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***Via Electronic Submission***

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

***Re: Ex Parte Communication***
*CTIA Petition for Declaratory Ruling, WT 05-194*

Dear Ms. Dortch:

Sprint Nextel Corporation ("Sprint Nextel") submits the following written *ex parte* in support of the CTIA Petition for Declaratory Ruling filed in the above captioned docket. Sprint Nextel urges the Federal Communications Commission ("FCC" or "Commission") to confirm that Early Termination Fees ("ETFs") are a part of a carrier's rates and rate structure within the meaning of Section 332(c)(3)(A) of the Act. In addition, Sprint Nextel addresses the faulty legal arguments raised in the National Association of State Utility Consumer Advocates ("NASUCA") filing of May 20, 2008, and outlines the authority of the FCC to preempt state regulation in this area.

NASUCA contends that the Commission lacks authority to preempt state regulation of ETFs,[1] relying heavily on the Eleventh Circuit's decision in *NASUCA v. FCC.*[2] In fact, Congress has preempted state regulation of ETFs because they are "rates charged" under section 332(c)(3)(A) of the Communications Act.[3] In addition, the Commission has authority to preempt because permitting states to regulate ETFs undermines the achievement of important federal goals such as making wireless service affordable. But the Eleventh Circuit's decision is instructive in showing that it is important for the Commission to craft a preemption decision carefully.

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[1] Letter from P. Pearlman et al. to M. Dortch, WT Docket No. 05-194 (May 20, 2008) ("May 20 NASUCA ex parte letter").

[2] 457 F.3d 1238 (11th Cir. 2006), *cert. denied sub nom. Sprint Nextel Corporation v. NASUCA*, 128 S. Ct. 1119 (2008).

[3] 47 U.S.C. § 332(c)(3)(A).

The *NASUCA* case involved a Commission decision preempting state laws prohibiting or requiring wireless carriers to use line items to collect certain charges.[4] In preempting, the Commission relied exclusively on section 332(c)(3)(A), which denies states authority to regulate the "rates charged" by commercial mobile radio service ("CMRS") providers, but does not preempt state regulation of "other terms and conditions" of CMRS.[5] In its brief discussion, the Commission did not define the meaning of "rates charged" in section 332(c)(3)(A) or distinguish "rates charged" from "other terms and conditions" in a manner that the Eleventh Circuit found satisfactory.[6] The Commission alluded to the possibility of conflict preemption, but did not base its decision on that theory.[7] The Eleventh Circuit based its judgment vacating the Commission's decision primarily on its conclusion that regulation of line items affects only the "presentation" of charges on a wireless bill.[8]

Sprint Nextel and T-Mobile sought Supreme Court review of the Eleventh Circuit's decision, and the Court asked the Solicitor General to provide the views of the United States. The Solicitor General opined that the Eleventh Circuit "erred by not according appropriate deference to the FCC's reasonable construction of Section 332(c)(3)(A)," but added that "its decision does not warrant further review at this time."[9] In recommending against review, the Solicitor General noted the absence of a conflict in the circuits concerning the interpretation of section 332(c)(3)(A) and the availability of preemption under a conflict theory.

The Commission should heed the Solicitor General's advice and not retreat from its reasonable construction of section 332(c)(3)(A). The Commission should take this opportunity to carefully articulate its interpretation of "rates charged" and distinguish ETFs from line items on the ground that ETFs do not merely affect the presentation of charges on bills. The Commission should also invoke conflict principles as supporting the conclusion that ETFs are "rates charged."

As explained in more detail below, the Commission should conclude that ETFs are "rates charged" for two related reasons. First, the ordinary dictionary definition of "rate" includes any charge made in connection with the provision of a service, and an ETF is itself a "rate" under that approach. Second, the Commission has adopted a "rate structure" approach to interpreting section 332(c)(3)(A), pursuant to which states may not regulate any factor that directly affects charges imposed on subscribers. Because the record shows that charges for ETFs directly affect charges for handsets and monthly rates for wireless service, states may not regulate ETFs for that reason as well. Even if ETFs were not rates, preemption would be warranted under conflict principles because plans with ETFs make wireless service more affordable and because Congress has

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[4] *Truth-in-Billing and Billing Format*, 20 FCC Rcd 6448 (2005).

[5] *Id.*, ¶¶ 30-34.

