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March 30, 2006

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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., SW
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Re: Ex Parte Presentation. *Petition of the Cellular Telephone & Internet Association for an Expedited Declaratory Ruling Confirming that Early Termination Fees in Wireless Contracts Are "Rates Charged" for Commercial Mobile Services Within the Meaning of Section 332(c)(3)(A), WT Docket No. 05-194 (filed March 15, 2005); 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 (filed Feb. 22, 2005).*

Dear Ms. Dortch:

This notice is to inform you that on March 29, 2006, John Scott and William Wallace of Verizon Wireless and the undersigned, on behalf of Verizon Wireless, had an *ex parte* meeting with Samuel Feder, General Counsel, Matthew Berry, Deputy General Counsel, and Joel Kaufman, Associate General Counsel and Chief of the Administrative Law Division, Office of General Counsel.

The purpose of the meeting was to discuss the legal basis for the Commission's issuance of a declaration that pending state court class actions that attempt to regulate early termination fees constitute preempted rate regulation under Section 332 of the Communications Act, as requested in the above-referenced petitions. A White Paper outlining and expanding upon Verizon Wireless' legal arguments is attached.

Sincerely yours,

Helgi C. Walker

cc. Samuel Feder
Matthew Berry
Joel Kaufman

**GRANTING CTIA'S PETITION DOES NOT REQUIRE THE
COMMISSION TO BREAK ANY NEW LEGAL GROUND OR DIVEST
THE STATES OF JURISDICTION OVER TRADITIONAL CONTRACT
CLAIMS AND SIMILAR CAUSES OF ACTION**

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INTRODUCTION AND SUMMARY

In Section 332, Congress, in a dramatic departure from prior federal-state relations, vested exclusive authority in the FCC over wireless rates. As explained in CTIA's original petition for declaratory relief,¹ that authority is now being trespassed upon by a variety of state actions -- most notably state class action lawsuits that seek to adjust the rates and rate structures in wireless service contracts. Due to the uncertainty over the proper lines of federal-state jurisdiction created by these lawsuits, CTIA asked the FCC to affirm its exclusive authority over CMRS rates in order to protect the uniform national wireless policy established by Congress. Specifically, CTIA sought a declaration that: (1) ETFs are "rates charged" for wireless service within the meaning of Section 332(c)(3)(A); and (2) any application of state law by a court or other tribunal to invalidate, condition, or modify the use or enforcement of ETFs based, in whole or in part, on an assessment of the reasonableness, fairness, or cost-basis of the ETF, or to prohibit the use or enforcement of the ETFs as unlawful "liquidated damages" or penalties, constitutes prohibited regulation of wireless rates.

In response to the overwhelming legal and economic presentation made by CTIA and the industry in support of the Petition, the plaintiffs' bar and others have alleged that the requested ruling requires the Commission to break new ground regarding the boundaries of federal jurisdiction in this area and to make novel incursions into state authority to enforce generally applicable laws against wireless carriers. This is a smokescreen, and the Commission should not be blinded by it.

¹ *Petition of the Cellular Telecommunications & Internet Association for an Expedited Declaratory Ruling*, WT Docket No. 05-194 (Mar. 15, 2005) ("CTIA Petition").

Because ETFs fall well within the scope of “rates charged,” there is simply no need for the Commission to define the outer boundaries of “other terms and conditions.”² The opponents’ argument that an ETF must have a particular “cost-basis” in order to qualify as a rate or part of a rate structure is meritless. Under Section 332, no state actor has “any authority”³ to measure a wireless rate against some state-dictated measure of cost, for that *itself* is rate regulation. If carriers had to establish the cost-basis of every rate or rate element in state court before the protection of Section 332(c)(3)(A) would apply, the statute would be rendered meaningless.

Furthermore, there is nothing new about the jurisdictional boundaries that CTIA has asked the Commission to enforce here. Commission precedent *already* provides the test for deciding whether a particular type of state action amounts to prohibited rate regulation. Six years ago, in *Wireless Consumers Alliance*,⁴ the Commission clearly established that state court action that involves an assessment of the reasonableness, fairness, or cost-basis of rates or any part of rates can, even when arising in the context of lawsuits predicated on seemingly neutral state laws, run afoul of Section 332. All the Commission need do in the instant proceeding is to apply that well-established precedent to the issues presented by the Petition. Proper application of that precedent leads to the conclusion that the state court lawsuits now facing carriers, which seek to invalidate, condition, or modify ETFs based on their alleged unreasonableness or supposed lack of relation to costs, are preempted by Section 332.

² 47 U.S.C. § 332(c)(3)(A).

³ *Id.*

⁴ *Wireless Consumers Alliance, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 17021 (2000) (“*Wireless Consumers Alliance*”).

Contrary to the alarmist protestations of some, this conclusion is not an improper encroachment of the “traditional power of states to regulate commercial activities within their borders.”⁵ Rather, it constitutes fidelity to the statutory scheme established by Congress in Section 332 and interpreted and enforced by the Commission in its prior decisions. And *that* scheme is the touchstone here, not the federal-state relations that may have predated the passage of that statute. If CTIA’s Petition is granted – as it must be, under the language and purpose of Section 332, and the Commission’s precedent interpreting that statute – states will retain plenary authority to regulate the “other terms and conditions” of wireless service and to enforce their generally applicable laws, so long as such enforcement does not involve review of the reasonableness of rates.

Finally, opponents allege that it is procedurally inappropriate to resolve CTIA’s request at this time. The Petition is clearly ripe for decision. Indeed, it has been pending for almost a full year, and several class actions first described in the Petition are now nearing or at critical decision points.⁶ Those tribunals that are proceeding to decide the statutory questions now before the Commission are generating the potential for conflicting caselaw on the meaning of

⁵ Ex Parte of AARP, WT Docket Nos. 05-193, 05-194, at i (Feb. 2, 2006).

⁶ The Alameda County litigation, although partially stayed, is now entering the class certification stage, with a hearing on certification with respect to ETF claims set for April 28, 2006. Judge Sabraw has already tentatively certified a class with respect to other claims in that case. See Tentative Order Granting Motion of Plaintiffs for Class Certification on the Sprint Handset Locking Complaint, *In re Cellphone Termination Fee Cases*, No. J.C.C.P. 4332 (Cal. Super. Ct., Alameda County, Mar. 23, 2006) (Attachment A). Other ETF-related controversies are likewise steaming ahead, with the arbitrator in two consolidated class actions, *Brown* and *Zobrist*, denying a request that he stay the arbitration pending the outcome of the instant administrative proceeding. See Order, *Brown v. Cellco Partnership*, No. 11 494 01274 05, at 11-15 (Am. Arbitration Ass’n, Mar. 20, 2006) (Attachment B). Adding to the confusion and the need for prompt action by the Commission, a federal district court in California has stayed the entirety of the action pending there in recognition of the FCC’s primary jurisdiction in this area. See Memorandum and Order Regarding Defendant’s Motion to Stay, *Gentry v. Cellco Partnership*, No. CV 05-7888 GAF (C.D. Cal. Mar. 21, 2006) (“*Gentry Order*”) (Attachment C).

