T-Mobile

December 6, 2006

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: **Notice of Ex Parte Statement**
WT Docket No. 05-194

Dear Ms. Dortch:

On November 21, 2006, Tom Sugrue, Kathleen Ham, and Erin Boone of T-Mobile USA, Inc., met with Angela Giancarlo, Legal Advisor to Commissioner Robert McDowell, to discuss Early Termination Fee (ETF) issues.[1] This *ex parte* letter answers questions that were raised, and follows up on questions that occurred, during the meeting.

Specifically, at the meeting, T-Mobile representatives referenced Commission precedent, which interpreted that ETFs are "rates charged" under section 332. Attached is a copy of T-Mobile's comments filed in the ETF docket, which refer to and describe that precedent, including cites to the relevant cases.[2]

In addition, per a request made at the meeting, attached is a copy of a letter filed with the U.S. Court of Appeals for the Eleventh Circuit by CTIA and other wireless industry intervenors. That letter describes a recent federal district court decision that explicitly disagrees with the Eleventh Circuit's ruling that states are not prohibited by section 332 from regulating line item charges of customer bills. In contrast to the Eleventh Circuit's holding, the district court asserted that "state regulation of line items constitutes rate

[1] *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Kathleen O'Brien Ham, Managing Director, T-Mobile USA, Inc., WT Docket No. 05-194 (filed Nov. 21, 2005).

[2] *See* Comments of T-Mobile, USA, Inc., WT Docket No. 05-194 (filed Aug. 5, 2005) at 12-15 (discussing, for example, a Commission decision that describes a termination fee as part of a "rate structure." *Application of BellSouth Corporation et. al for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 ¶ 43 (1998)).

T-Mobile USA, Inc.
401 9th Street, NW Suite 550
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regulation," which is prohibited under section 332.[3] In any event, although T-Mobile disagrees with the Eleventh Circuit's determination that requiring or prohibiting line item charges does not constitute prohibited state rate regulation, language from the court's decision makes clear that the court's rejection of the Commission's truth-in-billing order in no way limits the Commission's authority to determine that ETFs are "rates charged."[4]

Pursuant to Commission Rule 1.49(f), this *ex parte* letter is being filed electronically via the Commission's Electronic Comment Filing System for inclusion in the public record of the above-referenced docket.

Sincerely,
/s/ Kathleen O'Brien Ham
Managing Director
Federal Regulatory Affairs
T-Mobile USA, Inc.

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[3] *See* Letter from Helgi Walker, Counsel for CTIA and on behalf of Wireless Industry Intevenors, to Thomas K. Kahn, Clerk, US Court of Appeals for the Eleventh Circuit (05-11682) (filed Oct. 27, 2006) (citing *Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wa. Oct. 24, 2006) slip op. at 2. The letter was submitted in connection with the intervenors' petition for rehearing of the Eleventh Circuit's ruling that vacated parts of, and remanded the Commission's *Second Report and Order* in the Truth-in-Billing docket. *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, CG Docket No. 04-208, 20 FCC Rcd 6448 (2005) (*Second Report and Order*) (*petition for reh'g en banc denied, NASUCA v. FCC*, No. 05-11682-DD (11th Cir. Nov. 30, 2006).

[4] Specifically, the Court of Appeals states:

> The prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. State regulations of line items regulate the billing practices of cellular wireless providers, not the charges that are imposed on the consumer. Because the presentation of line items on a bill is not a "charge or payment" for service, Oxford English Dictionary (2d ed. 1989), it is an "other term or condition" regulable by the states. *NASUCA v. FCC*, 457 F.3d 1238 (11th Cir. 2006) at 1254.

ETFs, in contrast to the Eleventh Circuit's (erroneous, in T-Mobile's view) conclusion about line item fees, have nothing to do with the manner in which charges are presented on a customer's bill.

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cc (*via electronic mail*)
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October 27, 2006

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VIA OVERNIGHT DELIVERY

Thomas K. Kahn, Clerk
U.S. Court of Appeals for the 11th Circuit
Elbert P. Tuttle U.S. Court of Appeals Bldg.
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Atlanta, Georgia 30303

Re: *NASUCA v. FCC*, Case Nos. 05-11682, 05-12601; Supplemental Authority.

Dear Mr. Kahn:

Pursuant to Federal Rule of Appellate Procedure 28(j), attached please find the opinion recently issued in *Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wa. Oct. 24, 2006) ("Slip Op."). The Wireless Industry Intervenors respectfully submit this decision as supplemental authority in support of their pending Petition for Rehearing *En Banc* ("Petition").

In *Peck,* the District Court ruled that plaintiff's state-law claim that the defendant wireless provider unlawfully billed, charged, and collected a tax surcharge as a line item on customers' bills was preempted by 47 U.S.C. § 332. Specifically, the District Court held that "state regulation of line items constitutes rate regulation." Slip Op. 2. In so holding, the District Court deferred, in reliance on *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005), to the Federal Communications Commission's ("FCC") reasonable construction of the statute in the Order on appeal here. Slip Op. 3-4. The District Court expressly disagreed with the panel opinion in this case. *Id.* at 4.

