



August 26, 2008

**NOTICE OF EX PARTE PRESENTATION**  
(47 C.F.R. § 1.1206)

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, NW  
Washington, DC 20554

**Re: *Petition for Declaratory Ruling Filed by CTIA, WT Docket No. 05-194***

Dear Ms. Dortch:

The National Association of State Utility Consumer Advocates (“NASUCA”) submits this response to Sprint Nextel Corporation’s (“Sprint Nextel”) July 2, 2008 ex parte presentation to the Commission. Because Sprint Nextel’s ex parte contains so many misstatements and distortions of the relevant law, often lumping together disparate legal principles, NASUCA has been compelled to submit this detailed response sifting through Sprint Nextel’s arguments to properly address them.

**EXECUTIVE SUMMARY**

The crux of Sprint Nextel’s ex parte relies on three main arguments. First, Sprint Nextel claims that wireless carriers’ early termination fees (“ETFs”) are “rates,” or more precisely, “rate structures” or “rate elements,” and are therefore exempt from state regulation under Section 332(c)(3)(A) of the Federal Communications Act (“FCA” or “Act”).<sup>1</sup> Second, Sprint Nextel argues that if wireless ETFs are not themselves “rates,” then state laws governing the fees should be preempted because they “directly affect” wireless carriers’ rates or rate structures. And finally, Sprint Nextel contends that, even if wireless ETFs are not rates and even if state laws regulating ETFs do not directly affect wireless rates, the Commission should nonetheless

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<sup>1</sup> 47 U.S.C. § 332(c)(3)(A).

conclude that preemption of such state laws should be implied. Sprint Nextel's arguments are without merit and should be rejected for the following reasons:

- Ruling that wireless ETFs are “other terms and conditions” of CMRS, not “rates charged,” is entirely consistent with prior Commission decisions in *Southwestern Bell*, *Wireless Consumers Alliance*, etc. that make clear the direct link between the “rates” charged customers and the “service” the customer uses (pp. 3-7, *infra*).
- Ruling that wireless ETFs are “other terms and conditions” of CMRS is consistent with every judicial ruling that has directly addressed the question (p. 8. *infra*).
- Sprint Nextel's argument that wireless ETFs are part of CMRS providers' “rate structures” or “rate elements” is contrary to longstanding Commission precedent limiting the meaning of these terms (*infra*, pp. 8-12).
- The Eleventh Circuit has rejected the broader meaning of “rate elements” and “rate structures” Sprint Nextel advocates (*infra*, p. 12).
- Determining that ETFs are “other terms and conditions” of CMRS is consistent with the Commission's past treatment of ETFs (*infra*, pp.12-13).
- The Commission is precluded from broadly interpreting “rates charged” to preempt state authority preserved by Congress (*infra*, pp. 13-14).
- The Commission in *Wireless Consumers Alliance* and other decisions rejected the logic and analysis underlying the filed rate doctrine upon which Sprint Nextel's “direct” and “necessary” effect argument is based (*infra*, pp. 15-19).
- Sprint Nextel's “direct effect” argument, founded on the filed rate doctrine, has been overwhelmingly rejected by courts addressing preemption in the wireless context (*infra*, pp. 19-22).
- The case law Sprint Nextel relies on in support of its “direct effect” argument is of dubious precedential value (*infra*, pp. 22-23).
- There is no implied “obstacle” preemption of state laws governing wireless ETFs since such laws are consistent with Congress' purposes and express intent (*infra*, pp. 23-27).
- There is no implied “conflict” preemption since there are no federal regulations governing wireless ETFs with which state laws conflict (*infra*, p. 27).

## ARGUMENT

There is nothing particularly new or noteworthy in Sprint Nextel's arguments. Since rehashed industry arguments do not grow more convincing in the retelling, Sprint Nextel's operating assumption appears to be that – as with lies – baseless arguments will be accepted simply if repeated often and loudly enough.<sup>2</sup> The Commission must not fall for this canard. Instead, the Commission must reject Sprint Nextel's arguments and reasoning since they are fundamentally flawed and, in many respects, distort the legal authorities upon which they are premised.

### A. SPRINT NEXTEL'S CLAIM THAT ETFs ARE "RATES" IS CLEARLY WRONG.

Sprint Nextel's claim that "rates charged" includes wireless ETFs relies on two arguments. First, that "[i]t would not be possible for the Commission to square a decision concluding rules governing ETFs are not prohibited rate regulation with its prior conclusion [in *Southwestern Bell*] that rules prohibiting rounding up or charging for incoming calls are prohibited rate regulation."<sup>3</sup> Second, that "any amount charged pursuant to a wireless contract is a 'rate charged'" is an interpretation that "easily falls within the Commission's prior construction of the phrase and the dictionary definitions of the terms."<sup>4</sup> Neither argument passes muster.

#### 1. Determining That ETFs Are Not "Rates Charged" Is Entirely Consistent With *Southwestern Bell* And Other Commission Decisions.