Section 332 and thereby undermining the goal of regulatory uniformity for CMRS, and those that have prudently stayed action on those questions are awaiting an answer from the Commission.

For all these reasons, the Commission should resolve expeditiously the CTIA Petition and reaffirm the FCC's past interpretations of Section 332 in order to put an end to the current uncertainty regarding the proper division of regulatory authority over wireless rates and rate structures such as ETFs and to turn the rising tide of state actions undercutting the FCC's exclusive authority in this area.

I. BECAUSE ETFS ARE "RATES CHARGED," THE COMMISSION NEED NOT ADDRESS THE SCOPE OF "OTHER TERMS AND CONDITIONS" IN ORDER TO REAFFIRM ITS EXCLUSIVE AUTHORITY OVER WIRELESS RATES

A. ETFs Are Rates and Constitute an Integral Part of Carriers' Rate Structures

As established in CTIA's petition, an ETF is a "rate[] charged by [a] commercial mobile service" under Section 332(c)(3)(A). An ETF is a charge, imposed upon early termination, that a subscriber agrees to pay as part of the carrier-customer bargain for obtaining the discounts on equipment and lower monthly service rates that term contracts provide.⁷

ETFs are not, as opponents would have it, "purely ancillary to the services the carriers provide to customers."⁸ To the contrary, and as the record in this proceeding clearly shows, ETFs are a critical component of an entire (and popular) package of technology and services that represents tradeoffs between up-front and long-term costs and requires a time commitment by both carriers and subscribers. It is disingenuous to say that "ETFs are premised not on the

⁷ See generally CTIA Petition at 7-22 (explaining why ETFs are rates and part of rate structures).

⁸ Initial Comments of the National Association of State Utility Consumer Advocates, WT Docket No. 05-194, at 22 (Aug. 5, 2005) ("NASUCA Comments").

customer's use of the carrier's service, but on the customers' discontinuation of service.”⁹ This characterization obscures the relevant time period – the entire contract term for service, not the isolated point in time at which a customer wishes to end the contract – and ignores that ETFs are vital to the *ex ante* development and offering of technology and service packages.

Other commenters advance a cramped definition of rates under which only those charges that are based on actual, direct costs qualify as “rates charged.”¹⁰ This, however, puts the cart before the horse. Under the statute, no state actor has “any authority” to measure a wireless rate against some state-dictated measure of “cost,” for that *itself* is rate regulation. If carriers had to establish the “cost-basis” of every rate or rate element in state court before the protection of Section 332(c)(3)(A) would apply, the statute would be rendered meaningless. A classic form of state rate regulation (measurement of the propriety of a rate or rate element in relation to state-sanctioned costs) would thus become the determinant of federal preemption of state rate regulation. This is an absurd result, and surely cannot be what Congress intended. Moreover, the Commission has repeatedly determined that the rates for wireless services should *not* be regulated at either the state or federal level.¹¹ Allowing state courts, legislatures, or commissions

⁹ *Id.*; see also Ex Parte of AARP at 13-14 (“ETFs are not ‘rates’ when the consumer gets **no service** in return for remitting an ETF” (emphasis in original)).

¹⁰ See Comments of AARP in Opposition to the CTIA Petition for Declaratory Ruling, WT Docket Nos. 05-194, 05-193, at 9-10 (Aug. 5, 2005) (“AARP Comments”) (“ETFs are designed, not to recover the costs of providing service, but to influence and constrain customer behavior” and ETFs “are not associated with an element of service nor designed to recover the cost of service.”).

¹¹ See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1463-93 (1994) (“*Second CMRS Report and Order*”) (forbearing under section 332(c)(1)(A) from requiring CMRS providers to comply with the tariff filing obligations of section 203); *Petition on Behalf of the State of Hawaii*, Report and Order, 10 FCC Rcd. 7872 (1995) (denying state request to continue to regulate wireless rates under Section 332(c)(3)(A)(i)-(ii)); *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd. 7842 (1995) (“*Ohio Petition*”) (same), *recons. denied*, 10 FCC Rcd.

to impose any cost-related basis on ETFs would thus directly contravene the Commission's efforts to promote consumer-driven choices in the highly competitive wireless industry.

Further, Commission decisions arising under Section 332 make clear that this definition of rates is untenable. In *Southwestern Bell Mobile Systems*,¹² for example, state efforts to limit carrier practices of "rounding up" to the nearest whole minute and charging for incoming calls were found to be prohibited rate regulation, without any requirement that the practices be based exclusively on costs. The Commission also found in the 2005 *Truth-in-Billing* matter¹³ that line items charges, surcharges or other fees on wireless bills are rates and rate structures, without suggesting that such status depends upon a particular line item's relation to costs. Indeed, the Commission defined protected line items broadly as "a discrete charge identified separately on an end user's bill,"¹⁴ which doubtlessly covers charges for ETFs.

Finally, this argument ignores the well-established regulatory understanding of rates, which has never required that charges be exclusively cost-based in order to qualify as rates. In FCC-regulated industries, many charges that are indisputably "rates" are based on factors other than, or in addition to, direct costs. For example, tariffed rates for wireline telephone service

12427 (1995); *Petition of the People of the State of California and the Public Utilities Commission of the State of California*, Report and Order, 10 FCC Rcd. 7486 (1995) (same); *Petition on Behalf of the State of Connecticut*, Report and Order, 10 FCC Rcd. 7025 (1995), *aff'd*, *Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996); *Petition of New York State Public Service Commission to Extend Rate Regulation*, Report and Order, 10 FCC Rcd. 8187 (1995).

¹² *Southwestern Bell Mobile Systems, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd. 19898, 19906-907 (1999).

¹³ *Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6448, 6462-67 (2005).

¹⁴ *Id.*, at 6462.

include elements that are not cost-based, such as cross-subsidies.¹⁵ And profit margins, which this constricted interpretation of rates apparently would exclude, are *of course* a permissible element of rates. For all these reasons, opponents' constricted definition of "rates charged" should be rejected.