Peck provides direct support for the proposition that line items are "rates charged" under Section 332 and that state regulation thereof is preempted, as argued by Wireless Industry Intervenors. Petition 4-10. *Peck* also directly supports Wireless Industry Intervenors' argument that the proper application of *Chevron* and *Brand X* requires deference to the FCC's construction of Section 332 because it is, at least, a permissible reading of the statute. *Id.* at 10-13.

This Court should rehear this case *en banc* so as to correct the significant legal errors in the panel opinion, as further evidenced by *Peck*.

Sincerely,

Helgi Walker

Helgi C. Walker

Counsel for CTIA and on behalf of Wireless Industry Intervenors

Attachment

I hereby certify that on this date, October 27, 2006, I caused a copy of the foregoing letter regarding supplemental authority, along with the attachment, to be sent via overnight delivery to the following:

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Megan L. Brown

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JARED PECK, individually and on behalf of all the members of the class of persons similarly situated, Plaintiffs, v. CINGULAR WIRELESS, LLC, a Delaware limited liability company, d/b/a Cingular Wireless, et al., Defendants.	No. C06-343Z ORDER

This matter comes before the Court on Defendant's Motion to Dismiss Based on Federal Preemption, docket no. 23. The Court, having reviewed the briefs in support of and in opposition to these motions, hereby GRANTS Defendant's Motion to Dismiss.

BACKGROUND

Plaintiff Jared Peck is an individual who is a customer of Defendant Cingular Wireless, LLC ("Cingular"), a provider of wireless cellular telephone service. (Compl., docket no. 4, at 1-2.) Mr. Peck filed suit in King County Superior Court on February 14, 2006, alleging that Defendant Cingular billed, charged, and collected a business and occupation (B&O) tax surcharge in violation of RCW 82.04.500.[1] (Compl. at 2.) Mr. Peck seeks to represent a class of all current or past Washington state cellular phone customers of Cingular from whom it collected a "State B and O Surcharge" as a line item appearing on the customers' bills. (Compl. at 2.) Cingular filed to remove this case to federal court on March 13, 2006. (Notice of Removal, docket no. 1.) Mr. Peck did not oppose removal. Cingular now brings this Motion to Dismiss Based on Federal Preemption, docket no. 23.

DISCUSSION

The Federal Communications Act ("FCA"), 47 U.S.C. § 332, prohibits states from regulating the "rates" of commercial mobile telephone service, but reserves to the states regulation of "other terms and conditions" of such service. The relevant section states:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A). Cingular argues that the Court should dismiss Mr. Peck's claims because they are a challenge to Cingular's rates and are preempted by federal law. (Mot. to Dismiss, docket no. 23, at 1.) Mr. Peck argues that his claims do not challenge Cingular's rates and are not preempted. (Pl.'s Resp. to Mot. to Dismiss, docket no. 43, at 1.) For the reasons set forth below, the Court concludes that state regulation of line items constitutes rate regulation and that Mr. Peck's claims are preempted by § 332.

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[1] "It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons." RCW 82.04.500 (2006).

A. Section 332 Preempts State Regulation of Line items

In 2005, the Federal Communications Commission ("FCC") issued a declaratory ruling[2] that a state regulation curtailing a wireless carrier's ability to structure its bills and isolate charges into separate line items "would have a direct effect on a [wireless] carrier's rate structure presented to its end users and, if instituted by a state commission, would be preempted by [§ 332(c)(3)]." Second Report and Order in re Truth and Billing, 20 F.C.C.R. 6448, para. 31, 6464 (2005) ("Second Report and Order"). However, the Eleventh Circuit reviewed the Second Report and Order and held that "[b]ecause the regulation of line-item billing is not rate regulation, the express language of section 332 (c)(3)(A) of the Communications Act does not preempt state regulations that require or prohibit the use of line items on cellular wireless bills." Nat'l Ass'n of State Util. Consumer Advocates v. Fed. Commc'n Comm'n, 457 F.3d 1238, 1258 (2006) ("NASUCA").[3] Because the interpretation of rates contained in the Second Report and Order is consistent with other court rulings and prior FCC usage of the term, this Court affords deference to the FCC interpretation of § 332. See Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

An agency interpretation is entitled to deference if (1) the plain language of the statute is ambiguous or silent on the precise question at issue, and (2) the agency interpretation is based on a permissible construction of the statute. Chevron, 467 U.S. at 842-43. "[W]here a statute's plain terms admit of two or more reasonable usages, the Commission's choice of one of them is entitled to deference." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S.Ct. 2688, 2704 (2005) (citing Verizon Commc'n Inc. v. FCC,

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[2] In the Second Report and Order, the FCC "address[ed] a Petition for Declaratory Ruling filed by [NASUCA] seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state, or local law." Second Report and Order in re Truth and Billing, 20 F.C.C.R. 6448, para. 1, at 6449 (2005).