[6] 457 F.3d at 1251-58.

[7] *Truth-in-Billing and Billing Format*, ¶ 35.

[8] *NASUCA v. FCC*, 457 F.3d at 1242, 1254, 1255, and 1256.

[9] Brief for the United States in *Sprint Nextel Corporation v. NASUCA*, Sup. Ct. No. 06-1184 (Dec. 2007) ("Brief for the United States"), at 11.

made clear that regulators should rely on competition to protect consumers. The conclusion that state regulation would undermine the achievement of those federal goals is both a separate reason to preempt and a further justification for a construction of section 332(c)(3)(A) that includes charges imposed by carriers on subscribers.

### A. The Commission Should Preempt Under Section 332(c)(3)(A).

The Commission should preempt primarily on the ground that rules restricting ETFs are "rates charged" under section 332(c)(3)(A). The Commission's most extensive treatment of what constitutes regulation of the "rates charged" by wireless carriers was in *In re Southwestern Bell Mobile Systems, Inc.*, where the Commission concluded that "states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments."[10] In reaching that conclusion, the Commission favorably noted Sprint's submission that a "rate" includes an "'amount of payment or charge based on some other amount.'"[11] The Commission also relied on the Supreme Court's conclusion that "'Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.'"[12] The Commission also noted that it had previously concluded that section 332(c)(3)(A) prohibits states "from prescribing, setting, or fixing rates' of wireless service providers."[13] The Commission concluded:

> Thus, we find that the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.[14]

It bears emphasis that the issue in *Southwestern Bell Mobile Systems* did not relate to the *amount* of a charge – what the Commission referred to as a "rate level" – and that everyone assumed (correctly) that states are preempted from regulating the amount of charges imposed by CMRS providers. For example, it is perfectly clear that a state may not determine that $30 is too much to charge for 300 minutes of service per month. Similarly, states plainly may not determine that $30 a month is a reasonable charge for a "bucket of minutes" only if a carrier permits a subscriber to use at least 400 minutes of service. The number of minutes of service allowed un-

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[10] 14 FCC Rcd 19898, ¶ 23 (1999).

[11] *Id.* at ¶ 19, *quoting Webster's Third New International Dictionary* (1993).

[12] *Southwestern Bell Mobile Systems*, 14 FCC Rcd at ¶ 19, *quoting AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 1963 (1998).

[13] *Southwestern Bell Mobile Systems*, 14 FCC Rcd at ¶ 20, *quoting CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999), and *citing In re Pittencrief Communications, Inc.*, 13 FCC Rcd 1735, 1745 (1997).

[14] *Southwestern Bell Mobile Systems*, 14 FCC Rcd at ¶ 20.

der a rate plan is not in isolation a "rate" – because it is not the amount of a charge – but regulation of the minutes of use permitted for a certain charge necessarily is prohibited "rate regulation" since, as the Supreme Court explained in *Central Office Telephone*, rates have meaning only with respect to the services to which they are attached. In the language the Commission used in *Southwestern Bell Mobile Systems*, rules about matters such as the number of minutes of use provided for a given amount are rules that affect a carrier's "rate structure."

Rather than the relatively easy questions of whether states may regulate the amounts CMRS providers charge their customers or whether states may regulate the amount of service provided for a given charge, the issue in *Southwestern Bell Mobile Systems* was the more difficult question of whether states may regulate what counts as a minute of service. As noted above, the Commission broadly, but reasonably, construed the statute to preempt such regulation – specifically preempting prohibitions on "rounding up" calls to the next minute and charging for incoming calls. The Commission correctly recognized that such prohibitions necessarily affect a carrier's rate structure, including its rate levels for other rate elements. For example, if carriers were not permitted to round up or charge for incoming calls, they undoubtedly would reduce the number of minutes provided for a given charge or increase the charge for the number of minutes. Or the carrier might adjust its rate structure by introducing a new charge – *i.e.*, a new "rate element" – to make up for the revenues lost because it was not permitted to round up or charge for incoming calls.