Sprint Nextel's claim that the Commission cannot possibly reconcile a determination that ETFs fall under "other terms and conditions" of CMRS with its 1999 decision in *Southwestern Bell* is specious. Not only can a Commission determination that ETFs fall within states' continuing authority to regulate "other terms and conditions" of CMRS be reconciled with its 1999 ruling in *Southwestern Bell*, consistency with that ruling – and others – compels the Commission to determine that ETFs fall under "other terms and conditions" of CMRS subject to state authority. What the Commission's order in *Southwestern Bell* and other Commission decisions makes clear is that "rates" and "service" are inextricably linked. In other words, **"rates" are charges that are billed directly to the customer for the telecommunications services that the customer uses, not – as Sprint Nextel contends – any amount that a carrier may charge a customer under the terms and conditions of a service contract.**<sup>5</sup>

The Commission's ruling in *Southwestern Bell* is consistent with the construction of "rates" advocated by NASUCA, not Sprint Nextel's construction. In that proceeding, the

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<sup>2</sup> "A lie told often enough becomes the truth." – Vladimir Ilyich Lenin.

<sup>3</sup> Sprint Nextel ex parte, p. 4, referring to *In re Southwestern Bell Mobile Systems Petition for Declaratory Ruling*, 14 F.C.C.R. 19898 (1999) ("*Southwestern Bell*").

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5 ("The Commission also should provide a more comprehensive definition of 'rates charged' . . . start[ing] by including any amount charged pursuant to a contract for CMRS.").

wireless carrier sought declaratory rulings from the Commission with regard to its practice of charging for calls in whole-minute increments (*i.e.*, “rounding up”) and charging for incoming calls, specifically seeking a declaration that: (1) “rates charged,” as used in 47 U.S.C. § 332(c)(3), includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for these services; and (2) state-law claims directly or indirectly challenging the “rates charged” by CMRS providers are barred by 47 U.S.C. § 332(c)(3).<sup>6</sup> The Commission’s ruling on the first issue emphasized the close link between “service” provided and the “charge billed,” in defining what constitutes “rates,” that Sprint Nextel ignores. On this point, the Commission noted that “[i]nterexchange telephone services historically have been billed on a rounded-up, whole minute basis,” that “this is still the most common billing practice for interexchange services, as well as for CMRS,” and that “charging for calls on a whole minute basis ‘is a simplified method on which to base charges which still reflects general costs,’ and that ‘charging for incoming calls is reasonable because the carrier incurs costs to switch and transport calls for incoming calls . . . .”<sup>7</sup> Such “rate practices,” the Commission concluded, “are clearly among those which CMRS providers, consistent with [47 U.S.C. § 201(b)], have discretion to implement for their services.”

The Commission’s second ruling in *Southwestern Bell*, defining “rates charged” for purposes of Section 332(c)(3)(A) of the Act, made the close link between a carrier’s “service” and the “charge” billed to the customer for the service even clearer. In that portion of its ruling, the Commission noted that “a ‘rate’ has no significance without the element of service for which it applies.” The Commission further noted that “the term ‘rate’ is defined in the dictionary as an ‘amount of payment or charge based on some other amount,’” and cited the Supreme Court’s observation that “[r]ates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.”<sup>8</sup> Based on such definitions of “rates,” the Commission concluded that “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.”<sup>9</sup>

The critical link between the service provided to the customer and the charge billed for that service identified in *Southwestern Bell* was consistent with the Commission’s determination regarding what constitutes “rates” in its *Truth-in-Billing* order,<sup>10</sup> issued shortly before the decision in *Southwestern Bell*. In its *Truth-in-Billing* order, the Commission drew a clear distinction between “line items” and “rates,” noting that, unlike “rates,” “line-item charges cannot be attributed to individual tangible articles of commerce.” Using men’s socks to prove the point, the Commission noted that:

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<sup>6</sup>*Southwestern Bell*, 14 F.C.C.R. at 19899-19900, ¶3.

<sup>7</sup> *Id.* at 19904, ¶14.

<sup>8</sup> *Id.* at 19906, ¶19.

<sup>9</sup> *Id.* at 19907, ¶20.

<sup>10</sup> *In re Truth-in-Billing and Billing Format*, 14 F.C.C.R. 7492 (1999) (“*Truth-in-Billing*”).

When a consumer purchases socks, the consumer knows what item the bill refers to regardless of whether the bill describes the product as socks, men's wear, hosiery, etc. In contrast, a consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill.<sup>11</sup>

“Rates” are like the price the consumer pays for socks – the consumer is billed a charge in exchange for the service provided by the carrier. In contrast, ETFs – like line items – are not associated with any service that the customer receives from the carrier. Indeed, a customer only pays an ETF **when he or she no longer is receiving service from the wireless carrier.**

Sprint Nextel's assertion that defining “rates” as any amount charged pursuant to contract is also inconsistent with the Commission's 1997 ruling in *Pittencrief*,<sup>12</sup> which addressed whether state regulatory assessments imposed on wireless carriers were preempted “rate” regulation under Section 332(c)(3)(A) of the Act. In *Pittencrief*, neither the Commission nor the wireless carriers suggested that the state regulatory assessments imposed on the carriers themselves constituted “rates.” Instead, the Commission and carriers considered only whether the **impact** such assessments had on wireless carriers' rates, *i.e.*, increased operating costs that could be passed through to customers as higher rates, rendered the state assessment preempted “rate” regulation. Since wireless carrier service contracts typically provide that taxes and other government assessments imposed on the carriers may be passed through to customers – in other words, they are “amounts charged pursuant to contract” – such taxes and assessments would constitute “rates” under Sprint Nextel's current interpretation of the term. Thus, the interpretation of “rates” urged by Sprint Nextel is inconsistent with the Commission's decision in *Pittencrief*.<sup>13</sup>

Nor is the expansive definition of “rates” sought by Sprint Nextel consistent with the Commission's decision in *Wireless Consumers Alliance*.<sup>14</sup> In that decision, the Commission rejected wireless carriers' arguments that sought an expansive interpretation of “rates” – based on case law developed under the filed rate doctrine – to extend to monetary damages because they would be modifications to the lawful tariff rate and thus equivalent to ratemaking.<sup>15</sup> The

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<sup>11</sup> *Id.* at 7531 ¶61.