B. The Judicial Decisions Relied upon by Opponents to Disprove that ETFs are Rates and an Integral Part of Rate Structures Are Inapposite

As CTIA demonstrated in its Petition, the great majority of courts to consider the nature of ETFs have read "rates" to include more than just the monthly price in a service plan.¹⁶ Moreover, both Commission and D.C. Circuit precedent predating Congress's action in 1993 made clear that ETFs were "rates" and thus properly regulated by tariff.¹⁷ These decisions preclude any argument that "rates" as that term was understood when Congress amended Section 332(c)(3)(A) to include the preemption provision did not intend to reach ETFs in the context of long-term service contracts.

¹⁵ See, e.g., *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393 (1999) ("Currently, state laws require local phone rates to include a 'universal service' subsidy.").

¹⁶ See CTIA Petition at 13-14 & n.46 (discussing *Chandler v. AT&T Wireless Servs.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. July 21, 2004); *Redfern v. AT&T Wireless Servs.*, No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003); *Consumer Justice Found. v. Cingular Wireless, et al.*, Case No. BC 214554 (Cal. Super. Ct., Los Angeles County, July 29, 2002); *Aubrey v. Ameritech Mobile Commc'ns, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002); *Gilmore v. Southwestern Bell Mobile Sys.*, 156 F. Supp. 2d 916 (N.D. Ill. 2001); *Simons v. GTE Mobilnet Inc.*, No. 95-5169 (S.D. Tex. Apr. 11, 1996)).

¹⁷ See *Equip. Distribs.' Coal., Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987). AARP's attempt to distinguish this case is unavailing. See Ex Parte of AARP at 15-16. AARP argues that the court only had to determine whether the termination charges there were "rates" for purposes of a settlement agreement. However, the Court's (and the FCC's) analysis was *precisely* the same as that repeatedly advocated by AARP itself – it asked whether the charge is a "charge to a customer to receive service," *id.* (quoting *MCI Telecomms.*, 822 F.2d at 86), a question the FCC and the Court answered in the affirmative. There, as here, the charges for early cancellation "are designed to unbundle these discrete costs [from early termination and the insufficiency of rates actually paid] and impose them directly on the customers [who terminate early]" rather than "spreading the costs among all ratepayers." *MCI Telecomms.*, 822 F.2d at 86.

Opponents of preemption¹⁸ have responded by citing unpublished district court cases from Illinois,¹⁹ Iowa,²⁰ and Texas²¹ that supposedly have reached the conclusion that ETFs are not rates.²² But these cases arose in the context of removal to federal court, where the issue was the existence of federal question jurisdiction, which depends on the doctrine of “complete preemption.” As explained below, that doctrine differs fundamentally from traditional substantive preemption.²³

“Complete preemption that supports removal and ordinary preemption are two distinct concepts.”²⁴ In removal cases, the first question is whether subject matter jurisdiction exists.

¹⁸ See AARP Comments at 15-18; NASUCA Comments at 14-18; Comments of Wireless Consumers Alliance *et al.*, WT Docket Nos. 05-193, 05-194, at 4 n.4, 17-23 (Aug. 5, 2005); Initial Comments of Consumers Union, National Association of State PIRGs, National Consumer Law Center, WT Docket No. 05-194, at 7-8 (Aug. 5, 2005).

¹⁹ *Kinkel v. Cingular Wireless*, No. 02-999 (S.D. Ill. Nov. 8, 2002).

²⁰ *Phillips v. AT&T Wireless*, No. 04-40240, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa July 29, 2004); *Iowa v. U.S. Cellular Corp.*, No. 00-90197, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa Aug. 7, 2000).

²¹ *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713, 715-16 (S.D. Tex. 1996).

²² Opponents have not offered any opinions from the courts of appeals, all but one of their district court opinions are unpublished, and the judge who wrote the Illinois opinion later reversed course to hold that an ETF was part of rates and thus within Section 332. Compare *Kinkel, supra* n. 18 (Murphy, G.) (granting motion to remand and holding that “a cellular provider could fashion an [ETF] that is indisputably an integral part of its rate structure [but concluding] that is not the case here”), with *Redfern*, 2003 U.S. Dist. LEXIS 25745, at *2 (Murphy, G.) (denying motion to remand and “agree[ing] with [d]efendant that the early termination fee affects the rates charged for mobile service”).

²³ See, e.g., *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1071-72 (7th Cir. 2004); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000); *Phillips*, 2004 U.S. Dist. LEXIS 14544, at *1; *U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656, at *3; *Esquivel*, 920 F. Supp. 713.

²⁴ *Roddy v. Grand Trunk Western R.R.*, 395 F.3d 318, 323 (6th Cir. 2005); see also, e.g., *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987) (“The fact that a defendant might ultimately prove that a plaintiff’s claims are preempted . . . does not establish that they are removable to federal court.”); *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004); *Marks v. Watters*, 322 F.3d 316, 323 (4th Cir. 2003).

The analysis of complete preemption thus proceeds as a narrow exception to the well-pleaded complaint rule and turns on the comprehensiveness of the remedial scheme enacted by Congress, not the discrete, statutory construction question whether ETFs are “rates charged.”²⁵ If complete preemption is not found, a federal court has no jurisdiction even to *address* ordinary preemption.²⁶ “[I]t is not necessary for a court addressing complete preemption to decide whether a claim is defensively preempted in order to decide the complete preemption issue, and, . . . a federal court’s order remanding a case to state court based on the inapplicability of the complete preemption doctrine *leaves open* the question whether the plaintiff’s claims are nevertheless defensively preempted.”²⁷ Doctrinally, then, it is possible to have a case in which there is no complete preemption for purposes of federal question jurisdiction but in which the defendants ultimately prevail on a substantive preemption theory, either in federal court under diversity jurisdiction or following remand to state court. Thus, contrary to some contentions,²⁸ cases rejecting complete preemption simply do not determine whether ETFs are “rates charged” or whether state action seeking to control ETFs is preempted.²⁹

²⁵ Under complete preemption, “the proper focus of complete preemption analysis is on whether Congress intended that the federal action be exclusive.” *PCI Transp., Inc. v. Fort Worth & Western R.R.*, 418 F.3d 535, 544 (5th Cir. 2005).

²⁶ See *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1158 (10th Cir. 2004) (“When the doctrine of complete preemption does not apply, but the plaintiff’s state claim is arguably preempted, . . . the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption. It lacks power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.”).

