May 30, 2006

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: ***Ex Parte Communication, Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332,* WT Docket No. 05-194; *Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition For Declaratory Ruling Filed by Debora 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**

Dear Ms. Dortch:

The commenters opposing the petition for declaratory relief filed by CTIA – The Wireless Association® ("CTIA") do not seek merely to restrict or condition CMRS providers' use of the early termination fee ("ETF") – they seek to restructure CMRS rates. In so doing, they would dismantle one of the primary engines of CMRS growth in the past decade: The term contract backed by a standardized ETF. This rate structure – which, as the Commission has observed, reduces up-front and monthly fees – has enabled millions of consumers to enjoy the benefits of mobile telecommunications services. As a result, wireless penetration exceeds 50% of the nation's population. Under ETF-backed contracts, consumers agree to pay either the monthly access charge for the full term of the contract, or, if they wish to terminate their contract prematurely, the monthly access charges through the date of termination plus an ETF. In return, they receive equipment at reduced prices and/or reduced origination and monthly fees. Those consumers who wish to avoid a term commitment and the possibility of incurring an ETF are not forced to agree to this rate structure – it is undisputed that they may subscribe on a pre-paid or month-to-month post-paid basis, albeit generally at a higher up-front or monthly cost.

The term-contract-plus-ETF rate structure has developed precisely because of Congress's and the Commission's deliberate decision to allow CMRS prices to be set by competitive market forces, rather than by state or federal regulators. It is tremendously popular, with a substantial majority of subscribers choosing it over a pay-as-you-go, no-commitment arrangement. It is this rate structure – the one produced by market forces in conformance with federal policy and the one preferred by the vast majority of subscribers – that elements of the plaintiffs' class action bar seek to modify or eliminate pursuant to state law. This is clear from the complaints in the California, Florida and Illinois proceedings cited in the CTIA Petition. For example, in the consolidated *Cellphone Termination Fee Cases*[1] pending in a California state court, the class action complaints do not allege breach of contract – in fact, they allege that the contracts signed by the plaintiffs in fact require payment of ETFs upon termination. Nor do they allege that the ETF clause was in any way inadequately disclosed or concealed – rather, they allege that the ETF itself is "unfair," "unreasonable," "unduly harsh," or an unlawful "penalty."

The essence of the current opposition to the CTIA Petition boils down to four assertions made in a recent filing by the Wireless Consumers Alliance and other putative class action plaintiffs (collectively, "WCA"): (1) the Commission has established a "bright line rule" that state laws of "general applicability" are not preempted; (2) state restrictions on "liquidated damages" provisions are not preempted because they do not require courts to engage in the "regulatory type of analysis" prohibited by Section 332(c)(3)(A); (3) the Commission has "never purported to make rulings on the preemption of specific claims or remedies," such as the CTIA Petition purportedly seeks, and "[a]t most" can offer only "general guidance" on the subject of preemption; and (4) there is not "even a colorable legal basis" to support a conclusion that ETFs constitute "rates charged" for CMRS within the meaning of Section 332(c)(3)(A).[2] Each of these assertions is demonstrably false.

First, the supposed existence of a "bright line rule" that laws "that do not specifically target the wireless industry" are exempt from Section 332's preemptive reach is belied not only by the statute itself but by Commission precedent.[3] Soon after the passage of the statute, the Commission admonished state commissions that their certification jurisdiction was preempted with respect to CMRS providers.[4] Most recently, the Commission declared specific state laws regulating line item charges of all telecommunications services to be preempted with respect to CMRS.[5]

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[1] *Cellphone Termination Fee Cases*, Superior Court of the State of California, County of Alameda, Case No. J.C.C.P. 4332.

[2] Reply of Wireless Consumers Alliance, *et al.* to "White Paper" of Verizon Wireless, filed April 18, 2006 [hereinafter WCA April 18, 2006 *Ex Parte*] at 1-4.

[3] *See* § I, *infra* p.4.

[4] *See, e.g., In re Petition of People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7550 n.307 (1995).

[5] *In re Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448, 6464-65 n.87 (¶ 31) (2005) [hereinafter *Second Truth-in-Billing Order*].

Second, it is equally clear that Section 332 preempts all state laws that regulate rates, not just those that require a tribunal to engage in a "regulatory type of analysis." A state law decreeing that CMRS airtime shall be no more than $.01 per minute requires no "regulatory type of analysis" by an enforcing court or commission – the legislature has already determined that rates in excess of $.01 per minute are *de jure* unjust and unreasonable. WCA's argument, if valid, would exempt such a law from Section 332(c)(3)(A)'s preemptive scope – an absurd result.[6]

Third, WCA's claim that the Commission has "never before" made preemption rulings that would affect claims pending before courts or other tribunals is demonstrably wrong. Just last year, in its *Second Truth-in-Billing Order*, it specifically preempted state regulations governing CMRS line item charges that were the subject of ongoing disputes. By asserting that the Commission's authority to make declaratory rulings with respect to the meaning of the Communications Act is limited to providing "general guidance" flies in the face of the Commission's institutional prerogative to interpret the Act in the manner it reasonably deems necessary to further its statutory goals – a prerogative most recently confirmed in the Supreme Court's *Brand X* decision.[7] Furthermore, a contrary rule – one that would postpone Commission adjudication of declaratory rulings during the pendency of related litigation – would allow the class action bar to delay such rulings indefinitely.[8]

Fourth, WCA's assertion that there is not "even a colorable basis on which the Commission could conclude that ETFs are 'rates charged' for CMRS service [*sic*]" defies comprehension. As documented extensively by the comments and *ex parte* filings of CTIA, Cingular, Verizon Wireless, T-Mobile and others, it is clear from both the structure of the CMRS market and Commission precedent that ETFs constitute "rates charged" for CMRS within the meaning of 47 U.S.C. § 332(c)(3)(A).[9] The relief requested by the CTIA Petition would confirm that Section 332(c)(3)(A) bars applications of state law that would prohibit, restrict, or condition the use of ETFs based on a finding that they are "unjust," "unreasonable," "unfair," or "unconscionable," or upon a state legislature's determination that such rate elements are "illegal penalties." It would ***not***, as WCA has intimated, insulate CMRS providers from accountability under state contract, tort, or consumer protection laws of general application for failing to fulfill their contracts or for deceptive conduct. The requested declaratory ruling would simply confirm that Section 332(c)(3)(A)'s preemption of state laws purporting to regulate CMRS rates applies to state laws of general applicability where such laws are applied to regulate CMRS rates *qua* rates – that is, with reference to their intrinsic fairness or legality.[10]

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[6] *See* § II, *infra* p.12.
[7] *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).
[8] *See* § IV, *infra* p.16.
[9] *See* § III, *infra* p.14.
[10] *See* § I.B *infra* p.8.