<sup>12</sup> *In re Pittencrief Communications Petition for Declaratory Ruling*, 13 F.C.C.R. 1735 (1997), *aff'd sub nom.*, *CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (“*Pittencrief*”).

<sup>13</sup> The Commission in *Pittencrief* ultimately determined that the state regulatory assessments had too indirect an impact on wireless carriers' rates to be considered preempted under Section 332(c)(3)(A) of the Act. *Pittencrief* is often cited for the proposition that state laws that have a “direct” effect on wireless carriers' “rates” may be preempted. However, it is worth noting that the Commission's *Pittencrief* decision was issued prior to the Commission's rejection in *Wireless Consumers Alliance* of the expansive scope of matters that might be considered to “affect” rates under the filed rate doctrine. NASUCA submits that the “direct” versus “indirect” effect analysis, applied to state laws under Section 332(c)(3)(A) pursuant to *Pittencrief*, either is no longer applicable or has been curtailed significantly in light of subsequent Commission and court decisions.

<sup>14</sup> *In re Wireless Consumers Alliance Petition for Declaratory Ruling*, 15 F.C.C.R. 17021 (2000) (“*Wireless Consumers Alliance*”).

<sup>15</sup> *Id.* at 17025, ¶7; *see also id.* at 17026, ¶9 (“We also conclude that, because the purposes behind the filed rate doctrine do not apply to CMRS services, the analysis and logic of the filed rate cases regarding the issue of whether awarding monetary damages is tantamount to ratemaking are inapplicable in cases dealing with Section 332.”).

Commission noted that the filed rate doctrine had been held to preempt a customer's state law claims for breach of contract and tortious interference with contract against a common carrier relating to a tariffed communications service, as well as to preempt claims for damages based on fraud claims because "any remedy that requires a refund of a portion of the filed rate . . . is barred" under the filed rate doctrine.<sup>16</sup> Given the detariffed nature of the wireless industry, the Commission concluded not only that the filed rate doctrine did not apply to CMRS but that the logic or analysis applied under the filed rate doctrine likewise does not apply in the CMRS context.<sup>17</sup> The Commission further noted that its decision rejecting the applicability of either the filed rate doctrine or case law developed under that doctrine was consistent with other Commission determinations that once services were detariffed, "consumers would be 'able to take advantage of remedies provided by state consumer protection laws and contract laws against abusive practices,'" and that "eliminating the filed rate doctrine 'would serve the public interest by preserving reasonable commercial expectations and protecting consumers.'"<sup>18</sup>

Having rejected the filed rate doctrine and case law developed under it that could justify the sort of broad, expansive interpretation of "rates charged" that the wireless industry sought, the Commission in *Wireless Consumers Alliance* concluded that:

[A]warding monetary damages is not necessarily equivalent to rate regulation. . . . First, [t]here is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior. . . . In addition. . . . tort and contract law have the additional and separate function of compensating victims, which sets them apart from direct forms of regulation. . . . [T]he tort system is the traditional prerogative of the states and is the means through which consumers are able to seek redress for injustices. *We agree . . . that Section 332 was designed to promote the CMRS industry's reliance on competitive markets in which private agreements and other contract principles can be enforced. It follows that, if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts. We also agree . . . that enforcement of such laws through a monetary remedy is compatible with a free market. . . . "[T]hese duties fall no more heavily on CMRS providers than on any other business."*<sup>19</sup>

Sprint Nextel candidly admits that ETFs are "amounts charged pursuant to a wireless contract" rather than charges billed for service provided to, or used by, the customer.<sup>20</sup>

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<sup>16</sup> *Id.* at 17030, ¶16.

<sup>17</sup> *Id.* at 17032-33, ¶21.

<sup>18</sup> *Id.* at 17033-34, ¶22.

<sup>19</sup> *Id.* at 17034-35, ¶¶23-24, quoting Public Citizen Comments, p. 17 (emphasis added).

<sup>20</sup> Sprint Nextel ex parte, p. 4; see also *id.* at 5.

Moreover, Sprint Nextel concedes that ETFs are imposed not for service provided to the customer but rather “is the amount charged for *terminating* service.”<sup>21</sup> ETFs, in other words, are purely contractual remedies that wireless carriers give themselves as part of the terms and conditions of their unilateral, non-negotiable contracts for service. States, and consumers, expect that contractual remedies – such as ETFs, late-payment charges, returned check charges, and other provisions for non-performance – should be regulated in accordance with state contract or tort law. That is precisely the point of the Commission’s ruling in *Wireless Consumers Alliance*.