²⁷ *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1281 n.14 (11th Cir. 2005) (emphasis added).

²⁸ See Ex Parte of AARP at 25-26.

²⁹ Even if the cases cited by opponents could be seen as conflicting, the very existence of apparently contradictory opinions about the statutory status of ETFs illustrates the need for clarification that ETFs are “rates charged” and that state regulation thereof in the pending

Accordingly, the proposition that ETFs are “rates charged” is affirmatively supported by the case law, and the judicial decisions proffered by opposing commenters are inapposite.

C. Rates or Rate Elements, Such as ETFs, Are by Definition Not “Other Terms and Conditions” of Wireless Service

Because the state court actions at issue constitute prohibited rate regulation, they *cannot* be regulation of “*other* terms and conditions” of CMRS service, as opponents of the CTIA Petition claim. Opponents ignore the critical word “other” – which plainly means that permissible terms and conditions can only be those that are not rates, regardless of the label affixed to the state law under review. Therefore, once it is determined that the state actions at issue directly impact rates charged and constitute prohibited rate regulation, that is the end of the matter.

As the Eighth Circuit recently explained, in order to prevent the “other terms and conditions” exception from “subsuming the regulation of rates within the governance of ‘terms and conditions,’ the meaning of ‘consumer protection’ in this context *must exclude regulatory measures . . . that directly impact the rates charged by providers.*”³⁰ Simply calling something “consumer protection” or traditional contract law is plainly inadequate to bring it within “other terms and conditions”:

Subdivision 3 . . . goes beyond traditional requirements of contract law, and thus falls outside the scope of the “neutral application of state contractual or consumer fraud laws,” which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by

lawsuits is preempted. As the Court in *Gentry* observed, “[t]he need for uniformity is acute in this [area],” *Gentry Order* at 10, and any confusion in the courts is thus particularly troubling.

³⁰ *Cellco P’ship v. Hatch*, 431 F.3d 1077, 1082-83 (8th Cir. 2005) (emphasis added).

providers in one industry, and substitutes by statute a different contractual arrangement.³¹

The theories used by the plaintiffs in various state class actions seek to do precisely the same thing – to void the terms of contracts and substitute by judicial fiat a different arrangement. This sort of action *directly* attacks rates and thus cannot be regulation of “*other* terms and conditions.”

In short, once the Commission determines that ETFs are rates and a critical component of rate structures, it need say no more. Adjudication of the CTIA Petition does not require any discussion of the general parameters of “other terms and conditions.”

II. THE COMMISSION NEED ONLY REAFFIRM THAT SECTION 332’S PREEMPTION PROVISION APPLIES TO STATE ACTION PREMISED ON THE REASONABLENESS OF RATES AND APPLY THAT WELL-ESTABLISHED PRINCIPLE TO THE PETITION

As explained above, ETFs are rates and a fundamental element of rate structures. Thus, under Section 332, states lack “any authority” to regulate them. Under the Commission’s existing precedents regarding what it means to “regulate” rates, it is clear that certain state court action that goes to the reasonableness of a wireless rate, or the appropriateness of the use of any particular element within a wireless rate structure, is preempted – *whether or not that action is taken pursuant to a state law of supposedly general application*. Analysis of the claims against carriers reveals that they require state decisionmakers to make just this prohibited assessment of the reasonableness, or permissible uses, of ETFs. Accordingly, they are preempted, and the Commission should so declare.

Despite efforts to characterize such a declaration as predicated on a radical redrawing of the boundaries of federal-state jurisdiction over wireless rates, this conclusion follows directly

³¹ *Id.*

from the Commission’s longstanding standards for determining when state court proceedings amount to prohibited rate regulation. All the Commission must do in order to decide CTIA’s Petition is to apply those principles to the present circumstances. If the Petition is granted, as it must be, significant areas of state authority over wireless contracts will remain untouched – namely, action that does not attempt to gauge the reasonableness of rates or the appropriate use of various rate elements, such as adjudication of claims based on nondisclosure, misrepresentation, or pure breach of contract.

A. Commission Precedent Makes Clear that Any State Evaluation of a Rate’s Reasonableness Is Preempted

Six years ago, in *Wireless Consumers Alliance*, the Commission clearly established that state court action that “purports to determine the *reasonableness* of a prior rate” or “sets a prospective charge for services” is preempted by Section 332.³² The decision thus made clear that even neutral state laws of general applicability are subject to preemption if their application to specific causes of action involves an assessment of whether a specific rate is reasonable by some measure, or whether a certain rate element must be based on some cost metric. Thus, the opposition’s apparent position that *all* consumer protection and contract laws are currently immune from preemption, and that the petition requires the announcement of new rules regarding federal-state jurisdiction over rates, is plainly incorrect.

In *Wireless Consumers Alliance*, the FCC unambiguously ruled that “a [state] court will overstep its authority under Section 332 if, in determining damages, it . . . enter[s] into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets

³² *Wireless Consumers Alliance*, 15 FCC Rcd. at 17041 (emphasis added).

a prospective charge for services.”³³ Whatever the basis for the determination, whether a consumer protection, tort, or contract claim, “[i]f a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was *unreasonable*, the court would be preempted from doing so by Section 332.”³⁴ The prohibited reasonableness calculus can come at any stage of the state court adjudication process, *e.g.*, at the assessment of liability or the calculation of damages. Thus, while the Commission declined to find a *per se* violation of Section 332 in every case awarding monetary damages, it firmly staked out the proposition that state court action can amount to prohibited rate regulation where the analysis turns on reasonableness.³⁵

At the same time, the FCC plainly contemplated that state law would continue to govern claims of pure misrepresentation, non-disclosure, or breach. The Commission explained:

A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a ‘reasonable rate’ for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing.³⁶

By asking that states be permitted to evaluate and invalidate carriers’ rates in the absence of allegations of misrepresentation, non-disclosure, or breach, however, it is the opponents of CTIA’s Petition that seek to change the law by carving out a new and unlawful role for states to

³³ *Id.*

³⁴ *Id.* at 17035 (emphasis added).

³⁵ *See id.* at 17041 (“[W]hile we conclude that Section 332 does not generally preempt damage awards based on state contract or consumer protection laws, *this is not to say that such awards can never amount to rate or entry regulation.*” (emphasis added)).

³⁶ *Id.* at 17035-36.

prescribe rates and rate structures and to specify the services and contract provisions that can be subject to charges. This is rate regulation that directly contravenes Section 332, as made clear by *Wireless Consumers Alliance*.