The lesson to be drawn from *Southwestern Bell Mobile Systems* with respect to ETFs is that states may not regulate the amount of a charge imposed by a CMRS provider or prohibit a CMRS carrier from imposing a charge pursuant to a contract for the provision of wireless service. Regulation of that sort will necessarily affect the carrier's rate structure. The record in this proceeding makes that abundantly clear because it shows that when carriers offer essentially the same service without an ETF they either charge more per month for the service or they increase the price of the handset provided to the subscriber.[15] Therefore, whether there is an ETF and the amount of the ETF plainly affect rates, just as prohibitions on rounding up or charging for incoming calls do. It would not be possible for the Commission to square a decision concluding that rules governing ETFs are not prohibited rate regulation with its prior conclusion that rules prohibiting rounding up or charging for incoming calls are prohibited rate regulation.

In explaining its decision, the Commission should make clear that ETFs are "rates charged" for two reasons. First, ETFs are themselves "rates charged" pursuant to an agreement to provide CMRS. The Commission should conclude that any amount charged pursuant to a wireless contract is a "rate charged" – an interpretation that falls easily within the Commission's prior construction of the phrase and the dictionary definitions of the terms. For example, Black's Law Dictionary, cited approvingly by the Eleventh Circuit, defines "rate" as "an amount paid or charged for a good or service."[16] The D.C. Circuit also approvingly relied on that definition in a

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[15] NASUCA collected many of the citation showing the relationship between ETFs and lower charges in footnotes 3 and 4 of its May 20 ex parte letter.

[16] *NASUCA v. FCC*, 457 F.3d at 1254.

wireline case and concluded that ETFs are "rates."[17] ETFs – fees charged for termination – fall easily into this definition. Similarly, the Oxford English Reference Dictionary defines "rate" as "a fixed or appropriate charge or cost or value." An ETF is a "fixed ... charge."[18] And the Commission has previously determined that, under section 332(c)(3)(A), "[a] carrier may charge whatever price it wishes ... as long as it does not misrepresent ... the price."[19]

In addition, the Commission should conclude that states may not regulate the amount of a charge, or prohibit a charge altogether, whether or not the charge itself is viewed as a "rate," because such regulation necessarily directly affects carriers' rate structures. That is, whenever restrictions are placed on the amounts a carrier may charge its subscribers, the carrier almost certainly will adjust other charges, including charges that are indisputably rates, to compensate. Under this view, whether or not an ETF is a "rate" when viewed in isolation, states may not regulate ETFs because such regulation necessarily affects other parts of carriers' rate structures. That is the same approach the Commission followed when it determined that states may not prohibit carriers from rounding up or charging for incoming calls.

It would be useful for the Commission to comprehensively illustrate what constitute "rates charged" using common rate plans for wireless services. Of course, monthly charges for a "bucket of minutes," charges for minutes used in excess of the bucket, and charges for advanced features such as voice mail or text messaging are "rates charged." In addition, carriers often charge for buying a handset, for activating service, and for terminating service, and each of these charges should be viewed both as a rate element and as an item that necessarily affects the charges for other items that indisputably are rate elements.

The Commission also should provide a more comprehensive definition of "rates charged" than it has to date. As stated above, such a definition necessarily should start by including any amount charged pursuant to a contract for CMRS. The district courts that have held that state law challenges to ETFs are preempted have recognized that principle and concluded that any challenge to the amount of a charge is necessarily a form of rate regulation. In *Aubrey v. Ameritech Mobile Communications, Inc.*, for example, the court held that "by alleging that the rates which AMC charged for terminating a subscriber's service were exorbitant, it is clear that the Plaintiff is challenging the rates charged by AMC for its wireless services."[20] The Commission

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[17] *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987).

[18] "Fixed or appropriate charge" is the second definition of "rate" in the Oxford English Reference Dictionary (Rev. 2d ed. 2006). The first definition is a "numerical proportion" such as "50 miles per hour." That definition, which also is common to most dictionaries, would apply to items such as "$30 for 300 minutes." An ETF would fall into that definition if it is prorated, such that the fee is, for example, "$20 per month left on the contract."

[19] *In re Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17201, ¶ 27 (2000).

[20] 2002 U.S. Dist. LEXIS 15918 at *12 (E.D. Mich.).

similarly has concluded that states may not determine "whether a price charged for a CMRS service was unreasonable."[21]

Challenges to ETFs under state law necessarily allege the ETF at issue is unreasonable, generally because the ETF allegedly is not adequately tied to the cost of providing service or subsidizing a handset purchase. Carriers dispute those factual issues, but the key point with respect to the preemption issue is that the terms of the dispute show that prohibited rate regulation is at issue. Whether a charge is based on the cost of providing service is at the heart of an ordinary analysis of whether rates are just and reasonable under the Communications Act.[22] Congress has prohibited state regulation of the reasonableness of charges – and it should not matter whether the issue is whether $30 is too much to charge for a bucket of 300 minutes or whether $175 is too high a charge for terminating service. Addressing either issue is a form of rate regulation and, while the Commission may regulate CMRS rates, states may not.