The declaratory ruling requested by the CTIA Petition is essential to maintaining the integrity and effectiveness of the national, uniform scheme of CMRS regulation mandated by Congress and implemented so effectively by the Commission. The industry's experience shows that when courts misinterpret Section 332(c)(3)(A) to permit regulation of a CMRS rate element pursuant to state law, the class action device converts what might have been isolated errors into an intolerable commandeering of federal CMRS rate regulation authority on a multistate basis. For example, a state court in Louisiana has determined that a CMRS carrier's usage charges are "unduly burdensome and extremely harsh" because they are calculated in whole-minute increments – a rate element that the Commission has held both falls within Section 332's prohibition of state regulation of CMRS rates and is neither unjust nor unreasonable as a matter of federal law. That matter has now been certified as a class action, and the plaintiffs' bar and the Louisiana District Court for New Iberia Parish are thus poised to make whole-minute billing unlawful in nine states, even though the Commission has expressly found that practice reasonable under Section 201 of the Act.[11]

The argument by some commenters that the CTIA Petition should be denied because ETFs are unfair begs the question presented: Whether ETFs constitute CMRS rates and rate elements such that Section 332 preempts applications of state law to ETFs in ways that, in substance and effect, amount to rate regulation. Since they do, states may regulate CMRS ETFs only with the permission of the Commission, after showing systemic market failure. Moreover, to the extent WCA or others seek a ruling in this proceeding that ETFs are unjust or unreasonable, their request is not properly before the Commission: To secure such a ruling they must either file a complaint alleging violations of Section 201(b) or petition the Commission for an investigation or rulemaking on the subject of CMRS rates structures.[12]

I. SECTION 332(C)(3)(A) PROHIBITS ALL STATE REGULATION OF CMRS RATES, INCLUDING REGULATION THROUGH THE APPLICATION OF STATE LAWS OF GENERAL APPLICABILITY

A. Section 332(c)(3)(A)'s Preemptive Force Is Not Limited To State Laws That Specifically Target CMRS Rates

WCA insists that Commission precedent establishes that "state laws that do not specifically target the wireless industry[] are not preempted by § 332."[13] This is

[11] *See* § V, *infra* p.17.
[12] *See* § VI, *infra* p.20.
[13] WCA April 18, 2006 *Ex Parte* at 4. WCA previously framed this argument in misleading terms, asserting that "the relief Petitioners seek is foreclosed by long-standing Commission authority holding that ***§ 332 does not preempt the application of neutral state laws of general applicability***." *Ex parte* Letter dated January 11, 2006 from J. Hobson to Secretary Dortch on behalf of Wireless Consumers Alliance et al., at 4; *see Ex parte* Letter dated March 1, 2006, from J. Hobson to Secretary Dortch on

nothing less than a mischaracterization of the Commission's decisions. The Commission has never suggested, much less held, that state courts may regulate CMRS rates as long as they do so through the neutral application of state laws of general applicability. To the contrary, as the Commission has repeatedly explained, "it is the substance, not merely the form" that determines whether an application of state law constitutes rate regulation proscribed by Section 332(c)(3)(A).[14] Since "actions under state law could in substance and effect amount to regulation of CMRS rates even though not formally styled as such,"[15] "state law claims may, in specific cases, be preempted by Section 332."[16] In other words, while state laws are not preempted in all cases touching upon CMRS rates, they ***are*** preempted when their application "in substance and effect amount[s] to regulation of CMRS rates," notwithstanding their neutral administration or general application. WCA's insistence that the *Wireless Consumers Alliance Order* "confirmed" a "bright line rule" that state laws "that do not specifically target the wireless industry" are exempt from preemption cannot be squared with the Commission's statement, ***in the same order***, that actions under state laws that are not "formally styled" as CMRS rate regulation are nevertheless preempted by Section 332 "in specific cases" where the "substance and effect" of the state law is to regulate CMRS rates.

WCA next claims that the Commission "repeatedly" emphasized this imaginary "bright line rule" in its recent declaratory ruling in its *Truth-in-Billing* proceeding. WCA can do this only by the creative use of ellipses. As evidence of the "bright line rule," WCA cites the Commission's statement that "we believe that states' enforcement of their own generally applicable contractual and consumer protection laws . . . would ***not*** constitute rate regulation under section

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behalf of Wireless Consumers Alliance, at 3-4. This misstates the actual text of Commission decisions. The Commission has never held that the Section 332 exempts "***neutral state laws***" from preemption. Rather, it has held that CMRS providers are subject to the "***neutral application***" of state contractual or consumer fraud laws—that is, applications that do not "prescribe how much is charged for CMRS services or rate structures for CMRS." *In the Matter of Wireless Consumers Alliance; Petition for a Declaratory Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Laws Prohibiting False Advertising and Other Fraudulent Practices, and/or (b) in the context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws*, 15 F.C.C.R. 17021, 17025-26 (¶ 8) (2000) [hereinafter *Wireless Consumers Alliance Order*] (citing *In the Matter of Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 F.C.C.R. 19898, 19906-07 (¶¶ 10, 20) (1999) [hereinafter *Southwester Bell Mobile Systems Order*]). WCA's latest filing abandons the misleading and nonexistent term, "neutral state laws," and thus tacitly concedes that it was cut from whole cloth.

[14] *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6466 (¶ 34); *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17035, ¶ 28.

[15] *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17035, ¶ 28 n.91.

[16] *Id*. at 17035, ¶ 28.

332(c)(3)(A)."[17] However, when the language omitted by WCA is restored, the statement ***negates*** WCA's assertion: "we believe that states' enforcement of their own generally applicable contractual and consumer protection laws ***-- to the extent such laws do not require or prohibit the use of line items --*** would not constitute rate regulation . . . ."[18] In other words, enforcement of generally applicable state contract and consumer protection laws would not constitute rate regulation – ***except to the extent that they prohibit or require the use of a particular rate or element of CMRS carrier's rate structure.*** The unabridged language from the *Second Truth-in-Billing Order* cited by WCA not only fails to flesh out WCA's imaginary "bright line rule"—it supports the construction of Section 332 put forth in the CTIA Petition.