CTIA's Petition does not involve state damages awards that are not necessarily the equivalent of rate regulation because the awards have only an "uncertain" or "indirect" effect on prices,³⁷ or where the effort to invalidate ETFs can be characterized as "incidental" to rates.³⁸ Rather, the state litigation at issue in the Petition directly seeks to proscribe wireless carriers from recovering a central component of their rate structure, and many seek a refund of ETFs. Consequently, as explained fully by Professor Jerry Hausman,³⁹ the relief requested by plaintiffs in state court would "directly affect end-user rates"⁴⁰ and thereby falls squarely within Section 332's ban on state rate regulation.

B. All of the Causes of Action Referenced by the CTIA Petition Require Substantive Review of the Reasonableness of ETFs

The majority of the lawsuits at issue seek to use equitable state law doctrines not to enforce contracts as written but to *override* an existing price term in the contract and substitute for that term a set of cost or revenue criteria dictated by state law in order to "establish a value

³⁷ *Id.* at 17034.

³⁸ *Id.* at 17040-411 (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 300 (1976)).

³⁹ See Declaration of Professor Jerry A. Hausman, WT Docket No. 05-194, at 11-15 filed with Ex Parte Letter of Verizon Wireless (Oct. 25, 2005) (explaining that invalidating the ETF are directly connected to the level of other rate elements).

⁴⁰ *Ohio Petition*, 10 FCC Rcd. at 7852-53; see also *Fedor*, 355 F.3d at 1073 (explaining that "state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service"); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (same); *Brown v. Balt./Washington Cellular, Inc.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000) (Section 332 preempts all claims "that involve the reasonableness or lawfulness of the rates themselves.").

(i.e., set a rate) for the service provided in the past.”⁴¹ But, as explained above, no state has the authority to prohibit a particular rate or rate structure or to adjudicate its “reasonableness” under a state law theory of “average cost” or “lost revenue.” In fact, the determination that any rate should be based upon cost or some other metric is itself a determination that such a methodology is *reasonable* and therefore amounts to rate regulation.

Distinguishing state law causes of action that are preempted because they are predicated on theories of unreasonableness, unfairness, or supposedly improper costs-bases from those that are not preempted turns on the analytical requirements of the relevant cause of action. If a court is asked to resolve a dispute over whether an ETF was in fact provided for in a contract, such a claim is not preempted. By contrast, if a court is asked to resolve a dispute over whether an ETF was *legitimately* included in a contract, or whether a concededly contracted-for ETF is *excessive*, such a claim is preempted.

To be more precise, if, for example, plaintiffs assert that they never agreed to an ETF, that one was not contained in their contract, that they were never billed for an ETF that the carrier claims is past due, or that there has been a breach of an otherwise valid contract (say because the ETF assessed was greater than that to which they agreed, or because the conditions for liability for an ETF had not occurred), those claims can proceed in state court. They seek traditional interpretation and enforcement of a contract, and are predicated on a standard theory of breach that does not require the decisionmaker to pass judgment on the merits of the ETF

⁴¹ *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, 13198 n.40 (2002) (“*Sprint PCS Declaratory Ruling*”).

itself.⁴² But if there is no dispute that the relevant contract indeed provides for an ETF, and the plaintiff instead argues that the ETF should not apply because it is unlawful due to its size, its relation (or alleged lack thereof) to the carrier's costs, its punitive nature, or its anticompetitive effect, that sort of challenge is a challenge to the *reasonableness* of an otherwise valid and agreed-upon ETF and thus preempted. These claims seek not just interpretation and enforcement of a contract, but invalidation of the ETF as provided for in the contract.⁴³

This distinction between claims in which the decisionmaker simply construes a contract and remains agnostic as to the merits of an ETF and claims that require the decisionmaker to judge the ETF itself against some normative standard, such as reasonableness or cost, has already been drawn by the FCC:

⁴² Though generic breach of contract cases should survive Section 332's preemption, some may still run afoul of Section 332(c)(3)(A) *if* the calculation of damages requires the courts to evaluate the ETF's reasonableness. *See Wireless Consumers Alliance*, 15 FCC Rcd. at 17041 ("Of course, 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 charge for services.").

⁴³ The SunCom and CTIA Petitions crystallize this pivotal legal distinction. CTIA's Petition presents the full spectrum of state law causes of action that are preempted because they attack the fairness or amount of an ETF that all agree was provided for under a valid contract. By contrast, the SunCom Petition relates to litigation involving traditional questions of contract formation and interpretation. The theory of Count I of the SunCom complaint is that the subscriber never agreed that an ETF would apply to a contract extension, *i.e.*, that the contract never provided for an ETF once the original term of service was concluded. *See Amended Complaint* ¶ 5, *Edwards v. Triton PCS Operating Co.*, No. 02-CP-26-3359 (S.C. Ct. of Common Pleas May 25, 2004) ("The agreements do not allow for an early termination fee after the initial term."). This Count appears only to require the court to read the four corners of the contract to ascertain whether that document provides for ETFs when the original contract is extended, not necessarily to measure the ETF against any standard of reasonableness, fairness, or cost. The complaints at issue in the CTIA Petition do not challenge the *existence* of a contractual requirement to pay the challenged ETF, as in the SunCom litigation, but focus instead on the *fairness* of the contractually-required ETF. Similarly, Count II of the SunCom complaint, which relies on a theory of "money had and received," is conceptually distinct from the remedies sought in the cases underlying CTIA's Petition. Because this count of the SunCom Complaint, like the first, is based on an allegation that the subscriber *never agreed* to pay the ETF that was assessed, the plaintiff there seeks a return of funds that she asserts were improperly collected under a *contractually inapplicable* ETF. This prayer for recovery differs from the restitution and quantum meruit claims that animate the CTIA Petition, which are based on an allegation that an otherwise due and owing fee is unfair or unjust due to its size or lack of relation to costs.

[A] case may present a question of whether a CMRS service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier's advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. In such a situation, a court need not rule on the reasonableness of the CMRS carrier's charges in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. In our view, the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a *difference between promise and performance*.⁴⁴

Reaffirming this distinction and making clear that it applies to lawsuits concerning ETFs will resolve any lingering misunderstanding by courts and allow them promptly to terminate unlawful class actions on grounds of federal preemption. The state court suits that necessitated CTIA's Petition do not seek interpretation or enforcement of the wireless service contract as written, are not based on allegations of nondisclosure or misrepresentation, and do not seek to measure any "difference between promise and performance."⁴⁵ Rather, the typical action concedes that ETFs are contained in contracts but claims that they should *not* be enforced because their terms are essentially "unfair," based on a variety of statutory, equitable, and quasi-contract doctrines that by their nature require a state court to determine whether an otherwise valid ETF is unreasonable. The complaint filed in the Alameda County action is a prime example of such an effort.⁴⁶ Thus, the theories of liability pled by most of the plaintiffs rest on a "reasonableness" inquiry that is fundamentally incompatible with Section 332(c)(3)(A)'s preemptive force and the Commission's teachings concerning its interpretation and application.