The critically important point in *Southwestern Bell* and other Commission decisions ignored by Sprint Nextel, and indeed all the wireless carriers in this proceeding, is the inextricably-linked relationship between a wireless carrier’s “rates” – how much it charges and in what manner – and the service the wireless customer is actually provided or using. ETFs, as NASUCA has previously made clear to the Commission,<sup>22</sup> are not “rates charged” since they have no relationship to any service or service function provided by the wireless carrier. ETFs are not billed to the customer based the customer’s use of any particular service, or the amount of service used, nor are ETFs attached to any particular services provided by the carrier. Indeed, ETFs are premised not on the customer’s use of the carrier’s service but rather upon the termination of the customer’s contractual right to use such service. A customer who terminates his or her service agreement clearly is not receiving a service in exchange for the ETF, and certainly the termination is not a “service” being provided by the carrier at the customer’s behest. Moreover, construing a carrier’s termination of a customer’s contract followed by the imposition of an ETF (which apparently is fairly typical)<sup>23</sup> to be a “service” perverts the English language.

Finally, not only is Sprint Nextel’s suggested construction of “rates” contrary to prior Commission decisions, it has also been roundly rejected by all courts that have squarely addressed the wireless industry’s claim that ETFs are “rates,” based on both the plain meaning of “rates” and the legislative history of Section 332(c)(3)(A) of the Act.<sup>24</sup> In fact, NASUCA has

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<sup>21</sup> *Id.* at 9 (emphasis added).

<sup>22</sup> See NASUCA Comments, pp. 21-22 (Aug. 5, 2005); NASUCA Reply Comments, pp. 5-14 (Aug. 25, 2005).

<sup>23</sup> See *Ayyad v. Sprint Spectrum, L.P.*, Case No. RG03-121510, slip op. at 15 (Sup. Ct. Alameda Cty., July 28, 2008) (evidence showed that, in roughly 80% of the instances in which an ETF was imposed, Sprint was the party that terminated the service contract prior to its expiration). NASUCA previously provided the Commission with a copy of the *Ayyad* court’s proposed decision in an August 5, 2008 ex parte. As NASUCA noted in that ex parte, the decision is proposed, not final. NASUCA is aware that both the plaintiffs and defendants have filed objections to the proposed decision.

<sup>24</sup> See, e.g., *Esquivel v. Southwestern Bell Mobile Systems, Inc.* 920 F.SUPP. 713, 715-16 (S.D. Tex. 1996); *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, slip op. at \*36-37 (S.D. Iowa 2004); *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656, slip op. at \*18-19 (S.D. Iowa 2000); *Kinkel v. Cingular Wireless*, No. 02-999-GPM, slip op. at 3-4 (S.D. Ill., Nov. 8, 2002); *Zobrist v. Verizon Wireless*, No. 02-CV-1000-DRN, slip op. at 4-5 (S.D. Ill., Dec. 6, 2002); *Votava v. Sprint Spectrum*, No. 02-CV-0932-DRH, slip op. at 4-5 (S.D. Ill., Dec. 10, 2002). Recently, yet another court has ruled squarely that ETFs are not “rates.” See n.21, *supra*, discussing *Ayyad* decision.

Likewise undermining Sprint Nextel’s construction of “rates” to include any amount charged pursuant to contract is the court’s decision in *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421 (D. Md. 2000),

been unable to find a single court that, after carefully analyzing the issue, has agreed with the wireless industry's assertion that ETFs are "rates charged" for wireless service.<sup>25</sup>

## 2. Characterizing ETFs As Rate "Elements" Or "Structures" Is Contrary To A Long Line Of Commission Rulings.

Sprint Nextel also argues that ETFs fall within the preemptive scope of Section 332(c)(3)(A) because they are part of a wireless carrier's "rate structure" or "rate elements."<sup>26</sup> As support for its claim, Sprint Nextel relies on the Commission's observation in *Southwestern Bell* that "rates charged" in Section 332(c)(3)(A) "may include both rate levels and rate structures for CMRS" and that "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."<sup>27</sup> However, even if rate "structures, levels, or elements" are included within the scope of Section 332(c)(3)(A)'s preemption, those terms merely identify more precisely matters subsumed *within* "rates"; they cannot expand the scope of preemption *beyond* "rates charged" for CMRS to include contractual remedies for a customer's breach, such as ETFs. This conclusion is consistent not only with the ordinary meaning of the terms but also with a long line of Commission decisions. Moreover, Sprint Nextel's suggestion that "rate structures" or "rate elements" expand the scope of matters

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which rejected this argument in the analogous context of late payment penalties, *i.e.*, contractual remedies imposed by wireless carriers for a customer's breach that are similar to ETFs. *Id.* at 423.

<sup>25</sup> In its July 2, 2008 *ex parte*, Sprint Nextel cites three decisions in support of its arguments. Two of those decisions determined, wrongly, that state action (*i.e.*, civil suits) regarding ETFs were preempted not because ETFs are "rates" *per se*, but because – under the filed rate doctrine – such suits "necessarily affected" or "directly challenged" the carriers' rates. *See Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004) and *Aubrey v. Ameritech Mobile Communications, Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. 2002). NASUCA will address those decisions more fully in its discussion of Sprint Nextel's "direct effect" argument. *See, infra* at pp. 19-22.

The third decision relied on by Sprint Nextel, *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987) is similarly inapposite. In *MCI v. FCC*, the Commission allowed AT&T to implement proposed revisions to its interstate private-line tariffs establishing project liability charges for a customer's cancellation or discontinuance of large service orders. The issue presented was whether or not the cancellation tariff violated the settlement agreement. The issue had nothing to do with whether or not the project liability charge was an unlawful penalty clause, because it was not governed by contract law but, rather, by Commission regulation of tariffs. That the Commission found that the project liability charges were "rates" within the meaning of the settlement agreement under wireline-based tariff law has no relationship to the contracts between wireless carriers and their subscribers.