The Commission's interpretation of the scope of Section 332 in the *Wireless Consumers Alliance Order* was most recently endorsed by the U.S. Court of Appeals for the Eighth Circuit. In *Cellco Partnership v. Hatch*,[19] the wireless carriers had sought declaratory and injunctive relief against a provision of Minnesota's "Wireless Consumer Protection" law that restricted the timing and manner of wireless rate changes. In response, the state had argued that "consumer protection measures" were among the matters that constituted "other terms and conditions" of wireless service, and that the measure in question "is a consumer protection measure that 'furthers the underlying traditional requirements of contract law as a way to protect consumer interests' by guarding consumers against unilateral contract changes."[20] The court of appeals disagreed:

> We find this argument overbroad, and we are not persuaded. Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid 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.[21]

Just as the invocation of "consumer protection" did not insulate state laws regulating CMRS rates from preemption in *Hatch*, so too the shibboleth of "laws of general applicability" fails to permit state regulation of CMRS rates in the ETF context.

[17] WCA April 18, 2006 *Ex Parte* at 5 (quoting *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6476 (¶ 53) (emphasis and omission added by WCA)).
[18] *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6476 (¶ 53) (emphasis added).
[19] No. 04-3198, 2005 U.S. App. LEXIS 26887 (8th Cir. Dec. 9, 2005).
[20] *Hatch*, 2005 U.S. App. LEXIS 26887 at *15.
[21] *Id.*

In an earlier filing WCA attempted to distinguish the preempted legislation at issue in *Hatch* from statutes invoked in the *Cellphone Termination Fee Cases* on the ground that the former was CMRS-specific, while the latter are "neutral" laws of general applicability.[22] This argument is specious. As explained above, the Commission has ***never*** exempted "neutral laws" from Section 332(c)(3)(A)'s prohibition but instead has held that "neutral application" of state contractual and consumer fraud laws – that is, applications that do not "in substance and effect amount to regulation of CMRS rates even though not formally styled as such" do not, by hypothesis, fall within the statute's prohibition.[23] The Minnesota legislature's targeting of CMRS providers meant that the ***only*** effect of the statute at issue was to regulate CMRS rates; therefore, as the carrier plaintiffs argued and as the *Hatch* court found, the relevant provision of the statute was preempted on its face and in its entirety. It is plain from both the *Hatch* court's analysis and the language of Section 332(c)(3)(A) that the Minnesota statute at issue would have been preempted with respect to CMRS even if it had regulated rates for services other than CMRS. It could have been drafted to apply to term contracts for all types of telecommunications services, or to term contracts for all types of consumer services, or even to all term contracts of whatever nature executed in the state of Minnesota. In every case, while Section 332(c)(3)(A) would permit the regulation of the rates charged for ***other*** types of telecommunications services, for ***other*** consumer services, or pursuant to any ***other*** contracts executed in Minnesota, it would still, nevertheless, preempt the statute to the extent it purported to regulate the rates charged for CMRS. Nothing in the *Hatch* court's analysis, or Section 332(c)(3)(A), permits or even suggests a contrary result.

The *Hatch* court's interpretation of the *Wireless Consumers Alliance Order* and Section 332(c)(3)(A) thus squarely supports the relief requested by CTIA — confirmation that an ***application*** of a state law that amounts to regulation of the "rates charged" for CMRS is preempted, no matter how neutral the law appears on its face. For example, in the *Cellphone Termination Fee Cases*, the California laws at issue apply to businesses other than CMRS providers, and do not, on their face, purport to regulate CMRS providers. Rather, it is the ***application*** of the California statutes to invalidate CMRS providers' ETFs on the basis of their "fairness" or "legality" under state law, as demanded in the *Cell Phone Termination Fee Cases*, that constitutes impermissible state regulation of CMRS rates. The *Cell Phone Termination Fee Cases* thus are precisely the "specific cases" of preempted state-law claims anticipated by the Commission in the *Wireless Consumers Alliance Order*.[24]

The misinterpretation of the Commission's *Wireless Consumers Alliance Order* as standing for the proposition that ***no*** claims challenging wireless carriers' rates are preempted by Section 332 is not limited to the plaintiffs' class action bar. As outlined in the CTIA's Petition, a number of courts have misinterpreted the

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[22] WCA March 1, 2006 *Ex Parte* at 3.
[23] *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17035, ¶ 28 n.91.
[24] *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17035, ¶ 28.

Commission's careful delineation between permissible and impermissible regulation of matters touching upon CMRS providers' rates as a *de facto* safe harbor for consumer class action suits using state law to challenge the reasonableness of ETFs under the rubric of state contract, tort, and consumer protection laws of general applicability.[25] As a result, the CMRS industry faces the very real prospect of having the ETF/term contract rate structure – a structure that has been instrumental in bringing mobile phone service to well over half the population of the United States – declared unlawful in one or more states.

B. The Requested Declaratory Ruling Will Not Result In Preemption Of "All State Law Challenges, Of Any Kind Or Character" to ETFs.

WCA's latest filing asserts that the CTIA Petition "asks the Commission to obliterate centuries of contract law precedent."[26] This assertion also appears in earlier WCA filings, in only slightly less histrionic terms, where CTIA's position is misrepresented as contending "that 47 U.S.C. § 332 preempts ***any and all*** state-law claims that challenge in ***any*** respect the validity or enforceability of ***any*** early termination fee charged by a cellphone carrier."[27] To the contrary, the requested declaratory ruling would ***not*** preempt state laws that merely "have an impact on the costs of doing business for a CMRS operator," would ***not*** provide CMRS providers with "blanket immunity" against the neutral application of state laws of general applicability, and would ***not*** preclude state-law damages claims for contract, tort, or consumer protection claims not challenging the intrinsic fairness, reasonableness, or legality of ETFs. Nor would it allow CMRS providers to "avail themselves of breach of contract laws but ignore all defenses."[28]

WCA's breathless parade of horribles, which is based upon increasingly extreme mischaracterizations of the ruling requested by CTIA, is answered simply by referring to the requested declaratory ruling as set forth in the CTIA Petition: A ruling confirming that

> any application of state law that purports to authorize a court or other tribunal to invalidate, modify, or condition the use or enforcement of ETFs ***based, in whole or in part, upon an assessment of the reasonableness, fairness or cost-basis of the ETF***, ***or upon an application of state law prohibiting the use or enforcement of ETFs*** or so-called "liquidated

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[25] *See* CTIA Petition at 2-7.

[26] WCA April 18, 2006 *Ex Parte* at 6.

[27] *Ex parte* Letter dated January 11, 2006 from J. Hobson to Secretary Dortch on behalf of Wireless Consumers Alliance et al., at 1 (emphasis added); *see Ex parte* Letter dated March 1, 2006, from J. Hobson to Secretary Dortch on behalf of Wireless Consumers Alliance, at 3 ("The Relief CTIA Seeks Would Exempt The CMRS Industry From Generally Applicable State Contract Law.").

[28] WCA April 18, 2006 *Ex Parte* at 7.