[3] Mandate has not issued in NASUCA. Petition for rehearing en banc was filed on September 14, 2006 and is currently pending. Eleventh Circuit docket no. 05-11682-DD.

535 U.S. 467, 498 (2002). Shortly after Nat'l Cable, the Ninth Circuit applied Chevron to an FCC interpretation of a different section of the FCA, and found that the FCC's interpretation was entitled to deference. See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1064-70. The Ninth Circuit held that the FCC's interpretation was entitled to deference because "nothing in the statute clearly preclude[d] the construction offered," id. at 1068, and the FCC's interpretation was "reasonable," id. at 1070.

The FCC's interpretation of "rates" meets the first prong of the Chevron test because there are at least two reasonable usages of "rates" as it is used in § 332. The common meaning of "rate" permits the FCC's interpretation of "rate" in § 332. Dictionaries define a "rate" as "an amount of a charge or payment . . . having relation to some other amount or basis of calculation," Oxford English Dictionary (2d ed. 1989), and "an amount paid or charged for a good or service," Black's Law Dictionary (8th ed. 2004). The NASUCA court held that "[s]tate regulations of line items regulate the billing practices of cellular wireless providers, not the charges that are imposed on the consumer. The Eleventh Circuit held that because the presentation of line items on a bill is not a 'charge or payment' for service, it is an 'other term or condition' regulable by the states." Id. (emphases added) (citations omitted). However, a line item is one of the charges a wireless customer pays in order to receive service. An ambiguity exists because "rate" could mean only the carrier's base rate, or it could refer to the total amount a customer pays for service.

The FCC's interpretation of "rates" meets the second prong of the Chevron test because it is a permissible usage of the term. The FCC concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and are preempted under section 332(c)(3)(A)." Id. Specifically, the FCC concluded that "rates charged" in § 332(c)(3)(A) includes regulation of line items. 20 F.C.C.R. para. 30, at 6462–63. The FCC found that, although Congress did not define the term "rates charged" in the FCA, rate regulation under § 332(c)(3)(A) includes regulation of "rate levels" and "rate structures," and that state regulations regarding whether or not certain costs may be recovered by a separate line item "clearly and directly affect" rate structure. Id. para. 30–31, at 6463. To illustrate the fact that regulation of line items affects rates, the FCC explained that if states were permitted to regulate whether or not certain costs could be recovered by a line item, a carrier would have to tailor its rates and rate structure state-by-state. Id. para. 31, at 6464. Because this is a plausible interpretation of "rates," this court gives deference to the FCC interpretation. The Eighth Circuit has agreed with the FCC'as interpretation of "rate regulation" under § 332(c)(3)(A) and has held that state action which "has a clear and direct effect on rates" constitutes rate regulation. Cellco Partnership v. Hatch, 431 F.3d 1077, 1083 (2005).

The Second Report and Order is consistent with previous FCC decisions. However, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." Nat'l Cable, 125 S.Ct. at 2699. Furthermore, an agency is allowed to change an interpretation and explain its reasons for the change. Id. at 2699-2700. The FCC in its Second Report and Order gives adequate reasoning for its interpretation of "rates." The FCC noted that, while it had previously recognized that "state regulation of customer billing practices fall within 'other terms and conditions,'" the FCC had never before addressed the more specific question of "where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall." 20 F.C.C.R. at 6464 n.90.

For the reasons stated above, the Court gives deference to the FCC's interpretation of § 332 and holds that state regulation of line items is preempted by federal law.

B. Plaintiff's Claims are Preempted by § 332

Mr. Peck's claims are based on state law. However, "it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section

332." In re Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, para. 28, at 17037 (2000). Mr. Peck claims that Cingular's "collection" of the state B&O tax as a line item violates Washington law. (Compl. at 3.) Nevertheless, because the collection of the tax directly affects the rate Cingular charges, Mr. Peck's claims are preempted by § 332(c)(3)(A).

Mr. Peck argues that his claims are not preempted because another court in this district has previously ruled that claims under the Washington Consumer Protection Act ("CPA") were not preempted by the FCA. See Order on Plaintiff's Motion for Remand, Baxter Air v. NOS Commc'ns, Inc., Civ. No. C05-2119P (March 10, 2006). The plaintiff in Baxter Air alleged that the defendant used "a complex and difficult-to-understand 'call-unit' billing method," thereby engaging in an "unfair or deceptive business practice" in violation of the CPA. Id. at 1. By contrast, Mr. Peck alleges that Cingular's "billing and collecting" of the state B&O tax as a line item on his bill violates the CPA. (Compl. at 7.) Mr. Peck does not allege an unfair or deceptive business practice in his Complaint.[4]

Similarly, Mr. Peck cites Metrophones for his contention that his claims are not preempted. Pl.'s Resp. at 8. While it is true that some of the claims in Metrophones, including a state law breach of contract claim, were not preempted, the Ninth Circuit did not hold that all breach of contract claims are not preempted. Rather, Metrophones held that the plaintiff's breach of contract claim was not preempted because it was not inconsistent with the FCA. Metrophones, 423 F.3d at 1076. Mr. Peck's breach of contract claim is inconsistent with § 332 because it is based on the allegation that Cingular billed, charged, and collected the B&O tax as a line item, an allegation that implicates Cingular's rates.