<sup>26</sup> Sprint Nextel *ex parte*, p. 4 ("Regulation of that sort will necessarily affect the carrier's rate structure."); *id.* at 5 ("[C]arriers 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.").

<sup>27</sup> *Southwestern Bell*, 14 F.C.C.R. at 19907, ¶20. The most appropriate meaning of "structure" is the "way in which parts are arranged or put together to form a whole." *See American Heritage Dictionary* 1208 (2d Ed. 1982). An "element" is best defined as a "fundamental, essential, or irreducible constituent of a composite entity." *Id.* at 444-45.

that should be considered “rates” was squarely rejected by the Eleventh Circuit in *NASUCA v. FCC*.

Giving the terms “rate structures” or “rate elements” their plain, ordinary meaning, it is clear that the terms merely describe how a CMRS carrier arranges its services and the prices charged for them, how much it charges per unit of service, and what components go into the calculation of the price the carrier charges for service. The FCC itself has ascribed such meanings to these terms in the context of wireline service. For example, the Commission has previously made it clear that “rate elements” refer to the particular services offered by a carrier, use of which results in a billed charge that is intended to recover the carrier’s costs of providing that particular service, noting that: “In addition to the price cap baskets, service categories, and subcategories, *there are various rate elements (billing elements) that are associated with specific costs and/or functions of LEC interstate services.*”<sup>28</sup> Similarly, the Commission clarified that the term “rate structures” refers to the manner in which rate (*i.e.*, billing) elements for service are arranged on customers’ bills, stating:

The Notice proposed the following guidelines: (1) *rate structures for the same or comparable services* should be integrated; (2) *rate structures for the same or comparable services* should be consistent with one another; (3) *rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics, and a rate element which appears separately in one rate structure should appear separately in all other rate structures*; (4) *rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures . . . .*<sup>29</sup>

In fact, the conclusion that “rate elements,” “rate structures” and “rate levels” merely define with more granularity what goes into the “rates” a carrier bills for its service, rather than expanding “rates” beyond its well-understood meaning, as Sprint Nextel urges, is supported by Commission rulings going back nearly thirty years. The following excerpts of the Commission’s 1979 order dealing with AT&T’s rate practices makes clear the narrow meaning of such terms:

*There is an apparent lack of internal rate structure consistency in the [proposed tariff]. Under the tariff two major subclassifications of facilities are proposed: intraexchange facilities and interexchange facilities, roughly equivalent to what we have termed intracity and intercity respectively. The two resultant rate structures have certain rate elements in common, and others which are unique to*

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<sup>28</sup> *In the Matter of Price Cap Performance Review for Local Exchange Carriers; Treatment of Operator Services Under Price Cap Regulation; Revisions to Price Cap Rules for AT&T*, 11 F.C.C.R. 858, 911, ¶118 (1995) (emphasis added).

<sup>29</sup> *In re Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C.2d 923, 924, ¶12 (1984) (emphasis added).

*each structure.* Even to the extent rate elements are used in common, they are poorly defined and non-comparable for all practical purposes.<sup>30</sup>

\* \* \*

*Rate elements.* In looking more closely at each of these offerings, it becomes obvious that *one of the major differences between these like or comparable services* is the result of the inconsistent use of rate elements. *Even though each of these groups of services . . . (i.e., voice, telegraph and data private lines and switched private line systems) involves essentially the same service functions – e.g., local distribution channels and intercity channels – they are represented by different rate elements.* Sometimes the rate elements are defined differently, are given different nomenclature, or represent different service functions or parts of service functions.<sup>31</sup>

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Another category [of inconsistent pricing practices] reflects the *different pricing of like or comparable rate elements in different offerings such as is the case with the local distribution channel.* In most tariffs these channels are priced at a flat rate (which varies according to the service offering and the definition of the rate element). . . . *An example of inconsistent pricing of like or comparable rate elements may be found in the way Bell prices its intercity transmission channels (interexchange channels or IXCs) on a mileage basis.* This is generally done on a mileage band basis as reflected in the Series 1000, 2000, 3000, 4000, 5000 extension channels and 8000 offerings. *However, with one minor exception, the mileage bands in every one of these offerings is different.*<sup>32</sup>

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*Rate element definitional complexity.* A major factor contributing to tariff complexity and rate structure inconsistency is the lack of clearly defined, uniform tariff terminology. *We are primarily concerned here with rate element terminology that describes service functions for which a customer is charged a specified rate . . . .* Another example of definitional complexity in Bell System private line tariffs can be shown with an examination of the Series 5000 (TELPAC) rate element “Base Capacity”. *This rate element is defined, in part, as “. . . the potential for communications channels and services which can be realized only with the use of service terminals . . . furnished in such manner as the Telephone Company may elect, whether by wire, radio or a combination thereof*

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<sup>30</sup> *In re AT&T Private Line Rate Structure and Volume Discount Practices*, 74 F.C.C.2d 226, 235, ¶17 (1979) (emphasis added).

<sup>31</sup> *Id.* at 236-37, ¶19 (emphasis added).

<sup>32</sup> *Id.* at 238, ¶22 (emphasis added).