> damages" provisions, constitutes unlawful rate regulation and is therefore preempted by Section 332(c)(3)(A).[29]

In other words, the CTIA Petition is directed at efforts to prohibit, restrict, or condition the inclusion of ETFs in a wireless carrier's rate structure pursuant to a normative judgment by a state or local government authority that the use of ETFs is unfair, unreasonable, or otherwise contrary to public policy in some or all circumstances. Such efforts may take the form of a state statute or regulation specifically directed towards the use of ETFs in CMRS providers' consumer contracts in order to redress perceived unfairness. Such efforts may also take the form of lawsuits or enforcement actions against CMRS providers pursuant to state laws of general applicability that prohibit some or all ETFs as "penalties" or excessive "liquidated damages." And such efforts may take the form of challenges to CMRS providers' ETFs pursuant to state laws that prohibit "unfair" competitive practices or the enforcement of "unconscionable" contract terms. In each case – the promulgation of CMRS-specific legislation or regulations, the enforcement of laws regulating "liquidated damages" or "penalties," and the adjudication of claims that such contract terms are "unfair" or "unconscionable" – the challenge to CMRS ETFs requires a determination that, under state law, the inclusion of ETFs in CMRS providers' rates structures in some or all circumstances is "unjust" or "unreasonable." Such determinations are, of course, the essence of rate regulation and, as such, prohibited to state and local governments by Section 332.

As shown by CTIA and the carriers participating in this proceeding, [30] the Commission's prior applications of Section 332(c)(3)(A) support – indeed, compel – the conclusion that ***any*** application of state law that would prohibit, restrict, or condition the use of a wireless carrier's ETF based upon an assessment of the reasonableness of the ETF constitutes prohibited rate regulation: "If a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332."[31] Federal courts considering the matter have also confirmed that a state court oversteps its authority if it considers the reasonableness of a wireless rate.[32] "[C]laims that would enmesh the courts in a determination of the reasonableness of a

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[29] CTIA Petition at 31 (emphasis added); *see also* Public Notice, "Petition for Declaratory Ruling Filed By CTIA," 70 Fed. Reg. 38928 (July 6, 2005).
[30] *See, e.g.,* CTIA Petition at 1-2, 11-19; Cingular Wireless Comments at 10-16; Dobson Comments at 2-4; Nextel Comments at 4-9, 18-20; Sprint Comments at 8-10; SunCom Comments at 6-13; T-Mobile Comments at 4-7, 12-15; Verizon Wireless Comments at 5-6, 9-17, 22-24; Verizon Wireless White Paper, 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, at 11-22 (filed March 30, 2006) [hereinafter Verizon Wireless White Paper].
[31] *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17035 (¶ 25).
[32] *See. e.g., AT&T Corp. v. FCC,* 349 F.3d 692, 702 (D.C. Cir. 2003) (citing *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17041, ¶ 39.

rate charged" are preempted by section 332.[33] Where "the nature of [plaintiff's] claims would necessarily require an examination of the reasonableness of the rates charged by [a wireless carrier], such claims are preempted under the [Act]."[34]

The overriding thrust of the pending state court actions challenging carriers' ETFs is that the charges are ***intrinsically*** "unfair," and therefore unenforceable, under state law. As shown in the CTIA Petition, although the complaints plead a variety of statutory, equitable, and quasi-contractual claims (*e.g.,* unconscionability, illegal penalties, *quantum meruit*, unjust enrichment, unfair competition, and consumer protection), each of them depends upon a determination of the "reasonableness" of the ETF – either by a state legislature (*e.g.* in the case of "illegal penalties") or by a court applying state law (*e.g.* in finding "unjust" enrichment or "unconscionable" contract terms).[35] This of course is the essence of rate regulation, prohibited to states by Section 332(c)(3)(A) as interpreted by this Commission. Indeed, WCA and the other class action plaintiffs tacitly concede as much in their April 19, 2006 *ex parte*, in which they emphasize that under the *Wireless Consumers Alliance Order*, Section 332 preempts applications of state law that "require courts to engage in a 'regulatory analysis.'"[36]

The California *Cellphone Termination Fee Cases*[37] cited by CTIA and others illustrate the kind of applications of state law that clearly regulate the "rates charged" for CMRS in violation of Section 332(c)(3)(A). The complaints assert state-law claims under various equitable doctrines and statutory theories of liability, alleging that ETFs constitute ***unlawful*** penalties, ***unfair*** business practices, and ***unconscionable*** contract terms, and, as such, have ***unjustly*** enriched wireless carriers. The common basis for all of these claims is the allegation that the ETFs permit wireless carriers to "generate enormous profits" as a result of: (a) the revenues from the plaintiffs' payment of the ETFs, which are allegedly not "reasonable" in relation to carriers' actual revenue losses from early termination, and (b) the revenue generated by discouraging the plaintiffs from terminating service during the initial

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[33] *Fedor v. Cingular Wireless Corp.,* 355 F.3d 1069, 1073 (7th Cir. 2004).

[34] *Chandler v. AT&T Wireless Servs., Inc.,* No. 04-180-GPM, 2004 U.S. Dist. LEXIS 14884 at * 5 (S.D. Ill. July 21, 2004); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) ("This clause completely preempted the regulation of rates . . . .").

[35] CTIA Petition at 22-27.

[36] WCA April 18, 2006 *Ex Parte* at 7 (heading formatting and capitalization omitted). WCA distorts Verizon Wireless's March 30, 2006 *Ex Parte* by stating that it argues that "only generally applicable laws 'that do not involve a reasonableness inquiry' can escape preemption under § 332." WCA April 18, 2006 *Ex Parte* at 8 (quoting Verizon Wireless March 30 2006 *Ex Parte* at 23). A quick review of Verizon Wireless's statement in the context of its filing, however, confirms that the statement was made in the context of state laws affecting CMRS rates; in other words, applications of generally applicable state laws ***to CMRS rates*** are saved from preemption only if they "do not involve a reasonableness inquiry."

[37] *Cellphone Termination Fee Cases*, Superior Court of the State of California, County of Alameda, Case No. J.C.C.P. 4332. The complaint filed against AT&T ("*Ca. AT&T Compl.*"), attached as Exhibit A to the CTIA Petition, is representative of the substantially similar complaints in these cases.

terms of their contracts.[38] The remedies sought by the complaints reinforce the nature of their challenge to this rate element: in addition to damages, plaintiffs demand restitution and disgorgement of ETFs already collected, as well as an injunction preventing wireless carriers from enforcing ETFs in existing rate plans or including ETFs in future rate plans.[39] In other words, the gravamen of the complaints is that the ETFs produce unreasonable revenues and thus unjustly enrich the carriers, and the essence of the remedies sought is a reduction of the carriers' revenues through retrospective and prospective elimination of the ETF rate element, with a rebate for ETFs already paid. The *Cell Phone Termination Fee Cases* thus are the functional equivalent of a utility rate investigation upon complaint.