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[4] While Mr. Peck states in his Response to Defendant's Motion to Dismiss that he "claims that Cingular engages in an unfair and deceptive practice by not adequately disclosing to consumers that it passes on its Washington State B&O tax obligations in the form of a line item," Pl.'s Resp. at 4, nothing in the Complaint alleges that Cingular failed to disclose rates or taxes it charges to consumers.

CONCLUSION

Defendant's Motion to Dismiss, docket no. 23, is GRANTED because Plaintiff Peck's claims are preempted by 47 U.S.C. § 332(c)(3)(A).

IT IS SO ORDERED.

DATED this 24th day of October, 2006.

Thomas S. Zilly
Thomas S. Zilly
United States District Judge

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

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

COMMENTS OF T-MOBILE USA, INC. IN SUPPORT OF CTIA PETITION FOR DECLARATORY RULING

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August 5, 2005

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Early Termination Fees Are "Rates	)	
Charged" Within 47 U.S.C. § 332(c)(3)(A)	)	
	)	
To: The Commission	)	

COMMENTS OF T-MOBILE USA, INC.
IN SUPPORT OF CTIA PETITION FOR DECLARATORY RULING

T-Mobile USA, Inc. ("T-Mobile") hereby submits its comments in support of the Petition for an Expedited Declaratory Ruling filed by CTIA - the Wireless Association™ in the above-captioned proceeding.[1/] CTIA asks the Commission to confirm that early termination fees ("ETFs") in wireless carriers' service contracts constitute "rates charged" for commercial mobile radio services ("CMRS") and, as such, state regulation of ETFs is barred under section 332(c)(3)(A) of the Communications Act and Commission precedent. For the reasons set forth below, T-Mobile urges the Commission to grant CTIA's Petition.

INTRODUCTION AND SUMMARY

As part of comprehensive legislation designed to promote competition in the wireless market, Congress added section 332(c) to the Communications Act in 1993. Section 332(c)(3) -- entitled "State Preemption" -- provides that "no State or local

[1/] *Petition of the Cellular Telecommunications & Internet Association For An Expedited Declaratory Ruling*, WT Docket No. 05-194 (filed Mar. 15, 2005); *see* Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A)," WT Docket No. 05-194 (May 18, 2002).

government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ."[2/] Congress's recognition a decade ago that a uniform, national regulatory regime for wireless would promote competition, innovation, and lower prices for consumers has been realized far beyond expectations at that time. As the Commission related in its most recent annual wireless competition report, carriers demonstrate "independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various available handsets and policies on handset pricing."[3/] In addition to the introduction in 1998 of national rate pricing plans, which "altered the market and benefited consumers," a more recent "trend in mobile telephone pricing has been the expansion of free calling among a particular company's customers."[4/] The Commission also recognized that these innovative service packages generally allow customers to pay after they have incurred charges, instead of on a prepaid basis, and it noted with approval one carrier's "two-year contract," which provided unlimited mobile-to-mobile calling.[5/]

Notwithstanding the express prohibition against state rate regulation in section 332(c)(3)(A), in the past few years, various courts have concluded that they have jurisdiction to adjudicate disputes challenging under state law the reasonableness and

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[2/] 47 U.S.C. § 332(c)(3)(A). This provision permits states to petition the Commission for authority to regulate CMRS rates, and requires the Commission to grant such petition if the state can demonstrate that market conditions fail to protect consumers from unjust and unreasonable rates. A number of states filed petitions under section 332(c)(3)(A) in 1994, but the Commission denied them on the ground that the states had failed to demonstrate market failures.

[3/] *See 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*, Ninth Report, 19 FCC Rcd 20,597, ¶ 113 (2004) ("*CMRS Report*").

[4/] *Id.* ¶¶ 113-114. T-Mobile offers free mobile-to-mobile calling to customers on Family or pooled minute plans. Mobile-to-mobile minutes are directly dialed calls between T-Mobile phones on the USA network.