The Commission should respond directly to the decisions of those district courts that have held that ETFs are not "rates." The court in *Phillips v. AT&T Wireless*[23] provided a typical statement by such a court, basing its conclusion that ETFs are not rates on two grounds. First, it stated that an ETF "has nothing to do with a charge for airtime or minutes used, or any other fee for services rendered."[24] But that is wrong. Indeed, later in its opinion the court recognized that ETFs are closely related to other charges by conceding that "AT&T makes a compelling argument that its early termination fee is an integral part of its rate structure."[25] In a wireline case, the D.C. Circuit explained why a termination charge is a rate even though it is a charge to discontinue service:

> A "rate" is a charge to a customer to receive service. *See generally* Black's Law Dictionary 1134 (5th ed. 1979). Public utility rates are a means by which the carrier recovers its costs of service from its customers. Part of 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

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[21] *Wireless Consumers Alliance,* 15 FCC Rcd at ¶ 25.

[22] *See, e.g., COMPTEL v. FCC,* 87 F.3d 522, 529 (1966) (Ginsburg, J.) ("Sections 201(a) and (b) and 202(a) of the Communications Act of 1934, 47 U.S.C. §§ 201(a), (b) and 202(a), authorize the Commission to establish just and reasonable rates, provided that they are not unduly discriminatory. ... The Commission must ... specially justify any rate differential that does not reflect cost. *Alltel Corp. v. FCC,* 267 U.S. App. D.C. 253, 838 F.2d 551, 556-58 (D.C. Cir. 1988).")

[23] 2004 U.S. District LEXIS 14544 (S.D. Iowa).

[24] *Id.* at *31.

[25] *Id.* at *36.

> among all ratepayers. The Project Liability 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 customer to receive interconnection service. We therefore conclude that the Commission reasonably found that the Project Liability charges are "rates" within the meaning of the Agreement.[26]

Or as the court held in *Chandler v. AT&T Wireless Services, Inc.*, ETFs are "rates charged" because they are "directly connected to the rates charged for mobile service."[27]

The *Phillips* court also based its conclusion that ETFs are not "rates charged" on the argument "that 'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and the normal costs of operating a telecommunications business."[28] That line-drawing problem also affected the Eleventh Circuit's thinking in the line item case – the court could not understand why the Commission had concluded that states could not prohibit carriers from recovering state universal service fees by means of line items when the Commission had upheld states' ability to impose universal service fees.[29] The Commission already has provided the basis for answering that concern, but has not spelled out the answer. In *Pittencrieff*, where the Commission upheld the imposition of state universal service fees, it focused on the "indirect relationship" between the state universal service law and "the rates charged by a CMRS provider."[30] Similarly, in *In re Wireless Consumers Alliance, Inc.*, the Commission concluded "that imposition of a state damage award has merely an incidental effect upon the prices charged by a carrier."[31]

Thus, the Commission has drawn a line between direct and indirect effects on rates. The Commission has never held that a prohibition on a charge imposed by a wireless carrier on its customers has an indirect effect on rates, and such a conclusion would be unwarranted. It is abundantly clear that prohibiting carriers from imposing a particular charge will lead them to adjust other charges. With respect to ETFs, prohibitions or reductions will necessarily lead to increases in charges for handsets or monthly service. For those reasons, the Commission should conclude that state laws regulating ETFs have a direct effect on rates. More generally, the Commission should conclude that rules governing what carriers may charge their customers constitute prohibited regulation of the rates charged for wireless service. At the same time, the

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[26] *MCI*, 822 F.2d at 86.

[27] 2004 U.S. District LEXIS 14884 at *4.

[28] 2004 U.S. District LEXIS 14544 at 36.

[29] *See* 457 F.3d at 1256.