The true nature of the *Cell Phone Termination Fee Cases* is confirmed by the absence of allegations of failure of promised performance or nondisclosure of the ETF that can be decided under state law. With respect to contractual promises, the complaints acknowledge not only that the carriers' customers have entered into service agreements but also that their agreements require the payment of ETFs upon early termination.[40] With respect to nondisclosure, there is no allegation that any carrier concealed, or failed to disclose, the inclusion of ETFs among the rates charged under service plans requiring a term commitment. There is not even an allegation that any customer, or prospective customer, was unaware that wireless term contract service plans included ETFs. To the contrary, the "common questions of fact and law" alleged in support of class certification are limited to whether the ETFs are "unlawful," "unfair," "unlawful penalties," or otherwise illegal, whether plaintiffs are entitled to remedies designed to restore equity, and whether the ETF should be eliminated from existing and future rate plans.[41] The declaratory ruling requested by CTIA would confirm that the use of state law to mount such attacks on the intrinsic reasonableness or legality of a CMRS rate or rate structure is prohibited by Section 332(c)(3)(A).

The requested declaratory ruling, if granted, will not affect the application of state contract, tort, and consumer protection laws to the "other terms and conditions" of the provision of CMRS. Nor would it permit carriers to "avail themselves of breach of contract laws but ignore all defenses."[42] For example, if a wireless subscriber agrees to a 24-month contract with an early termination fee of $150, he or she will still enjoy the protection of state tort and contract law should the CMRS

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[38] *See, e.g., Ca. AT&T Compl.* at ¶ 37.

[39] *See, e.g., Ca. AT&T Compl.* at ¶¶ 11, 90.

[40] *See, e.g., Ca. AT&T Compl.* at ¶¶ 16-21, 33.

[41] *See, e.g., Ca. AT&T Compl.* at ¶ 45.

[42] WCA April 18, 2006 *Ex Parte* at 7. WCA asserts carriers cannot "pick and choose which parts of state contract law they want to abide by." *Id.* This is true, but irrelevant. It is ***Congress***, not the carriers, who has determined which "parts of state contract law" are preempted—*i.e.*, the parts that, when applied to CMRS, in substance and effect amount to regulation of CMRS rates. Moreover, if any party is guilty of selective enforcement of contract law, it is the class action plaintiffs, who, having received the lower rates and other benefits of ETF-backed term contracts, now seek to renege on their agreements to pay ETFs by having state courts declare them unenforceable.

provider try to collect an ETF of $250. Similarly, if a CMRS provider's agents use deceptive practices to impose ETFs on the provider's subscribers, the responsible parties will still be subject to liability under state consumer protection laws. The CTIA Petition merely seeks confirmation that Congress's decision to permit regulation of such "other terms and conditions" of CMRS through the neutral application of state laws of general applicability did not diminish Section 332(c)(3)(A)'s absolute prohibition of "any" state regulation of CMRS rates or rate structures.

II. SECTION 332'S PREEMPTION OF STATE REGULATION OF CMRS RATES IS NOT LIMITED TO LAWS REQUIRING COURTS TO ENGAGE IN A "REGULATORY TYPE OF ANALYSIS"

In the *Wireless Consumers Alliance Order*, the Commission was asked whether Section 332 preempted ***any*** state-law claim that might result in an award of damages and thus increase the costs that a CMRS provider would, in the fullness of time, recover through its rates. The Commission answered in the negative, but then explained that claims based on state laws of general application ***would be*** preempted if they were to require a court to engage in a "regulatory type of analysis" to determine the reasonableness of a prior rate or to set a prospective charge for services.[43] The *Wireless Consumers Alliance Order* thus can be summarized as follows: (a) state laws that do not on their face regulate CMRS rates do not regulate rates, and thus are not preempted, if their application merely increases CMRS providers' costs; and (b) even if state laws do not purport to regulate CMRS rates, a claim that requires a court to perform a "regulatory type of analysis" to set or determine the reasonableness of CMRS rates ***does*** regulate rates and is preempted. In its most recent *ex parte*, WCA attempts to recast what is clearly intended in the *Wireless Consumers Alliance Order* as a description of ***one*** form of prohibited rate regulation into a holding that it is the ***only*** kind that is preempted by Section 332. Having invented this supposed precedent, WCA argues that regulation of ETFs through application of state restrictions on "liquidated damages" clauses does not constitute preempted rate regulation because liquidate damages laws do not require courts to engage in the kind of "regulatory type of analysis" that characterizes rate regulation.[44] WCA's argument withers under even cursory scrutiny.

First, there are a myriad of state laws that, if applied to CMRS providers, would, even in the absence of a judge's "regulatory type of analysis, "regulate" CMRS rates or rate structures and thus fall within the preemptive scope of Section 332. For example, suppose a state enacted a law limiting all telecommunications

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[43] *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17041 (¶ 39).

[44] By focusing on "liquidated damages" prohibitions and the purported lack of "regulatory analysis" required by such laws, WCA's argument tacitly concedes that the ***other*** types of state law claims identified by the CTIA petition – those requiring judicial findings of "unconscionability," "unfairness," "unjust enrichment" and the like – ***do*** constitute prohibited rate regulation when applied to CMRS ETFs.

providers' measured usage charges to $.01 per minute. Suppose further that a wireless carrier did not comply with this law on the ground that it constituted rate regulation in violation of Section 332. If a customer brought a class action challenging its noncompliant rates, the court's job would be only to determine if the carrier did, in fact, charge rates in excess of the legal limit, order remittance of the excess rates to existing and prior subscribers, and enjoin future violations. Under WCA's interpretation of the Commission's decisions, since no "regulatory analysis" would be required in what would be essentially an enforcement action, the limitation of CMRS airtime rates to $.01 would not constitute rate regulation, and the application of the law to wireless carriers would not be preempted—an absurd result.

Moreover, both the Commission and the courts have found a number of state laws to be preempted despite the lack of any judicial "regulatory analysis." For example, in the latest *Truth-in-Billing Order*, the Commission declared that state-law prohibitions on line item charges regulate CMRS rates and therefore are preempted. Similarly, in the *Hatch* case, the court of appeals held that a statutory restriction on rate increases amounted to prohibited rate regulation. In both cases, a judge enforcing or executing the laws at issue would determine whether there was a violation, and then determine plaintiff's damages. In neither case would a judge be called upon to engage in the type of "regulatory analysis" that WCA insists is necessary to a finding of rate regulation and a holding of preemption, yet in both cases the laws the Commission (and, in *Hatch*, a court of appeals) properly determined the laws at issue to be preempted.