*and whether or not by means of a single facility or route”. . . . We shall consider two intraexchange rate elements identified in the BSOC tariff. They are the “facility link” and the “facility loop”*<sup>33</sup>

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Aside from definitional complexity and confusion, *other problems include the failure to use rate element terminology that can consistently be identified with the same service functions throughout all rate structures and the failure to select rate elements representing service functions which reasonably reflect customer needs.* We shall examine this problem area through the use of three categories of illustrative examples. The first category will show the inconsistency of use of rate element terminology. The second category will show how the same service functions are represented by different rate element terminology. The last category will deal with the inappropriate selection of rate elements, the most obvious problem of which is the combining or "bundling" of what would otherwise be discrete rate elements.<sup>34</sup>

Based on inconsistencies in the “rate structures” and “rate elements” set forth in AT&T’s proposed private line services tariff, the Commission sought comment regarding numerous changes it planned to make to the proposed tariff. Those proposals reinforce the notion that “rate elements,” etc. merely describe with greater granularity the manner in which charges are billed to customers for specific telecommunications services that customers use, as the following Commission-proposed tariff changes make clear:

- (a) Each separate tariff offering, including *each distinct service offering therein (e.g., voice grade, telegraph grade, television relay) where a separate rate structure is deemed necessary, shall be identified.*
- (b) *Each distinct service offering shall be broken down into the rate elements upon which charges would be made. The nomenclature and definition (including the identity of service functions involved) of each rate element shall be given, as well as the rationale for selection of such rate element.*
- (c) Rates for each rate element need not be given, but the reason for and method of applying or calculating charges shall be explained (e.g., flat rates, charge per mile).

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<sup>33</sup> *Id.* at 240-42, ¶¶26-30 (emphasis added).

<sup>34</sup> *Id.* at 243, ¶34 (emphasis added). The Commission’s discussion of the problems with the proposed tariff’s inconsistent use of “rate structures” and “rate elements” provided further clarification that a “rate structure” referred to particular services or facilities provided by the carrier, and that each “rate structure” consisted of a number of separate “rate elements” that together represented the billed “rate” a customer would pay for the service in question. *See id.* at 243-44, ¶35; *id.* at 247-48, ¶¶41 & 43.

(d) Where rate elements (both within and between services) have the same nomenclature, it shall be assumed that the identical rate will apply unless it is noted to the contrary.

(e) Where rate elements (both within or between services) represent the same service functions but are given different names or definitions, a full explanation and justification shall be given.<sup>35</sup>

Consistent with the plain meaning of these terms, and prior Commission rulings, the Eleventh Circuit in *NASUCA v. FCC* likewise concluded that the terms “rate structures” or “rate elements” provided narrower, more granular meaning to what constitutes “rates” rather than broadening the term “rates” beyond the charges billed to customers for services actually used or provided. In its ruling, the Eleventh Circuit squarely rejected an effort by the Commission, virtually identical to Sprint Nextel’s effort here, to use these components of “rates” to expand “rates” to include line item charges imposed by wireless carriers.<sup>36</sup> Instead, the court concluded, “[t]he inclusion of the specific components ‘rate levels’ or ‘rate structures’ within the general term ‘rates’ does not magically expand the authority of the Commission beyond what the statutory language allows.”<sup>37</sup> The Eleventh Circuit’s decision and analysis of “rates” was endorsed very recently by the Ninth Circuit in *Peck v. Cingular Wireless*.<sup>38</sup>

### **3. Determining That ETFs Are “Other Terms And Conditions” Of CMRS Is Consistent With Prior Commission Treatment Of ETFs.**

Determining that ETFs fall within the scope of “other terms and conditions” of wireless service that states may regulate is entirely consistent with the Commission’s treatment of ETFs historically. As an initial matter, in its *Wireless Porting* decision<sup>39</sup> – issued three years after *Southwestern Bell* – the Commission referred to ETFs as “*traditional contractual remedies*,” provided for in the terms and conditions of the carriers’ service contracts, rather than as “rates,” “rate structures” or “rate elements.”<sup>40</sup> The Commission specifically noted that the “*contractual provisions*” of wireless carriers’ standard service agreements included “minimum contract terms,

<sup>35</sup> *Id.* at 254, ¶56 (emphasis added).

<sup>36</sup> See *In re Truth-in-Billing and Billing Format: NASUCA Petition for Declaratory Ruling*, 20 F.C.C.R. 6448, 6463, ¶30 (2005) (“We also note that our interpretation here is consistent with prior Commission statements equating ‘line items’ with ‘rate elements.’ Recognizing the Commission’s broad prior interpretation of rate regulation and statements about line items, we find that state regulations requiring or prohibiting line items similarly fall within the statute’s zone of proscribed state regulatory activity.”).

<sup>37</sup> See *NASUCA v. FCC*, 457 F.3d at 1255-56

<sup>38</sup> *Peck v. Cingular Wireless, LLC*, 2008 U.S. App. LEXIS 16647 at \*11 (9th Cir., Aug. 8, 2008).

<sup>39</sup> See *In re Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, 18 F.C.C.R. 20971 (2002) (“*Wireless Porting*”). In *Wireless Porting*, the Commission rejected wireless carriers’ refusal to port their customers’ numbers, which they justified because such porting violated customers’ term agreements or made them subject to ETFs.