[5/] *Id.* ¶ 114.

lawfulness of wireless carriers' assessment of fees when customers cancel contracts early. Similarly, some state public utility commissions and legislatures recently have shown an interest in regulating the levels of and conditions under which wireless ETFs may be charged. Although the courts and other tribunals acknowledge that section 332 bars state regulation of wireless carriers' rates, some of them have determined that ETFs are not "rates" under section 332 but rather are "terms and conditions" of wireless service, resulting in a conflict among the decisions regarding whether ETFs are permissibly regulated by states.[6/]

T-Mobile agrees with CTIA that it is imperative that the FCC act to establish a uniform, nationwide policy on the permissibility of ETFs, and preempt state regulation of ETFs under section 332(c)(3)(A). ETFs are assessed to recover carriers' costs of providing wireless service and are a fundamental part of the carriers' pricing structures. As CTIA explains, CMRS providers, including T-Mobile, offer service through a variety of rate plans made up of multiple elements, including fees for activation, monthly access, special features, local and long distance airtime, certain roaming charges, and early termination.[7/] These elements, taken together, compensate wireless carriers for the costs they incur in acquiring and retaining customers, as well as the overall costs of providing wireless services.

Preventing inconsistent state regulation of ETFs, either through court decisions or regulatory rulings, benefits the public by allowing carriers to offer -- on a uniform, nationwide basis -- the service plans and upfront discounts demanded by subscribers. In

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[6/] *See* 47 U.S.C. § 332(c)(3)(A) ("this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services").

[7/] *See* CTIA Petition at 11.

addition, as the Commission has recognized on numerous occasions, the absence of state involvement in wireless rate regulation has helped foster the rapid expansion of the wireless industry. Allowing states to preclude or restrict the use of ETFs, either through a patchwork of likely inconsistent rules or through litigation, would have the effect of undermining nationally the consumer benefits that ETFs have made possible. Such efforts also ignore the fact that, in response to market forces rather than government mandates, T-Mobile and other carriers today offer consumers the option of avoiding ETFs by choosing a prepaid service plan.

Commission precedent unambiguously supports CTIA's position that ETFs constitute carrier rates, the state regulation of which is preempted by section 332. Indeed, in both the wireless and wireline contexts, the Commission has determined that ETFs are components of carriers' rate structures, and are designed to offset reductions in other rate elements. Indeed, the Commission has specifically *refused* to invalidate or reduce ETFs in telecommunications contracts because they help carriers recoup upfront costs when customers cancel their contracts early, and so allow customers to enjoy discounted and stable-priced services. The Commission should confirm these conclusions by granting CTIA's Petition, thereby securing the fullest possible choice and competition for wireless consumers.

I. THE ETF IS A CRITICAL ELEMENT OF T-MOBILE'S RATE STRUCTURE, WHICH HAS BENEFITED CONSUMERS

ETFs have been an essential part of many of T-Mobile's rate plans since at least 1996, allowing the company to offer subscribers innovative pricing that benefits consumers in the competitive CMRS marketplace.[8/] The ETF is a "rate charged" because it "directly correlate[s] to and is an integral part of the rates charged by [a wireless provider] for its services under its wireless service agreements."[9/] Each of T-Mobile's rate plans comprises a variety of elements, including, among others, fees for activation, monthly access, special features, local and long distance airtime, certain roaming charges, and early termination. Together, these fees constitute the "price" that T-Mobile charges for the wireless services it provides under each plan. The multiple rate components under any given plan allow T-Mobile to recover its costs and are designed to be competitive with rate plans offered by other wireless companies.

For those plans that include an ETF, T-Mobile offers subscribers handsets and/or accessories at low or no cost and large "buckets" of minutes for low monthly rates in exchange for a subscriber's commitment to remain a customer for a minimum time period (usually one year). Under those plans, if a subscriber decides to terminate before the end of the minimum contract period, T-Mobile has the right to charge the subscriber an ETF (currently $200). T-Mobile makes extensive efforts to make sure all customers and potential customers are fully aware of the ETF.[10/]

Like other components of its rates, T-Mobile charges customers the ETF to compensate the company for the costs of the wireless services T-Mobile provides, the costs it incurs in acquiring customers, and to earn a profit from these business activities.

[8/] Until July 2002, T-Mobile was known as VoiceStream Wireless.

[9/] *Redfern v. AT&T Wireless Servs.*, Civ. No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745, at *2-4 (S.D. Ill. June 16, 2003) (Murphy, J.).

[10/] In its advertisements, customer contracts (both in the body and on the signature page), and at the point of sale (orally, in writing, or online), T-Mobile explains that customers who take advantage of handset discounts and high-value rate plans are committing to a yearlong contract and agreeing to pay an ETF.

Customer acquisition costs are significant. Not only do most new customers signing term contracts receive steeply discounted handsets, but T-Mobile must have personnel on hand to run credit checks, counsel customers regarding T-Mobile products and services, create and circulate service and equipment documentation, program phones, create and distribute contracts and welcome packages, and execute number portability requests. Similarly, carriers often have to pay commissions to sales representatives and dealers. These are all upfront costs to T-Mobile, but its wireless rate plans are structured to allow subscribers to pay for them throughout the contract period through a variety of elements, including, if cancelled early, a cancellation fee.