[30] *Southwestern Bell Mobile Systems*, 13 FCC Rcd at ¶ 20. In addition, 47 U.S.C. § 254(f) specifically states that states may impose universal service fees, as both the Solicitor General (Brief for the United States at 17) and the D.C. Circuit, *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999), have noted.

[31] *Wireless Carriers Alliance*, 15 FCC at ¶ 34.

Commission should reiterate its conclusion that state laws increasing the cost of doing business generally fall on the "indirect" side of the line, as the Commission held in *Pittencrieff* and *Wireless Consumers Alliance*, in order to assure the courts that states are not prohibited from taking action simply because it increases the cost of doing business.[32]

In short, the Commission has reasonably concluded that a charge imposed by a carrier on a subscriber has a *direct* effect on rates, while a charge imposed by a state on a carrier generally has an *indirect* effect on rates. That is a reasonable interpretation of section 332(c)(3)(A) that the Commission should make explicit.

The Commission also should explain that ETFs are different than line items in a crucial respect emphasized by the Eleventh Circuit. That court stated that a regulation prohibiting line items merely "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."[33] In our view, the Eleventh Circuit misunderstood the effect of prohibitions of line items. But in any event, it cannot seriously be argued that a prohibition on ETFs merely affects the presentation of charges on bills rather than the amount charged. The Commission should spell out the effect of ETFs on handset charges and monthly fees, however, in order to clearly distinguish the line item case.

Because NASUCA places great emphasis on the legislative history of section 332(c)(3)(A),[34] the Commission should address that history. Specifically, NASUCA block quotes a statement from a House Committee report, emphasizing language stating that "the Committee intends" that "terms and conditions" should include such matters as "the bundling of services and equipment."[35] As an initial matter, it is not clear that any substantial weight should be given to that report, representing the views of members of a committee of one body. In any event, nothing in that statement suggests that regulations concerning charges imposed by a car-

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[32] Of course, we are not suggesting that rules regulating charges imposed by carriers on their customers are the *only* items that constitute prohibited rate regulation. As the Commission held in *Southwestern Bell Mobile Systems*, rules regulating matters such as the practice of rounding up minutes and charging for incoming call are also prohibited rate regulation. And in *Wireless Consumers Alliance*, the Commission carefully stated that awards of monetary damages are "not *necessarily* equivalent to rate regulation," but instead concluded that such an award "*generally* falls under the terms and conditions provision of Section 332." 15 FCC Rcd at ¶ 36 (emphasis added). Thus, the Commission recognized that there may be extreme cases where the imposition on charges on carriers amounts to prohibited rate regulation. But the regulation of charges by carriers on their customers is at the heart of rate regulation, and the Commission should make that clear.

[33] 457 F.3d at 1254. *See id.* at 1242, 1255, and 1256 (also emphasizing that line item prohibitions merely relate to the "presentation" of charges).

[34] *May 20 NASUCA ex parte letter* at 1-2.

[35] *Id.* at 2, *quoting* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993), *reprinted in* LEXSEE 103 H. Rpt. at 4 (1993).

rier on its subscribers are not prohibited rate regulation. In light of the language relating to "the bundling of services and equipment," it may be that the members of the House Committee thought that states could bar carriers from discounting handsets purchased with wireless service or promulgate regulations governing such bundling. But their statement does not mention ETFs and it certainly does not support the conclusion that states may regulate the amount charged for terminating service.

In short, with respect to section 332(c)(3)(A), the Commission should adhere to the reasonable approach it adopted in *Southwestern Bell Mobile Systems*. The Commission should enunciate the straightforward principle that an amount charged by a CMRS provider to a customer pursuant to a contract to provide wireless service is a "rate charged." Because ETFs are amounts charged by CMRS providers to their customers, and because experience shows that plans with ETFs also have lower handset charges or monthly fees or both, the Commission should conclude that states may not regulate ETFs.