<sup>40</sup> *Id.* at 20976 ¶16 (emphasis added).

*early termination fees*, credit requirements, or other similar provisions.”<sup>41</sup> In short, the Commission understood ETFs to be “other terms and conditions” of wireless carriers’ contracts rather than “rates” for service, in accord with both common sense and the legislative history of Section 332(c)(3)(A), recognizing that the issue of whether ETFs are liquidated damages or penalties has traditionally been defined by contract law.

Likewise, it is important to note that the Commission has historically treated ETFs as “contractual matters” rather than “rates” in its quarterly reports regarding wireless consumer complaints. In its reports, the Commission includes a category for “Billing and Rates Related” complaints, broken down into seven subcategories; ETFs are nowhere to be found among those subcategories of “Billing and Rates Related” consumer complaints.<sup>42</sup> Instead, the Commission reports customer complaints regarding wireless ETFs in its “Contract – Early Termination” category of wireless complaints, specifically the subcategory “Termination of Service by subscriber: *subscriber’s liability for terminating service prior to a specified contract term*.”<sup>43</sup> While the Commission’s treatment of ETFs as something other than “Rates and Billing” for purposes of processing, analyzing and reporting consumers’ informal complaints and inquiries is not a ruling on the issue, it reinforces the conclusion that a ruling that ETFs are “other terms and conditions” of CMRS is consistent with past Commission practice that draws a distinction between wireless “rates” (*i.e.*, charges billed to customers for service) and contractual matters, such as ETFs.

#### **4. The Commission Is Precluded From The Sort Of “Easy” Interpretations Of “Rates” Sprint Nextel Urges.**

Sprint Nextel also states that determining that “any amount charged pursuant to a wireless contract is a ‘rate charged’ . . . falls easily within the Commission’s prior construction of the phrase and the dictionary definitions of the terms.”<sup>44</sup> Contrary to Sprint Nextel’s suggestion, the Commission is not free to choose *any* construction it likes in interpreting undefined terms in the statutes it implements, particularly when that interpretation involves preempting state law. Longstanding jurisprudence commands that “[w]here it is possible to interpret a federal statute as not preempting a state claim, the statute must be interpreted in that way.”<sup>45</sup> To put it another

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<sup>41</sup> *Id.* at 20975, ¶14 (emphasis added). Similarly, the Commission noted that wireless carriers “may include provisions in their customer contracts on issues such as early termination and credit worthiness,” but could not abrogate their porting obligation through such contractual provisions. *Id.* at 20975, ¶15.

<sup>42</sup> These subcategories are: airtime charges, credits/refunds/adjustments, line items, recurring charges, roaming rates, rounding, and service plan rate.

<sup>43</sup> *See, e.g.*, Report on Informal Inquiries and Complaints: Fourth Quarter Calendar Year 2007, Consumer & Governmental Affairs Bureau, Executive Summary at 6, 8-9 (rel. July 2, 2008).

<sup>44</sup> Sprint Nextel *ex parte*, p. 4.

<sup>45</sup> *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 447 (2005). The Court’s injunction in *Dow Agrosciences* was recently applied by the California Superior Court for Alameda County in determining that Sprint Spectrum’s ETFs were not “rates charged” for wireless service and therefore were subject to the state contracts law governing liquidated penalties. *See Ayyad*, slip op. at 11.

way, where words in preemptive statutes are capable of several meanings, courts and agencies must adopt the narrower meaning in order to limit the scope of preemption.<sup>46</sup> Thus, even if the Commission were persuaded that Sprint Nextel’s argument that “rates charged” extends to ETFs was plausible – despite prior statements and rulings otherwise – the Commission would still be obligated to reject Sprint Nextel’s suggested interpretation broadening the scope of preemption beyond charges billed for particular services to included contractual matters like ETFs.

The constraints imposed on the Commission’s choices in interpreting “rates charged” under traditional preemption analysis are further reinforced by the presence of both the general savings clause in 47 U.S.C. § 414, as well as numerous other savings clauses throughout the Act that evince Congress’ intent to preempt narrowly, if it preempts at all.<sup>47</sup> In addition, the Commission’s choice in interpreting “rates charged” is constrained by the need to be consistent with prior rulings and actions or risk being vacated for being “arbitrary and capricious.”<sup>48</sup> Finally, the Commission is precluded from adopting Sprint Nextel’s reasoning that ETFs are “rate structures,” or “rate elements” by the fact that the Eleventh Circuit has already rejected the notion that these terms broaden the meaning of “rates” to extend to fees or charges not tied to a particular service provided by CMRS providers.<sup>49</sup> As the Supreme Court noted in *Brand X*:

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.<sup>50</sup>

## **B. STATE LAWS REGULATING ETFs DO NOT “DIRECTLY” AFFECT WIRELESS RATES.**

If the Commission (rightly) concludes that ETFs are not “rates charged” for CMRS, Sprint Nextel offers an alternative argument for preemption by claiming that a state law regulating or prohibiting such fees is preempted because it “necessarily directly affects carriers’

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<sup>46</sup>*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“Although dissenting Justices have argued that this assumption [against preemption] should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law, . . . we used a ‘presumption against the pre-emption of state police power regulations’ to support a narrow interpretation of such an express command in *Cipollone*. . . . That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.”).