⁴⁴ *Wireless Consumers Alliance*, at 15 FCC Rcd. 17035 (footnote omitted) (emphasis added).

⁴⁵ *Id.*

⁴⁶ See Third Consolidated Amended Complaint [Early Termination Fees] Against Verizon, *Cellphone Termination Fee Cases*, Case No. JCCP004332 (Cal. Super. Ct., Alameda County, June 24, 2005) ("*Ca. Verizon Compl.*") (attached as Exhibit A to Comments of Verizon Wireless in Support of CTIA's Petition for Declaratory Ruling, WT Docket No. 05-194 (Aug. 5, 2005)).

A review of the specific theories used to attack ETFs confirms that, at bottom, they aim at the size of the ETF and/or its relation to carrier costs. The most common doctrine employed to overturn a contractual provision on equitable grounds is unconscionability. Unconscionability requires “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁴⁷ The equitable defense of unconscionability thus encompasses both a procedural and substantive component and must each be satisfied.⁴⁸ Importantly, the substantive unconscionability component demands a “reasonableness” inquiry that runs afoul of Section 332. Courts have routinely explained that “substantive unconscionability” is merely a euphemism for an “unfair” or “unreasonable” contractual provision.⁴⁹ Hence, a “[d]etermination of whether a contract provision is substantively unconscionable rests on whether the provision is substantively reasonable.”⁵⁰

⁴⁷ 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:9 (4th ed. 2004) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965)); *see, e.g., Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002); *Beaver v. Grand Prix Karting Ass’n*, 246 F.3d 905, 910 (7th Cir. 2001); *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792-93 (8th Cir. 1998); *Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250, 263 (Mont. 2003); *Woodfield v. Providence Hosp.*, 779 A.2d 933, 937 (D.C. 2001); *Antz v. GAF Materials Corp.*, 719 A.2d 758, 761 (Pa. Super. Ct. 1998).

⁴⁸ 8 WILLISTON ON CONTRACTS § 18:10; *see, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003) (interpreting Ohio law); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (interpreting California law); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181-82 (3d Cir. 1999) (interpreting Pennsylvania law); *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983-84 (Cal. 2003); *Hubscher & Son, Inc. v. Storey*, 578 N.W.2d 701, 703 (Mich. Ct. App. 1998). Only a few states have ruled that either procedural or substantive unconscionability is sufficient to find a contractual provision unenforceable. *See, e.g., East Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002); *World Enters., Inc. v. Midcoast Aviation Servs., Inc.*, 713 S.W.2d 606, 610-11 (Mo. Ct. App. 1986).

⁴⁹ *Jeffrey Mining Prods., L.P. v. Left Fork Mining Co.*, 758 N.E.2d 1173, 1180-81 (Ohio Ct. App. 2001); *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (“Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed.”); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 504 (6th Cir. 2004) (“A

Plaintiffs also attack ETF clauses as illegal penalties. As a general matter, under this theory, “contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties.’ But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced.”⁵¹ Thus, the challenged contract term’s “reasonableness” ultimately informs the choice between viewing the provision as a valid liquidated damages clause, on the one hand, or an illegal penalty, on the other.⁵² Because “‘reasonableness is the touchstone’ for determining whether [a] liquidated damages clause is enforceable,”⁵³ this cause of action is also preempted under Section 332.⁵⁴

contract is substantively unconscionable . . . when its terms ‘are beyond the reasonable expectations of an ordinary person, or oppressive. . . .’” (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996)); *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.*, 680 N.E.2d 240, 243 (Ohio Ct. App. 1996) (“Substantive unconscionability involves those factors which relate to the *contract terms themselves* and whether *they* are commercially reasonable.” (quoting *Collins v. Click Camera & Video*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993))).

⁵⁰ *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1102 (W.D. Mich. 2000) (citing *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 323 (6th Cir. 1998)).

⁵¹ *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) (quoting *United States v. United Eng’g & Constr. Co.*, 234 U.S. 236, 241 (1914)).

⁵² See, e.g., *Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*, 387 F.3d 705, 716 (8th Cir. 2004) (interpreting Iowa law); *Energy Plus Consulting, LLC v. Ill. Fuel Co.*, 371 F.3d 907, 909 (7th Cir. 2004) (interpreting Illinois law); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 71 (2d Cir. 2004) (interpreting New York law); *Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 472 (8th Cir. 2004).

⁵³ *Miami Valley Contractors, Inc. v. Town of Sunman, Ind.*, 960 F. Supp. 1366, 1375 (S.D. Ind. 1997) (quoting *Rajski v. Tezich*, 514 N.E.2d 347, 349 (Ind. Ct. App. 1987)).

⁵⁴ While some have suggested that liquidated damages claims are somehow uniquely immune from preemption due to their historical place in contract law, they have no longer or more privileged a legal pedigree than any of the other causes of action discussed here. Moreover, the test for preemption, under FCC precedent, is whether application of a particular state law claim involves the decisionmaker in an assessment of the reasonableness of wireless rates. As we have shown, liquidated damages claims do just that. There is no basis for singling liquidated damages out from the class of preempted causes of action. Indeed, a declaration that ETFs are “rates charged” would have little practical force if some state law causes of action attacking ETFs were preempted while others, requiring the same essential analysis and seeking

In still other cases, plaintiffs use quasi-contract doctrines to attack ETFs. “Quasi contractual obligations are imposed by the courts for the purpose of bringing about a *just* result without reference to the intention of the parties.”⁵⁵ Although plaintiffs apply differing titles, such as contract implied-in-law, unjust enrichment, quantum meruit, restitution, or money had and received, their quasi-contract claims generally turn on the same criteria. In all cases, the plaintiff must show: “(1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.”⁵⁶ The court must therefore, without regard to the contractual language, determine if the benefit obtained should be returned based on principles of equity.⁵⁷ As explained above, equitable rulings inherently turn on a “reasonableness” determination. Quasi-contract claims are no different.⁵⁸ In fact, as the D.C. Circuit recently

the same remedy, were not preempted simply because of the label attached to them in a state's code or common law.

