertaining such claims would require the court to engage in determining whether an early termination fee is reasonable, and, presumably what a reasonable fee would be if the fee charged was found to be unreasonable. The Commission

Nextel South Corp. d/b/a Nextel Communications, No. 50 2004 CA 005062 (15th Jud. Cir. Palm Beach County, Florida Ct. May 17, 2004)).

¹⁰⁹ SunCom Petition at 14-17; CTIA Petition at 23-29.

¹¹⁰ WCA Comments at 35-37.

¹¹¹ *Id.* at 35.

¹¹² *Id.* at 36.

already has found that such examinations of the reasonableness of CMRS carriers' rates charged are forbidden to state courts under Section 332(c)(3)(A).¹¹³ Second, if WCA's intent is to accomplish the abolition of early termination fees nationwide, plainly that is the type of claim that should be brought to the Commission, not to individual state courts. In *SWBT Mobile*, the Commission made quite clear that the states have no authority to prohibit a particular rate element or rate structure.¹¹⁴ The Commission's recent ruling in the *Second Truth-In-Billing Order* (which goes unmentioned in many of the opposing comments) reaffirms the proposition that state regulation of individual rate elements is prohibited.¹¹⁵

In any case, Commission precedent already has emphasized that claims requiring state courts to determine the reasonableness of rates or rate components like early termination fees are preempted.¹¹⁶ Specifically with regard to *quantum meruit*-type claims, the Commission has indicated already that such claims against rate elements cannot be adjudicated by state courts.¹¹⁷ Accordingly, once the Commission has determined that CMRS early termination fees are "rates charged," it should make clear that equitable claims like *quantum meruit*, unjust enrichment,

¹¹³ *Wireless Consumers Alliance*, 17 FCC Rcd at 17041 ¶39 ("[A] court will overstep its authority under Section 332 if . . . it does enter into a regulatory type analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.").

¹¹⁴ *SWBT Mobile*, 14 FCC Rcd 19898, 19906-07 ¶ 20.

¹¹⁵ *Second Truth-In-Billing Order*, 20 FCC Rcd 6448, 6464-6467 ¶¶ 32-36.

¹¹⁶ *Id.*

¹¹⁷ *See Sprint PCS and AT&T Corp., Declaratory Ruling*, 17 FCC Rcd 13192, 13198 n.40 (2002) (emphasis added) (because "an award of quantum meruit would require the court to establish a value (i.e., set a rate) for the service provided . . . there is substantial question whether a court may award quantum meruit or other equitable relief under state law [in a case involving CMRS rates] without running afoul of Section 332(c)(3)(A)") (citing *Bastien*, 205 F.3d at 986; *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) ("*Gilmore*")).

money had and received, or any other claim that would require a state court to determine the reasonableness of an early termination fee is preempted by Section 332(c)(3)(A).

CONCLUSION

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

Respectfully submitted,

SunCom Wireless Operating Company, L.L.C.

A handwritten signature in black ink that reads "Michael Hays". The signature is written in a cursive style and is positioned above a horizontal line.

Michael D. Hays
J.G. Harrington
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Its Attorneys

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August 25, 2005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition for Declaratory 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))	WT Docket No. 05-193
)	
Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(C)(3)(A))	WT Docket No. 05-194

To: The Commission

DECLARATION OF DANIEL E. HOPKINS

1. My name is Daniel E. Hopkins and I am the Senior Vice President of Finance and Treasurer for SunCom Wireless Operating Company, L.L.C.

2. I am offering this declaration to supplement certain factual representations in the Petition for Declaratory Ruling (the "Petition"), Comments, and the foregoing Reply Comments of SunCom Wireless Operating Company, L.L.C., and to ensure a complete record in the above-captioned proceeding (collectively, the "Comments").

3. This supplemental declaration concerns additional SunCom rates charged during time periods relevant to the case of *Edwards v. SunCom*, Case No. 02-CP-26-3539 (Horry County, S.C.), which precipitated SunCom's Petition.