WCA's assertion that in order to regulate rates a state law must require a reasonableness determination by a judge is clearly wrong. However, the error does not lie in insisting on a reasonableness determination as a predicate to finding rate regulation but in restricting that determination to a judge adjudicating a claim or a state commission fixing a rate. In the hypothetical case of a legislature fixing airtime rates, and in the real cases of state restrictions on line item charges and price changes, the ***legislature*** (or state commission promulgating rules) has performed a "regulatory type of analysis" in deciding to cap airtime rates, prohibit the use of line item charges, or restrict carriers' exercise of their contractual rights to change their rates.

Similarly, in the example WCA emphasizes – statutory restrictions on so-called "liquidated damages" provisions – the legislature has determined as a matter of policy that ETFs must be restricted to an approximation of the losses suffered by an individual subscriber's decision to terminate her service contract and that any ETF that exceeds such costs is an unenforceable, illegal penalty. These sorts of determinations of what is just or reasonable go to the core of rate regulation. That they are made by a state legislature directly rather than by a judge applying state law neither diminishes their essential character as rate regulations nor insulates them from the preemptive force of Section 332(c)(3)(A).

III. ETFS CONSTITUTE "RATES CHARGED" FOR CMRS

Those who would modify or eliminate ETFs and the term contract rate structure of which they are an essential part persist in their mischaracterization of ETFs as a term or condition "other" than a "rate charged" for CMRS. The nature of ETFs as "rates charged" is amply demonstrated by the CTIA Petition and the supporting comments, reply comments, and ex parte presentations submitted in this proceeding.[45] The opponents of ETFs (and the term commitment discounts they make possible) simply refuse to acknowledge that the Commission has recognized that ETFs are one of several different rate elements employed by CMRS carriers in setting prices.[46] Nor do they recognize that in the wireline context the Commission and the courts have long understood that the ETF are both themselves rates and rate elements that are integral to, and inseparable from, service arrangements pursuant to which ratepayers have access to lower service charges in exchange for volume or term commitments:

> The Commission has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments. . . . ***In approving these provisions, the Commission recognized implicitly that they were a valid quid pro quo for the rate reductions included in the long-term plans***.[47]

As the DC Circuit has observed—

> Public utility rates are a means by which the carrier recovers its costs of service from its customers. Part of

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[45] *See, e.g.,* CTIA Petition at 12-22; Comments of Cingular Wireless LLC at 10-13; Verizon Wireless White Paper at 4-11.

[46] "[C]ellular prices have at least three main elements. These are monthly access, per minute peak-use period, and per minute off-peak-use period charges. In addition, there may be fees for activation, ***termination***, and roaming." *In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 F.C.C.R. 8844, 8868, ¶ 70 (1995) (emphasis added).

[47] *In re Ryder Communications, Inc v. AT&T Corp.*, 18 F.C.C.R. 13,603, 13,617, ¶ 32 (2003) (footnotes omitted) (emphasis added); *see also In re Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), American Tel. & Tel. Co. Request for Approval to Supplement the Capitalization of AT&T Information Systems in Connection with the Transfer of Embedded Customer Premises Equipment*, 100 F.C.C.2d 1298, 1324-25, ¶ 39 (1985) (declining to eliminate or reduce termination charges in CPE lease contracts, stating that revenue produced for AT&T by termination charge "is exactly what the CPE lease customers agreed to when they made their decision to enter into a contract with AT&T rather than going with a month-to-month arrangement or buying from an AT&T competitor.").

> AT&T's cost of providing private-line service is the cost incurred from last-minute cancellation of orders and early termination of service. These acts result in customers' not paying rates sufficient to cover the cost of filling the orders and often subject AT&T to additional costs while facilities lie idle. In the past, AT&T recovered these costs by raising its general rates for private-line service, thereby spreading the costs among all ratepayers. The [cancellation and discontinuance] charges are designed to unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs. ***This adjustment in billing does not mean that these cost items are not part of the charge to the customers to receive interconnection service. We therefore conclude that the Commission reasonably found that the . . . charges are "rates" within the meaning of the Agreement***.[48]

ETFs perform the same function in the wireless context.[49] Thus, they clearly constitute "rates charged" for CMRS within the meaning of Section 332(c)(3)(A).[50]

In its April 19, 2006 *Ex Parte*, WCA insists that in order for a state law to amount to "rate regulation," it must determine the reasonableness of a particular charge "***for services.***"[51] Since ETFs are not set to recover the costs of a specific wireless "service" but rather the costs of early termination, WCA argues they cannot be "rates" within the meaning of Section 332(c)(3)(A). This argument is foreclosed, however, by the Commission's analysis of line item charges in the *Second Truth-in-Billing Order*. CMRS providers use separate line item charges to recover the cost of state gross receipts taxes, universal service contributions, state E911 surcharges, and other costs that are not direct costs of providing wireless service. In the *Second Truth-in-Billing Order*, the Commission found that such line item charges

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[48] *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987) (emphasis added); *see also Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1199 (D.C. Cir. 1987) (upholding FCC determination that ETFs were not anticompetitive, and observing that "[t]he charges were imposed because premature termination, by cutting short the revenue stream contemplated by the contract, would otherwise result in a cost recovery below that assumed in the calculated monthly charges."). WCA's disparagement of these decisions as mere "filed rate" cases appears to be am attempt to avoid their substance.

WCA dedicates a large portion of its April 18, 2006 *Ex Parte* to rebutting Verizon Wireless's criticism of the handful of state and federal trial court decisions that appear to support WCA's legal position. Of course, these decisions do not dictate the Commission's interpretation of Section 332. *See generally National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

[49] *See, e.g.*, CTIA Petition at 12-13 & n.46.

[50] *See supra* n.45; *see also, e.g.*, Reply Comments of Cingular Wireless LLC at 8-27.

[51] WCA April 18, 2006 *Ex Parte* at 9 (emphasis in original).

nevertheless constituted "rates charged" for CMRS within the meaning of Section 332(c)(3)(A) and concluded that state laws prohibiting or requiring CMRS providers' use of such charges are preempted. As the Commission explained, such state laws "directly affect CMRS carriers' rates and rate structures in a manner that amounts to rate regulation. State regulations that ***prohibit*** a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates."[52]

State laws regulating ETFs similarly "directly affect CMRS carriers' rates and rate structures in a manner that amounts to rate regulation." A CMRS provider's rate structure is designed to recover its indirect as well as direct costs of providing service. If any rate, or any element of a carrier's rate structure, is prohibited or reduced by government command, the carrier must adjust its rate structure to recover the shortfall. As the Commission has argued in defense of its line item ruling, a state prohibition of particular kinds of charges "involves the State directly in the rate setting process by dictating specific forms of rate structure and proscribing the use of a specific rate element."[53] This is no less true in the case of ETFs.