⁵⁵ 1 WILLISTON ON CONTRACTS § 1:6 (emphasis added).

⁵⁶ 26 WILLISTON ON CONTRACTS § 68:5; *see, e.g., Dove Valley Bus. Park Assocs. v. Bd. of County Comm'rs of Arapahoe County*, 945 P.2d 395, 403 (Colo. 1997) (unjust enrichment and contract implied in law); *Eisele v. Rice*, 948 P.2d 1360 (Wyo. 1997) (quantum meruit); *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 168 (S.C. 2003) (restitution).

⁵⁷ *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 60 (2d Cir. 1997) (“[C]laims for unjust enrichment or quantum meruit do not hinge on the existence of an agreement, oral or otherwise.”); *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 285 (N.J. 1992) (“[Q]uasi-contractual recovery . . . ‘rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.’” (quoting *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966))).

⁵⁸ *See Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998); *Pioneer Operations Co. v. Brandeberry*, 789 P.2d 1182, 1189 (Kan. Ct. App. 1990).

explained, the FCC on this score has “left little room for confusion . . . , strongly suggesting that a claim based on quantum meruit would be preempted [under Section 332.]”⁵⁹

Finally, some plaintiffs bring their claims under state unfair competition laws or similar legislation. State statutes prohibit a broad swath of “unfair” practices, but each claim boils down to an allegation that the ETF provision is substantively unfair. For instance, in California, the plaintiffs argue that the defendants violated the California Consumer Legal Remedies Act,⁶⁰ among other statutes, by inserting “unlawful penalties, . . . unconscionable . . . [and] unenforceable” terms and in their contracts.⁶¹ The plaintiffs also argue under California’s Unfair Competition Law⁶² that the ETF is “a contract of adhesion”⁶³ that offers “no meaningful choice”⁶⁴ and contains terms that are “unreasonably favorable, . . . unduly harsh . . . [and] therefore is substantively unconscionable.”⁶⁵ Because these statutory claims, like their common

⁵⁹ *AT&T Corp. v. FCC*, 349 F.3d at 700-01 (citing *Sprint PCS Declaratory Ruling*, 17 FCC Rcd. at 13198 n.40). In that Declaratory Ruling, the FCC made clear that determination of the *existence* of a contract was within the bailiwick of the state court authority, but ventured advice about the general viability of *quantum meruit* claims: “Quantum meruit is premised on the notion that a party receiving service would be unjustly enriched if it were not required to pay for that service. . . . [A]n award of quantum meruit would require the court to establish a value (*i.e.*, set a rate) for the service provided in the past. We note that there is a substantial question whether a court may award quantum meruit or other equitable relief under state law without running afoul of section 332(c)(3)(A).” *Sprint PCS Declaratory Ruling*, 17 FCC Rcd. at 13198 n.40.

⁶⁰ Cal. Civ. Code §§ 1750-1785.

⁶¹ *See Ca. Verizon Compl.* ¶ 9; *see also* Cal. Civ. Code § 1770(a)(19) (making it a violation of the CLRA to insert “an unconscionable provision in the contract”).

⁶² Cal. Bus. & Prof. Code §§ 17200-17210.

⁶³ *See Ca. Verizon Compl.* ¶ 63.

⁶⁴ *See id.* ¶ 56.

⁶⁵ *See id.* ¶ 57.

law progenitors, turn on reasonableness, these claims too are preempted by Section 332(c)(3)(A).⁶⁶

C. **The Commission Need Only Reaffirm and Apply the Holding in *Wireless Consumers Alliance* in Order to Make Clear that the State Lawsuits at Issue Are Preempted**

The Commission need only apply *Wireless Consumers Alliance* to reaffirm that that any state law claims that have as their analytical basis an inquiry into the appropriate use, size, or cost-basis of the ETF, or any other analysis that asks whether an otherwise validly-contracted ETF is unreasonable, are preempted. This conclusion makes no new inroads into state authority over wireless rates. Rather, it follows directly from proper application of the Commission's established jurisdictional boundaries in the context of state suits challenging ETFs, the most recent iteration of various state efforts to exercise regulatory authority over wireless rates. As explained above, the Commission has *already* crossed the Rubicon on the question of how to deal with facially neutral state laws of general applicability and correctly found that enforcement of such laws *can* constitute prohibited rate regulation when state decisionmakers sit in judgment of the reasonableness of rates.

Left undisturbed by a declaration of preemption in this docket would be the traditional role of state contract law to govern legitimate disputes over: contract formation, interpretation, and enforcement; billing controversies that do not go to the amount of the ETF but, say, the question whether it can be considered past due because it was never billed to the customer or otherwise brought to his or her attention as payable; and allegations of misrepresentation or non-

⁶⁶ To be clear, Verizon does not contend that all state unfair competition or consumer protection statutes are preempted. Rather, these statutes, which prohibit a wide range of behavior, are preempted where the underlying cause of action requires the "reasonableness" assessment prohibited by Commission precedent.

disclosure. Likewise undisturbed would be the states' enforcement of neutral laws of general application, like consumer protection statutes, that do not involve a reasonableness inquiry. Thus, the FCC need not fear that CTIA's requested declaratory ruling will displace proper state authority to enforce contract law or to protect consumers under state statutes. Nor should the FCC fear that relief will deprive wireless subscribers of protection from perceived abuses. While the competitive market for wireless services already safeguards customers from questionable practices, any oversight that might be needed is provided by federal law.⁶⁷

III. THERE IS NO PROCEDURAL IMPROPRIETY IN GRANTING THE REQUESTED DECLARATORY RELIEF NOW

In an effort to prevent a decision in this docket, in apparent recognition of the strength of CTIA's arguments on the merits, AARP asserts that disputed factual issues render declaratory relief inappropriate⁶⁸ and that CTIA has failed to meet some "evidentiary burden" to prove its entitlement to clarification of federal law.⁶⁹ These arguments are meritless and should be rejected.⁷⁰ For the reasons given below, the FCC should have no doubt about its authority to issue the requested declaratory relief, and the propriety of doing so on this record.

⁶⁷ Wireless carriers' rates and rate structures are subject to federal review under the "unjust or unreasonable" standard set forth in 47 U.S.C. § 201(b), and the nondiscrimination requirements contained in 47 U.S.C. § 202(a). The FCC has found that wireless rates are presumptively reasonable and nondiscriminatory because wireless carriers lack market power in this highly competitive industry. *Second CMRS Report and Order*, 9 FCC Rcd. at 1478.