### B. Conflict Preemption Principles Also Support Preemption.

As the Solicitor General told the Supreme Court in his brief in the line item case, the Commission may preempt state regulation when such regulation undermines the achievement of federal goals. Under this approach, it does not matter whether ETFs are "rates charged" or "other terms and conditions" of CMRS. In our view, conflict preemption principles should be invoked to bar state regulation of ETFs, but this should be a secondary basis for preemption. The Commission should emphasize that construing section 332(c)(3)(A) to avoid conflict with the goals underlying the Communications Act is another reason that ETFs are properly considered to be "rates charged."[36]

The Solicitor General relied on the Supreme Court's decisions in *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, which held that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law,"[37] and *City of New York v. FCC*,[38] which the Solicitor General accurately described as permitting the Commission to preempt state

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[36] The Public Notice initiating this proceeding focused on preemption under section 332(c)(3)(A). 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 05-194 (May 18, 2005). That focus does not bar the Commission from addressing the closely related question of whether preemption is warranted on another basis, particularly when the Solicitor General has recently highlighted the importance of that alternative argument and because NASUCA and others will have an opportunity to respond to the argument that state regulation of ETFs should be preempted under conflict preemption principles. It certainly does not bar the Commission from invoking conflict principles in support of a construction of section 332(c)(3)(A) that avoids conflict with the goals underlying the Communications Act.

[37] 458 U.S. 141, 154 (1982).

[38] 486 U.S. 57 (1988).

regulations based on a conflict between "those regulations and the Communications Act as a whole."[39] As the Supreme Court has repeatedly stated, and as the Solicitor General recently explained, "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authority to displace state law.'"[40] Rather, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[41] "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has exercised the legislative power."[42]

The Commission plainly has authority over wireless carriers. Section 332(c)(1) provides that all of the provisions of Title II of the Communications Act apply to providers of commercial mobile service, unless the Commission specifies otherwise. Title II, of course, grants broad authority, extending to "[a]ll charges, practices, classifications, and regulations for and in connection with" the provision of service.[43] Accordingly, the FCC has broad authority over CMRS – including authority to make determinations relating to ETFs charged by wireless carriers.

The Commission would be acting within the scope of its authority if it preempted state regulation of ETFs. There are both legal and policy aspects to this inquiry. First, there is no legal bar to preemption. Although NASUCA and other sometimes refer to section 332(c)(3)(A) as *preserving* state and local regulation of "other terms and conditions" of CMRS, that provision does not "preserve" anything. Rather, it provides that "*this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile service" (emphasis added). Thus, in enacting section 332(c)(3)(A), Congress did not *itself* preempt regulation of other terms and conditions of CMRS. But Congress did not say that state regulation of those matters was inviolate, as section 2(b)[44] essentially provides with respect to intrastate wireline service.[45]

Section 332(c)(3)(A) contrasts with section 332(c)(7)(A), which was enacted at the same time. Section 332(c)(7) is entitled "preservation of local zoning authority" – in contrast with

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[39] Brief for the United States at 20.

[40] *City of New York v. FCC*, 486 U.S at 64 *quoting De la Cuesta*, 458 U.S. at 154.

[41] *City of New York v. FCC*, 486 U.S. at 63-64, *quoting Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

[42] City of New York v. FCC, 486 U.S. at 64.

[43] 47 U.S.C. § 201(b).

[44] 47 U.S.C. § 152(b).

[45] The Solicitor General noted that the Eleventh Circuit "stated in dicta that Section 332(c)(3)(A) 'preserved' state authority" over other terms and conditions of wireless service. Brief for the United States at 21 n.7. But as the Solicitor General concluded, such dicta do not bar the Commission from relying on conflict principles to preempt.

"state preemption," the title of section 332(c)(3). And while section 332(c)(3)(A) states merely that "this paragraph" does not preempt state regulation of terms and conditions, section 332(c)(7)(A) states that "nothing in this Act" limits state or local zoning authority "[e]xcept as provided in this paragraph." Thus, when Congress intends to *preserve* state regulation, it knows how to do so – it states that it is preserving state and local authority, as it did with respect to zoning, and that nothing in the Communications Act authorizes preemption, except as specifically provided. In contrast, when Congress does not intend to preserve state authority, but instead merely intends to make clear that *it* is not preempting, it drafts a provision such as section 332(c)(3)(A). In that situation, the Commission has legal authority to preempt when it concludes that state regulation "would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' or of federal regulations."[46]