IV. THE PENDENCY OF LITIGATION CHALLENGING ETFs PURSUANT TO STATE LAW DOES NOT PRECLUDE RULING ON THE CTIA PETITION

WCA argues that the pendency of state class actions and arbitrations challenging ETFs requires the Commission to delay its decision on the CTIA Petition, presumably until the termination of that litigation. This argument must be rejected.

First, WCA asserts that "such a ruling would be a groundbreaking departure from Commission procedure and precedent." This is simply untrue. The Commission routinely rules on petitions for declaratory relief despite the pendency of litigation; indeed, WCA's assertion is incomprehensible in light of the *Wireless Consumers Alliance Order*, which was the result of ***WCA's own petition*** "to resolve the issue of awarding damages in a class action suit involving a CMRS carrier."[54]

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[52] *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6463 (¶ 53) (emphasis in original).

[53] Brief for Respondents, *National Ass'n of State Util. Consumer Advocates v. FCC*, Nos. 05-11682-DD and 05-12601-DD (11th Cir., filed Jan. 12, 2006) (citing *Second Truth and Billing Order*).

[54] *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17022 (¶ 3). The state court proceeding was stayed pending the Commission's ruling. *Id. See also, e.g., Second Truth-in-Billing Order*, 20 F.C.C.R. at 6464-65 n.87 (¶ 31) (noting specific state laws preempted);; *Southwestern Bell Mobile Systems,* 14 F.C.C.R. at 19898 (¶ 1) (deciding petition for declaratory ruling "relevant to the resolution of issues now before the courts in class action law suits filed against . . . CMRS . . . providers"); *In re Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE; Class Action Complaint*, 16 F.C.C.R. 11558 (deciding primary jurisdiction referral relative to pending class action complaint).

Second, WCA asserts that differences among ETFs charged by the carriers preclude a declaratory ruling on whether ETFs are, in fact, rates for purposes of Section 332. This is false. The Commission did not pause to consider the particular characteristics of each state's prohibition on the use of line item charges when it declared such prohibitions under state law preempted. In any event, the CTIA Petition does not seek case-specific relief. To the contrary, it seeks confirmation that ETFs are "rates charged" for CMRS or elements of CMRS rate structures and therefore preempted.

V. THE EFFECTS OF REGULATION OF CMRS RATES PURSUANT TO STATE LAW ARE SUBSTANTIAL AND PERNICIOUS

The potential impact of the ETF actions on CMRS regulation may not be readily apparent. However, the threat of regulatory balkanization that such actions pose to the federal policy of uniform, market-based regulation of CMRS rates is evident from other cases in which courts have misinterpreted Section 332 and the Commission's decisions permitting state-law challenges to elements of CMRS rate structures.

For example, the Commission has expressly held that the use of whole-minute increments ("rounding up") to calculate CMRS airtime rates is neither unjust nor unreasonable under Section 201(b) of the Act.[55] It has also held that "it is clear from the language and purpose of Section 332(c)(3) of the Act that states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments. This would 'regulate . . . the rates charged by . . .[a] commercial mobile service . . . .'"[56] Although a number of courts have properly held that state-law suits challenging whole-minute charges are preempted by Section 332,[57] some have not.

The Louisiana class action litigation styled *Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, No. 91421 (16th Dist. Ct., Iberia Parish, La.), provides a case in point. *Sutton's Steel* is a plaintiffs' class action on behalf of all prior and current BellSouth Mobility customers residing in nine southeastern states, challenging BellSouth Mobility's use of whole-minute increments to calculate customers' airtime charges. The complaint alleged state-law claims for breach of contract. When

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[55] *Southwestern Bell Mobile Systems Order*, 14 F.C.C.R. at 19904 (¶ 14).

[56] *Id.* at 19908 (¶ 23).

[57] *See, e.g., Ball v. GTE Mobilnet*, 81 Cal. App. 4th 529, 541 (2000) ("We conclude that section 332(c)(3)(A) preempts plaintiffs' claims to the extent that plaintiffs challenge defendants' charging for noncommunication time, including rounding up . . . ."); *Lee v. Contel Cellular*, No. CV-95-1057-JH, 1996 U.S. Dist. LEXIS 19636, at *8-9 (S.D. Ala. Nov. 21, 1996) (Courts "cannot assess the use of 'rounding'"—that is, billing in full-minute increments—"without deciding if the rates resulting from that practice are 'unreasonable' or 'unjust'"; therefore, state-law claims against "rounding" are preempted by section 332(c)(3)(A)); *see also Gatton v. T-Mobile USA, Inc.*, No. 03-CV-130, 2003 WL 21530185, at *8 (C.D. Cal. Apr. 18, 2003) (section 332(c)(3)(A) preempted plaintiffs' state-law challenges to the manner in which the carrier calculated customers' monthly minutes of use).

BellSouth Mobility moved for summary judgment on the ground that the terms and conditions of the plaintiffs' contracts did, in fact, provide for whole-minute billing, plaintiffs' counsel responded that the whole minute billing provision was unenforceable as a matter of Louisiana contract law because it was contained in a form contract and was "unduly burdensome and extremely harsh" and unfair because rounding allegedly amounted to a "25% mark up in price."[58]

BellSouth Mobility vigorously argued that by requiring the court to determine whether the rounding-up provision was "unduly burdensome," "extremely harsh," or "unfair," the *Sutton's Steel* plaintiffs were asking the state court "to make an outright determination of whether a price charged for a CMRS service was unreasonable," and that, therefore, "the court [was] preempted from doing so by Section 332."[59] In response, the plaintiffs characterized Section 332 and the Commission's *Wireless Consumers Alliance Order* as prohibiting only the "fixing" of rates pursuant to state law and preserving all claims premised on state contract law.

The trial court denied BellSouth Mobility's motion for summary judgment, finding that the whole-minute billing provision was unenforceable because it was in small print in a standard form contract (like the vast majority of mass-marketed consumer agreements), and because it was "unduly burdensome and extremely harsh" for the reasons asserted by the plaintiffs.[60] The court rejected BellSouth Mobility's preemption argument on the ground that the action was "a breach of contract action and [did] not challenge the rate fixing or the rates that BellSouth is authorized to charge" by this Commission, finding that the plaintiffs were not "challenging the inherent reasonableness of billing in full minute increments" or BellSouth Mobility's authority to do so.[61]

BellSouth's petitions for appellate review of the trial court's preemption ruling were denied, the plaintiffs' nine-state class – alleged to have millions of members – was certified, and the litigation is now in its seventh year. In view of the Louisiana appellate courts' apparent lack of interest in reviewing the trial court's preemption ruling, it is quite possible that in a year or two state laws will have rendered whole-minute billing by wireless providers unenforceable in a large part of the country due to a determination that, contrary to the Commission's ruling in *Southwestern Bell Mobile Systems*, calculating CMRS airtime charges on the basis of whole-minute increments is somehow unjust or unreasonable.