Although some plaintiffs' lawyers characterize wireless carriers' term contracts (along with the ETFs) as an effort to "lock" customers into wireless service, in truth, all T-Mobile customers have a choice -- postpaid service with an ETF or prepaid service without an ETF. T-Mobile offers customers that do not wish to make a commitment the option of a prepaid service that has no minimum contractual period and no ETF. Of course, those prepaid rate plans are structured so that customers pay in advance for service, receive lower discounts on handsets, and pay higher airtime fees. The ETF simply allows T-Mobile to offer customers a wider range of service options and pricing plans. In addition, T-Mobile, like all the major carriers, allows subscribers an initial trial period during which service may be terminated without application of an ETF.[11/]

Notably, notwithstanding the availability of prepaid plans without a term contract -- and without ETFs -- in all T-Mobile markets, the vast majority of T-Mobile customers

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[11/] T-Mobile, together with more than thirty of its competitors, is a signatory to the CTIA Consumer Code, which, among other things, requires wireless carriers to offer a trial period after service is initiated and to disclose fully that an ETF will be assessed if service is cancelled during the remainder of the contract term.

choose postpaid plans with term contracts and ETFs. Consumers overwhelmingly prefer the subsidized handsets and lower monthly and airtime fees that are feasible for T-Mobile only in conjunction with an ETF, and they are willing to enter into a contract with T-Mobile in exchange for those benefits. Indeed, in response to competition and consumer expectations, T-Mobile is considering introducing 24-month plans with even larger handset subsidies and lower monthly charges, and a tenure-based rating that rewards long-term customers with lower rates.

If T-Mobile were not permitted to charge an ETF, or if the ETF were reduced, consumers would suffer because T-Mobile would likely have no choice but to increase its upfront and ongoing charges for wireless services, rather than offering the attractive pricing and service options consumers demand today. T-Mobile is an acknowledged innovator in the wireless marketplace, and has been recognized time and again for making consumer interests the hallmark of its business.[12/] It goes without saying that the public interest is not served by limiting consumer choice, especially at a time when wireless competition is fierce and consumer demand is pushing T-Mobile to offer more, not fewer, options.

II. THE COMMISSION SHOULD MAKE ITS AUTHORITY CLEAR BECAUSE PIECEMEAL STATE-BY-STATE REGULATION OF WIRELESS TERMINATION FEES WILL HARM CONSUMERS AND COMPETITION

The growth and innovation of the wireless sector has been fueled not only by competition, but also by a framework established by Congress to deregulate state

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12/ For two years in a row, J.D. Power and Associates has awarded to T-Mobile the claim for "Highest Ranked Customer Service Performance" among all wireless carriers. In addition to the residential consumer awards, J.D. Power and Associates announced in May 2005 that T-Mobile ranked "Highest in Customer Satisfaction with Business Wireless Service."

oversight of rates and entry. As Congress and the Commission repeatedly have recognized, burdensome regulation has a chilling effect on network deployment, raises the cost of services, and diverts funds that could be used to create additional creative products and services, thereby discouraging new subscribers.[13/] As explained above, state law limitations on ETFs are unnecessary and would in fact be counterproductive by reducing consumer choice. Moreover, if state legislatures or courts could impose their own limitations on ETF charges, the resulting state-to-state inconsistencies would be particularly problematic for mobile service providers that "operate without regard to state lines."[14/] Indeed, it was to prevent that very result that Congress prohibited state rate regulation of commercial mobile radio services.[15/]

The absence of state regulation of wireless rates and entry has benefited consumers through increased choices of service plans and lower prices, and has helped foster competition and the expansion of the wireless industry. The Commission's most recent analysis of competition in the CMRS market illustrates the success that rate deregulation has had in encouraging innovative price competition among carriers and expanding the market penetration of mobile services.[16/] Pricing innovations such as "national rate pricing plans" that allow customers to purchase large "buckets" of minutes

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13/ *See, e.g.*, *2000 Biennial Regulatory Review: Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22,668 ¶¶ 22-25 (2001) (discussing Congress' and, consequently, the Commission's, preference for deregulation over regulation); *Federal-State Joint Board on Universal Service*, *Report to Congress*, 13 FCC Rcd 11,501 ¶ 82, n.170 (1998) (regulation of ISPs would stifle development of new technologies and services); *TCI Cablevision of Oakland County, Inc.*, *Memorandum Opinion and Order*, 12 FCC Rcd 21,396 ¶¶ 105-106 (1997) (regulatory over-reaching by localities discourages competition and introduction of new services).

14/ H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.A.A.N. 378, 587.