⁶⁸ Ex Parte of AARP at 5-6.

⁶⁹ *Id.* at 9-11.

⁷⁰ These arguments are all the more inappropriate in light of the confidential filing by Wireless Consumers Alliance on December 28, 2005 of proprietary carrier information produced as a result of the state court litigation challenged herein as preempted. Though the carriers have not yet concluded their review of the filing, it is clear that as a result of the actions of the consumer groups the FCC has before it, in this very docket, highly sensitive cost and pricing information that, though legally irrelevant to the FCC's inquiry, more than satisfies AARP's

Unlike other FCC proceedings, the FCC's rules contain no evidentiary or pleading burden applicable to declaratory rulings.⁷¹ The FCC *routinely* uses declaratory rulings to clarify legal issues, resolve disputes, and end confusion. That is the purpose of declaratory relief and it is the very reason that the state court in the SunCom litigation referred this matter to the Commission in the first place.⁷²

AARP's argument that an ETF's status as a rate is a disputed question of "fact" that cannot be resolved in a declaratory ruling⁷³ is equally frivolous. Previous declaratory rulings amply support the propriety of CTIA's request for clarification of a purely legal question involving Section 332's preemption provisions on records far less robust than this. In fact, in *Wireless Consumers Alliance*, at the request of consumer groups, the FCC did precisely what the industry requests here.

WCA underscores the importance of resolving the issues raised in its petition, arguing that state courts throughout the country have reached inconsistent rulings based on their interpretations of Section 332(c)(3)(A)'s preemption of damage

own evidentiary demands and further demonstrates that AARP's procedural objections are fallacious.

⁷¹ See, e.g., *Towne Reader Service, Inc. v. MCI Telecommunications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 13131, 13132 ("It is well established that in a formal complaint proceeding pursuant to Section 208 of the Act, the complainant has the burden of proof." (citing *Amendment of Rules Concerning Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 8 FCC Rcd. 2614, 2616-17 (1993), which requires full fact pleading to establish a paper record for formal complaint proceedings)); *Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership*, Memorandum Opinion and Order, 9 FCC Rcd. 3341, 3345 (1994) ("In a complaint proceeding under Section 208 of the Communications Act, the burden would be on the complainant to plead facts . . .").

⁷² See 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

⁷³ Ex Parte of AARP at 6-8.

awards and that such inconsistent rulings are likely to continue without FCC guidance.⁷⁴

There, the “petition focuse[d] on the issue of whether, as a matter of law, the Communications Act preempts state courts from awarding monetary relief to consumers against CMRS providers for violating state consumer protection, tort, or contract laws.”⁷⁵ Here, CTIA’s Petition focuses on whether, as a matter of law, Section 332 preempts state courts from evaluating rates and awarding relief to consumers for allegedly violating consumer protection, tort, or contract laws.

AARP asserts that “whether ETFs are penalties established to prevent consumers from reacting to marketplace competition is a material fact which has not been developed by the Petitioner and which is in dispute on the record in this docket.”⁷⁶ As an initial matter, and as explained above, whether or not ETFs are cost-based is irrelevant to whether they are “rates charged” under Section 332. And, to the extent that some carriers might charge unreasonably high ETFs to discourage subscribers from switching providers, the reasonableness of the rate and the motivation for its imposition are questions for the Commission under Sections 201 and 202 of the Communications Act, not for state courts under a patchwork of state statutes and common law doctrines.

Moreover, in arguing that the parties “do not have differing interpretations of the applicable statutory provision but rather differing views of how particular ETFs must be classified under the statute,”⁷⁷ AARP tries to convert a disputed legal question, whether ETFs are

⁷⁴ *Wireless Consumers Alliance*, 15 FCC Rcd. at 17022.

⁷⁵ *Id.* at 17023.

⁷⁶ Ex Parte of AARP at 8.

⁷⁷ *Id.* at 11.

“rates charged,” into a question of fact. The parties’ disagreement over how to “classify” ETFs under the statute *is* a disagreement over how to interpret Section 332’s “rates charged” language and its ban on state efforts to “regulate” rates. A declaratory ruling is not inappropriate simply because AARP disagrees with CTIA’s legal position. In fact, that is what makes the requested declaration so vital.

In *Wireless Consumers Alliance*, as here, “[s]ome opposing commenters argue[d] that the Commission can only make a decision based on the facts of the particular case and since the facts were not properly pleaded we should deny the petition.”⁷⁸ However, the FCC concluded that “we can and should address the legal question of whether Section 332 of the Federal Communications Act generally preempts state courts from awarding monetary relief as a remedy for state consumer protection, tort or contract claims.”⁷⁹ The FCC should reach the same conclusion here, and issue a declaratory ruling that Section 332 preempts state courts from regulating the amount, use, or reasonableness of ETFs under various state law causes of action

IV. CONCLUSION

Given the progression of the ETF-related class actions against wireless carriers, it is more important than ever that the FCC act quickly and decisively to issue the relief sought in the CTIA Petition. The Commission should not be distracted from the task at hand by opponents’ efforts to mischaracterize the Petition as predicated on dramatic new incursions into state authority

⁷⁸ 15 FCC Rcd. at 17026.

⁷⁹ *Id.* Similarly, in *Southwestern Bell*, 14 FCC Rcd. 19898, the FCC determined that, although under Section 332 states lacked authority to prohibit CMRS carriers from charging in whole-minute increments or charging for incoming calls, state contract or consumer fraud laws relating to the disclosure of rates and rate practices were not generally preempted under Section 332. That declaratory ruling did not require an extensive factual record in order to answer the legal question presented.

under Section 332. The Petition simply asks the Commission to apply Section 332(c)(3)(A), as interpreted in well-established FCC precedent, to this latest variation of state efforts to assert regulatory authority over wireless rates. Faithful application of the statute and Commission precedent compels the conclusion that ETFs are covered by the on state rate regulation and that state court lawsuits run afoul of that ban when they require decisionmakers to evaluate the reasonableness or cost-basis of ETFs. That the instant challenges come cloaked as causes of action under putatively general state statutes or common law theories cannot insulate them from preemption, as the Commission long ago made clear in *Wireless Consumers Alliance*. It bears emphasis that a declaration of preemption here does *not* mean that states will be unable to interpret and enforce wireless contracts or to regulate conduct extrinsic to the reasonableness of rates under fraud and unfair competition laws; states will remain free to engage in this traditional activity that was not disturbed by Congress' reworking of federal-state relations in Section 332.