The necessary premise of the *Sutton's Steel* preemption ruling was that while Section 332(c)(3)(A) preempts state-law claims directly challenging the "inherent reasonableness" of whole-minute billing, it does not preempt state-law claims for

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[58] *Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc.*, No. 91421, Reasons for Judgment, slip op. at 2 (16th Dist. Ct., Iberia Parish, La.) [hereinafter *Sutton's Steel Order*]
[59] *Wireless Consumers Alliance Order*, 15 F.C.C.R. 17021, ¶ 25 (2000).
[60] *Sutton's Steel Order* at 2.
[61] *Sutton's Steel Order* at 3.

breach of contract, even where, in order to establish the breach, the plaintiffs must prove, and the court must find, that the rounding term is "unduly burdensome and extremely harsh." This premise is false. Nothing in Section 332(c)(3)(A) or the Commission's decisions leaves the states with "***any***" authority to regulate CMRS rates.

While most courts should come to this most logical conclusion, the dynamics of class action litigation allows would-be class counsel to file suits in carefully-selected jurisdictions until they find a court, like the *Sutton's Steel* court, that will allow their state-law challenge to a CMRS rate element or rate structure. Class counsel will then seek to extend the ruling into other jurisdictions through certification of a multistate or national class. The Seventh Circuit described this dynamic in the context of the class certification determination:

> Relitigation can turn even an unlikely outcome into reality. Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering [certain] claims and products. What this might mean in practice is something like "9 of 10 judges in every state would rule against certifying a nationwide class" . . . . Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits--and, if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives. Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% . . . . Filing in 20 states produces an 88% probability of national class certification . . . . This happens whenever plaintiffs can roll the dice as many times as they please--when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect.[62]

As the Commission has recognized, the wireless telephone industry is, by its very nature, national and interstate in scope and operation. It is thus particularly vulnerable to this "asymmetric system in which class counsel can win but never lose."[63]

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[62] *In re Bridgestone/Firestone Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003) (emphasis in original).
[63] *Id.* at 767.

The *Sutton's Steel* litigation illustrates this vulnerability in the context of state regulation of CMRS rates. It was of no moment that other courts had properly held that state-law challenges to whole-minute billing are preempted if they require an assessment of the reasonableness of that method of calculating CMRS charges. Having induced the Louisiana trial court to hold that Section 332 permitted elimination of whole-minute billing from CMRS contracts under state law pursuant to a determination that it was "unduly burdensome and extremely harsh," plaintiffs proceeded to extend that erroneous holding to nine states and potentially millions of CMRS contracts via class certification.

The same dynamic is at work in the pending ETF class action lawsuits. CMRS customer agreements, like the vast majority of consumer contracts, are standardized and not subject to negotiation at the point of sale. In states where a finding of such non-negotiability permits the voiding of an "unfair" or "unconscionable" contract term, or where ETFs have been legislatively determined to be "penalties," the class action mechanism will allow plaintiffs' counsel effectively to eliminate or dictate the form of ETFs in CMRS providers' rate structures in multiple states by arguing that enforcement of ETFs would be "unfair" or "unconscionable" or constitute unreasonable "penalties" under state law. Congress has made clear that CMRS rates are to be regulated pursuant to federal law, as applied by this Commission. Absent the clarification requested by the CTIA Petition, class action suits challenging the reasonableness of ETFs under state law threaten to thwart Congress's express command.

VI. THE QUESTION BEFORE THE COMMISSION IS NOT WHETHER CMRS CARRIERS' ETFS ARE JUST AND REASONABLE BUT WHETHER COURTS MAY PROHIBIT, RESTRICT, OR CONDITION THEIR USE UPON A DETERMINATION OF THE FAIRNESS, REASONABLENESS, OR LEGALITY OF ETFS UNDER STATE LAW

In addition to denying that ETFs are rates, class action plaintiffs' counsel argue that balkanized, state-specific oversight of ETFs is warranted because ETFs are inherently unfair. This argument – essentially an assertion that the market-based regulatory model mandated by Congress and implemented by the Commission has failed – begs the questions presented by the CTIA Petition: Whether ETFs constitute CMRS rates and rate elements such that Section 332 preempts applications of state law to ETFs in ways that, in substance and effect, amount to rate regulation. As shown above, they do, and it does.

The assertions by WCA and others in this proceeding that ETFs are unfair cannot, and do not, insulate state law from the preemptive force of Section 332(c)(3)(A). States may regulate the "rates charged" for CMRS only by petitioning for permission to do so and then demonstrating that "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates."[64] There is no

[64] 47 U.S.C. § 332(c)(3)(A)(i).

such petition before the Commission, and, even if there were, there is no evidence of the market failure required to allow state regulation of ETFs. To the contrary, it is clear that the market for CMRS is robustly competitive,[65] and that CMRS consumers enjoy a myriad of pricing and service options. The nationwide wireless carriers each offer a range of rate and service plans – some of which do not feature an ETF rate component.[66] Thus, in today's market, wireless subscribers have a choice: they may subscribe to CMRS on a month-to-month basis, without commitment or ETF, or they may secure lower activation and monthly charges and/or handset prices by entering into a term contract with an ETF — that is, by agreeing to pay either the monthly charges for the full term of the contract or the monthly charges until their early termination plus the ETF. ETFs are substantially more popular with the public than are no-commitment plans.

If any State desires authority to regulate ETFs, it may petition the Commission to do so as provided by Section 332(c)(3)(A). If any party believes that wireless carriers' ETFs are inherently unjust or unreasonable, he or she may file a complaint asserting violations of Section 201(b) or petition the Commission for an investigation or rulemaking pertaining to ETFs. However, as set forth in the CTIA Petition and the supporting comments, states may not regulate ETFs without the Commission's permission, and the plaintiffs' bar may not regulate ETFs through class actions that seek to prohibit, restrict, or condition the use of ETFs pursuant to an assessment of their fairness, reasonableness, conscionability, or legality under state law.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

/s/ Christopher Guttman-McCabe

Christopher Guttman-McCabe

[65] *See generally Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Tenth Report*, 20 F.C.C.R. 15908 (2005).
[66] *See, e.g.*, Reply Comments of Cingular Wireless.