15/ *Id.*

16/ *CMRS Report* ¶¶ 113-114.

that can be used nationwide without incurring roaming or long-distance charges, free night and weekend minutes, and "mobile-to-mobile" calling plans that allow unlimited calls among subscribers of the same company are all examples of the benefits that have resulted from deregulation.[17/]

The Commission has recognized that this "intense" price competition and plan differentiation has advantaged consumers. There has been "a sharp decline in mobile telephone prices" as well as a "long-term decline in the cost of mobile telephone services."[18/] In addition to low prices, the "rapid innovation and diffusion of service offerings" are equally beneficial to consumers.[19/] The Commission highlighted the "multitude of mobile calling plans" under which "[c]onsumers can choose from service offerings that vary widely with regard to a number of characteristics, including pricing level and structure, handset type, and the scope of ancillary services . . . ."[20/] Indeed, in the *CMRS Report*, the Commission specifically noted and commended one carrier's plan under which "new customers *who sign a two-year contract* for plans of at least $40 monthly would also receive unlimited mobile-to-mobile calling."[21/]

The ultimate result of these innovative pricing policies has been increased use of mobile services by the public, in harmony with congressional and Commission goals of promoting the growth and development of mobile services. By year end 2004, more than

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17/ *Id.* ¶¶ 3, 114.

18/ *Id.* ¶ 168.

19/ *Id.* ¶ 187.

20/ *Id.*

21/ *Id.* ¶ 114 (emphasis added). While consumers predominantly favor term plans, the *CMRS Report* also noted the availability of prepaid mobile services that require customers to pay for a fixed amount of minutes prior to making calls. At the time of the report, all national wireless carriers offered prepaid services, and T-Mobile had the largest percentage of subscribers using such plans – approximately 11 percent. *Id.* ¶¶ 115-16.

182 million people in the country subscribed to wireless services (up 23.4 million from 2003).[22/] Wireless carriers also are expanding their coverage substantially, increasing their cell site numbers by eight percent each year.[23/] T-Mobile itself has expanded from a regional wireless carrier to a nationwide competitor. While T-Mobile's predecessor, VoiceStream Wireless ("VoiceStream"), initially launched service in 1996 in only a few cities -- Honolulu, Salt Lake City, Albuquerque, Oklahoma City, Portland and Des Moines -- it had gained over 125,000 subscribers by year-end 1997 and over 320,000 subscribers by 1998. By 2000, VoiceStream was present in nearly all major markets and had more than 3.8 million subscribers. At least one analyst has attributed the increased growth largely to the availability of family and prepaid plans and a decrease in equipment prices.[24/]

Today, T-Mobile provides subscribers across the country access to handsets and accessories, buckets of minutes, data services, and additional features under identical rates, terms and conditions. This national offering is important to consumers, who demand uniformity and competitive pricing of minutes. A mobile phone purchased in one state can be used on a business trip or family vacation in another state, truck drivers can check in with their companies' home offices while on the road, and a subscriber may take her handset with her when she moves to a new home without the hassle of reinitiating service. T-Mobile subscribers have high expectations for affordable wireless service regardless of the state in which they reside or travel. Similarly, T-Mobile has

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22/ *See* CTIA Semi-Annual Wireless Industry Survey (2005) *available at* http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf.

23/ *Id.*

24/ *CMRS Report* ¶ 175.

accommodated customer demands that their buckets of minutes include long distance and roaming airtime with no additional charges. T-Mobile's various services packages, both contractual and prepaid, were formulated based on exhaustive market research and are designed to meet the needs and interests of many different types of consumers.

The benefits of competitive national pricing would be lost if each state commission and each court were allowed to create its own policies on the permissibility of ETFs and the circumstances under which they may be assessed. T-Mobile would have to restrict, or possibly even eliminate, the availability to subscribers of price plans with lower upfront rates and subsidized handsets. Such a decision would be to the clear detriment of consumers, who have shown by their behavior that they prefer these plans to any other,[25/] and would contradict the Commission's interest in promoting equal and affordable access to wireless services.[26/]

Moreover, T-Mobile, as the fourth national wireless carrier, is more likely to feel the competitive reverberations of such a dramatic change in the pricing of mobile services overall through the regulation of ETFs. T-Mobile has positioned itself as a value and price leader, offering new customers competitive rate plans and handset subsidies with only a one-year contract, in contrast to the two-year commitments demanded by

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25/ As discussed above, prepaid plans that do not have ETFs are currently available as an option for subscribers to choose and consumers are informed when plans have ETFs, but subscribers overwhelmingly prefer to receive lower and more dispersed costs in exchange for making a service commitment.

26/ *See CMRS Report* ¶ 4 ("[C]ompetition continues to afford many significant benefits to consumers. Consumers continue to contribute to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service."); *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04–208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55, ¶ 35 (rel. March 18, 2005) ("*TIB Second Order*").

most other carriers for a similar package. In all probability, unpredictable state-by-state changes in wireless carriers' ability to recover their upfront costs through ETFs would have a far greater effect on T-Mobile's business on the margins than it would on other larger competitors. In a consolidating marketplace, the Commission needs to take into account the serious impact of piecemeal, unauthorized state regulation of ETFs on wireless competition.