SunCom's Historical Rate Structure

4. Consistent with its current practice, from 1999 through 2004, SunCom provided service to its customers pursuant to rate plans that permitted customers to pay discounted rates in exchange for a contractual commitment to maintain service for an established term of either one or two years. For example, in 2002, at the time the plaintiff in *Edwards* was assessed an early termination fee, customers signing a one-year service contract could purchase a 900 minutes plan for \$50.00, a 1400 minute plan for \$75.00, and a 1900 minutes plan for \$100.00. In addition, SunCom's two-year term rate plans included a discounted handset, the cost of which would be recovered incrementally over the length of the customer's contract. As with its current service

contracts, customers with both one and two-year rate plans were charged a \$200 termination fee if they canceled their contract before they had completed their contractual term.

5. The early termination fee charged to customers with long-term service plans from 1999 to 2004 were designed to recoup the start-up and ongoing costs of providing CMRS service to SunCom's anticipated customer base. The costs of providing CMRS services to new and established customers are considerable. As explained in the Declaration of Charles Kallenbach ("the "Kallenbach Declaration"), submitted with SunCom's Petition, in the competitive CMRS market, new customer acquisition requires SunCom to subsidize and rebate customer handsets and accessories and to pay direct and indirect commissions to dealers, retailers, and other salespeople who sell SunCom's services to subscribers. Moreover, SunCom faces initial and ongoing costs for advertising and marketing, which are essential both to attracting new customers and to retaining existing customers, as well as other standard costs of doing business, including employee salaries and other expenses, rent and other office expenses, and similar types of costs. Finally, SunCom bears considerable ongoing overhead and other costs related to facilities, infrastructure, bandwidth, and interconnection that vary according to its anticipated customer base. Many of these costs require SunCom to make long-range forecasts of what its customer base will be, and many of them are attributable equally to new customers and to ongoing customers in the renewal terms of their contracts.

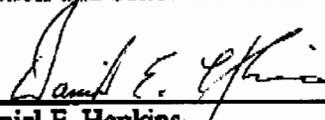
6. In September 2003, SunCom began offering its customers the option of entering into two-year service contracts that offered even more substantial discounts on handset and monthly service rates.

7. As explained in the Kallenbach Declaration, at all times relevant to the Edwards complaint, SunCom also served customers pursuant to non-discounted "prepaid" service plans, as it does today. During the times relevant to the Edwards complaint, SunCom's prepaid service plans generally allowed subscribers to obtain service on a per-minute basis at a substantially higher rate than that available to customers making a long-term contractual commitment. That rate typically was approximately \$0.25 per minute. Customers engaged in prepaid arrangements generally paid full retail value for their handsets. These plans never included early termination fees because: (1) they did not provide customers with the same discounted start-up, handset, and service rates offered by long-term plans; and (2) the higher per-minute rate allowed SunCom immediately to recover the other costs of customer acquisition, service, and retention.

8. In early 2005, SunCom rolled out its "month-to-month" service plan option. Like traditional prepaid plan subscribers, month-to-month customers pay full price for their handsets and pay a higher rate for service than long-term customers. SunCom's current month-to-month plans, which were updated in August, 2005, offer customers 1000 minutes for \$49.00 per month and unlimited calling for \$89.00 per month. The plans are "prepaid" in the sense that the customer is required to pay for their handset, activation fee, and first-month's service charge at the point of sale. Here again, month-to-month subscribers are not subject to early termination fees because customers are not provided with the same discounted start-up, handset, and service rates offered by long-term plans, and customers utilizing these plans do not allow SunCom to spread the other costs of customer acquisition, service, and retention over the length of a long-

term contract. Accordingly, SunCom recovers its costs immediately through charging higher service rates and the full retail price for handsets.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief formed after a reasonable inquiry.



Daniel E. Hopkins
Senior Vice President of Finance and
Treasurer
SunCom Wireless Operating Company,
L.L.C.
1100 Cassatt Road
Berwyn, PA 19312

August 25, 2005