Of course, the Commission must explain why it has concluded that additional state regulation would conflict with the achievement of important federal goals. In this matter, that should be straightforward. First, Congress has made clear that it intends that consumers should be protected by competition rather than regulation. When Congress enacted section 332(c)(3)(A), it also provided in section 332(c)(1)[47] that the Commission could decide which of the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers. In making that decision, Congress directed the Commission to consider whether, in light of the state of competition, regulation is necessary to ensure that rates are "just and reasonable," whether enforcement of each provision is "necessary for the protection of consumers," and whether the "public interest" favors enforcement or forbearance. Congress later used section 332(c)(1) as the model for section 10 of the Communications Act,[48] which directs the Commission to forbear from enforcement of any statutory provision or regulation applying to any common carrier when competition renders regulation unnecessary. Section 10(e) prohibits states from enforcing provisions of the Communications Act after the Commission has decided to forbear from enforcement of the provision. Under the scheme Congress adopted, and in light of the highly competitive nature of the wireless market, when the Commission decides to address an issue such as ETFs it should adopt whatever regulations are warranted, if any. Whether or not it adopts regulations, the Commission should conclude that additional regulation by the states is unwarranted because such regulation would conflict with the federal policy to rely on competition rather than unnecessary regulation.[49]

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[46] *Truth-in-Billing and Billing Format*, 20 FCC Rcd at ¶ 35, *quoting De la Cuesta*, 458 U.S. at 153, and *citing City of New York v. FCC*, 486 U.S. at 64, and *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

[47] 47 U.S.C. § 332(c)(1).

[48] 47 U.S.C. § 160.

[49] There is no need for the Commission to wait to determine whether federal ETF rules are warranted before it decides to preempt state regulation. It is sufficient for the Commission to explain that there is a need for any rules to be national in scope, as explained below, and the Commission will adopt any rules that are warranted.

ETFs promote a number of important federal goals – and hence regulations prohibiting or discouraging their use undermine the achievement of those goals. Given the common practice of subsidizing handset purchases under rate plans with ETFs, those fees serve to make wireless service more affordable – and affordability is a key principle underlying the universal service provision of the Act.[50] Similarly, because rate plans with ETFs have lower monthly rates, they are more affordable for that reason as well. And even if affordability were not by itself an important federal goal, allowing consumers to choose between plans with and without ETFs promotes the important goal of permitting consumers to decide what is best for them.

The Commission also has concluded that national rate plans help consumers compare the offerings of different wireless companies.[51] But if some states prohibit or limit ETFs and others do not, carriers are likely to adjust their plans so that handset charges or monthly fees are higher in states with burdensome regulations than in others, making it more difficult for consumers to compare rate plans. Alternatively, carriers might maintain rate plans that are uniform nationwide except that the ETFs vary, which would conflict with the principles embodied in the Commerce Clause because it would effectively permit states to export the cost of their regulations to consumers in other states. Or carriers might adopt uniform rate plans that comply with the most restrictive state laws governing ETFs – which would restrict the choices available to consumers, who overwhelmingly choose rate plans with ETFs.

In short, Congress has given the Commission broad authority over CMRS. But it has instructed the Commission to refrain from regulation and rely on competition to protect consumers wherever possible. Congress did not intend for states to step in and regulate in circumstances where the Commission has concluded that further regulation is not warranted. The Commission therefore would be acting well within its authority under the Communications Act if it determines that state and local regulations governing ETFs are preempted and concludes that the Commission should adopt whatever regulations, if any, are warranted. Indeed, it would conflict with the deregulatory scheme embodied in section 332(c)(1) and section 10 for the Commission to be indifferent to state and local regulation of CMRS. "The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers,"[52] and the Commission should not permit state regulation to undermine the benefits flowing from the Act's pro-competitive, deregulatory framework.

The conclusion that state regulation of ETFs conflicts with the federal scheme also bolsters a straightforward construction of section 332(c)(3)(A) pursuant to which ETFs are "rates

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[50] *See* 47 U.S.C. § 254(b) (listing principles).

[51] As the Commission has stated, state regulation tends to be "inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS" because "a patchwork of inconsistent state rules . . . would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." *Truth-in-Billing and Billing Format*, 20 FCC Rcd at ¶ 35.

[52] *Id.*

charged." There is no good reason to construe section 332(c)(3)(A) in a manner that permits unnecessary regulation pursuant to which juries applying state law determine whether charges are reasonable. To the contrary, section 332(c)(3)(A) should be construed in a manner that avoids conflict with deregulatory goals of that provision.

Pursuant to Section 1.1206 of the Commission's rules, this letter is being electronically filed with your office. Please let me know if you have any questions regarding this filing.

Respectfully submitted,

*/s/ Charles W. McKee*
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