III. COMMISSION PRECEDENT COMPELS THE CONCLUSION THAT EARLY TERMINATION FEES ARE RATES

As CTIA explains, section 332(c)(3)(A) was designed to implement a federal regulatory framework for wireless communications in order to promote investment and deployment of such services, establish uniformity of regulation across state lines, and prohibit discrimination among similarly situated customers.[27/] Thus, the Commission "consistently has interpreted the rate regulation provision of [section 332(c)(3)(A)] to be broad in scope . . . 'prohibit[ing] states from prescribing, setting or fixing rates,'"[28/] and has found that even generally applicable contract or consumer protection laws may constitute preempted rate or entry regulation if they affect the reasonableness of wireless rates.[29/]

In applying section 332(c), the Commission has confirmed that the proscription on state rate regulation "extends to regulation of 'rate levels' and 'rate structures' for CMRS," meaning that states may not specify "'the rate elements for CMRS'" or "'which

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27/ CTIA Petition at 8-9.

28/ *TIB Second Order* ¶ 30 (citing *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999)). *See also* CTIA Petition at 9-10.

29/ *See* CTIA Petition at 10-11.

among the CMRS services provided can be subject to charges by CMRS providers.'"[30/] Following these precedents, the Commission recently concluded that line item charges on end user bills are CMRS "rate elements" and that "a regulation curtailing a CMRS carrier's ability to structure its bills and isolate charges into separate line items" would "have a direct effect on a CMRS carrier's rate structure presented to its end users and, if instituted by a state commission, would be preempted by the Act."[31/] ETFs are no different than line item charges under the factors outlined in the *TIB Second Order* because, as explained above, ETFs are fundamental elements of a wireless carrier's overall rate structure and they permit carriers to recoup the costs of providing wireless service.

Prior Commission decisions have held unambiguously that ETFs are rates. In both the wireline and wireless contexts, the Commission has held that termination fees are part of carriers' pricing structures which recover upfront investment when a customer cancels service early. In *Expanded Interconnection*, for example, the Commission found that regulation of ETF charges fell directly within its *ratemaking* authority.[32/] In that case, the Commission directed local exchange carriers to reduce ETFs for certain offerings under the agency's statutory authority "to prescribe just and reasonable charges for tariffed LEC offerings, including termination charge provisions" and specifically declined to adopt one commenter's position that alteration of ETFs "is not a prescription

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30/ *TIB Second Order* ¶ 30 (quoting *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 Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19,898, ¶¶ 18-20 (1999)).

31/ *TIB Second Order* ¶¶ 30-31.

32/ *See Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341 ¶¶ 15-17 & n.23 (1993).

at all, but merely a refusal to enforce contractual penalties."[33/] In a subsequent decision, the Commission characterized a wireless carrier's "annual contract (with a cancellation fee of $10 per month remaining on the contract)" as a "rate structure," making clear that the ETF was one of the many components of the overall price of wireless service.[34/]

Other Commission cases involving requests by customers to invalidate long term contracts and applicable cancellation fees support the conclusion that an ETF is an element of a carrier's rate structure. In *Ryder Communications v. AT&T Corp.*, the Commission upheld ETFs in a contract-tariff on the ground that ETFs are "a valid quid pro quo for the rate reductions included in long-term plans. . . . [B]ecause carriers make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs."[35/] Similarly, the Commission has found that it is reasonable for carriers to link price discounts to ETFs because such provisions give carriers assurance that "costs will be recouped in the event a customer fails to utilize the service for the stipulated period of time" and allow customers to "enjoy discounted and stable priced services over the life of the contract term."[36/]

33/ *Id.*

34/ *Application of BellSouth Corporation et. al for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599 ¶ 43 (1998).

35/ 18 FCC Rcd. 13,603 ¶ 33 (2003).

36/ *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 18 FCC Rcd 19,020, ¶¶ 692, 698-99 (2003). *See also Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, 17 FCC Rcd 27,039 ¶ 348 (declining to override ETFs because carrier-customer "took advantage of discount pricing plans that offered lower rates in return for a longer term commitment").

These precedents compel the conclusion that ETFs are rates for purposes of section 332.[37/] A state's regulation of whether, when, and how much can be charged in the form of an ETF would affect all other elements of the carrier's rates. Given the Commission's determination that states may neither require nor prohibit wireless carriers from recovering regulatory costs in separate line items, as well as its prior rulings that ETFs are part of a carrier's rate structure, it necessarily follows that state regulation of wireless ETFs is preempted under section 332(c).

[37/] The Commission's decisions are consistent with the holdings of a number of state and federal courts, which that have found that challenges to ETFs are preempted. *See, e.g., Simons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. April 11, 1996); *Consumer Justice Found. v. Pacific Bell Tel. Co.*, No BC 214554 (Cal. Super. Ct. July 29, 2002); *Redfern v. AT&T Wireless Servs., Inc.*, Civil No. 03-206-GPM (S.D. Ill. June 16, 2003); *Aubrey v. Ameritech Mobile Comms., Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002); *but see Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996).

CONCLUSION

For the reasons discussed, the Commission should grant CTIA's Petition and find that ETFs are rates under section 332.

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August 5, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2005, I caused a true and correct copy of the foregoing Reply Comments to be served upon the following persons via ECFS and/or via E-mail, as indicated.

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