<sup>47</sup> See, e.g., *Precision Pay Phones v. Qwest Communs., Inc.*, 210 F.Supp.2d 1106, 1117 (N.D. Cal. 2002) (“Clearly, § 414 is intended to preserve state law to the extent feasible.”); *Russell v. Sprint Corp.*, 264 F.Supp.2d 955, 961 (D. Kan. 2003) (“This type of savings clause. . . indicates that Congress did not intend to ‘replicate the unique preemptive force of the LMRA and ERISA.’”); *Lewis v. Nextel Communs., Inc.*, 281 F.Supp.2d 1302, 1303 (N.D. Ala. 2003) (referring to Section 332(c)(3)(A)’s language preserving state authority over “other terms and conditions” of CMRS, court noted that savings clause in 47 U.S.C. § 414 employs “equally broad language” in preserving state common law remedies).

<sup>48</sup> See *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2699 (2005).

<sup>49</sup> *NASUCA v. FCC*, 457 F.3d at 1255-56.

<sup>50</sup> *Brand X*, 125 S.Ct. at 2700.

rate structures.”<sup>51</sup> This, Sprint Nextel claims, “is the same approach the Commission followed [in *Southwestern Bell*] when it determined that states may not prohibit carriers from rounding up or charging for incoming calls,” claiming such state laws necessarily affect a carrier’s rate structure, including its rate levels for other rate elements.”<sup>52</sup> Sprint Nextel’s assertions are without merit.

**1. The Commission Previously Rejected The Notion That State Laws Governing ETFs “Necessarily” Or “Directly” Affect Wireless Rates.**

**a. *Southwestern Bell* did not address Sprint Nextel’s argument.**

The Commission’s decision in *Southwestern Bell* clearly does not support Sprint Nextel’s argument that state laws governing ETFs “necessarily” or “directly” affect wireless “rates” in violation of Section 332(c)(3)(A). In *Southwestern Bell*, the Commission did not conclude that state laws prohibiting wireless carriers from rounding up minutes subject to usage-based charges or charging for incoming calls were preempted because of their “direct effect” on CMRS rates. Rather, the Commission preempted such laws because they actually regulated CMRS “rates” (i.e., “rate practices,” “rate structures” or “rate elements”).<sup>53</sup> Indeed, the Commission made this point crystal clear in its subsequent decision in *Wireless Consumers Alliance*, where it noted that the ruling in *Southwestern Bell* “supports this position by upholding Section 332’s preemption of state courts from deciding claims which specifically address CMRS carriers’ rates including such issues as billing in whole minute increments.”<sup>54</sup> In fact, the Commission declined to rule on the petitioner’s request for a declaratory ruling that state law claims based on breach of contract, unfair trade practices, etc. were preempted because they “directly or indirectly challeng[ed] the ‘rates charged’ by CMRS providers.” Instead, the Commission deferred ruling on that issue to its then-pending ruling on *Wireless Consumers Alliance*’s petition for declaratory ruling.<sup>55</sup>

**b. Sprint Nextel’s “direct effect” argument for broad preemption is based on the filed rate doctrine rejected in *Wireless Consumers Alliance*.**

More importantly, when the Commission actually did address the question of what types of state laws “directly affect” wireless carriers’ rates in *Wireless Consumers Alliance*, it rejected the broad scope of preemption urged by wireless carriers in that proceeding and by Sprint Nextel here. Regarding whether state law-based damages claims were preempted because of their effect

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<sup>51</sup> Sprint Nextel ex parte, p. 5.

<sup>52</sup> *Id.* at 4-5.

<sup>53</sup> *Southwestern Bell*, 14 F.C.C.R. at 19907, ¶20.

<sup>54</sup> *Wireless Consumers Alliance*. 15 F.C.C.R. at 17032, ¶19 n.67 (emphasis added), quoting *Southwestern Bell*, 14 F.C.C.R. at 19908, ¶23.

<sup>55</sup> See *Southwestern Bell*, 14 F.C.C.R. at 19908, ¶¶23-24.

on wireless carriers' "rates," the Commission concluded that "awarding monetary damages is not necessarily equivalent to rate regulation,"<sup>56</sup> noting:

[T]here is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior. For example, if a company is found monetarily liable for false advertising, it will presumably alter its advertising. The impact on its prices and other behavior, however, is uncertain. *The indirect and uncertain effects of monetary damage awards based on tort and contract law do not correspond to the mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities.*<sup>57</sup>

The Commission's decision in *Wireless Consumers Alliance* repudiated the sort of sweeping assertions offered by Sprint Nextel here, *i.e.*, that any state law regulating ETFs "necessarily directly affects the carrier's rate structures."<sup>58</sup> Sprint Nextel's assertion seeks the sort of broad pronouncements issued in cases applying the filed rate doctrine, in which courts have broadly characterized any state law-based challenge to the quality or adequacy of service provided by a carrier to be precluded by the carrier's interstate tariff, because "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."<sup>59</sup> As previously noted, however, in *Wireless Consumers Alliance* the Commission rejected application to the wireless telecommunications industry of either: (1) the filed rate doctrine, or (2) the logic and analysis applied under that doctrine.<sup>60</sup> Specifically, the Commission declared:

CMRS providers, however, take their argument one step further and contend that, because under the analysis found in filed rate cases, courts have found that calculating and awarding damages in filed rate situations is tantamount to rate regulation, the same should hold true for cases involving Section 332. We reject the sweeping extension of this broad analysis to CMRS cases. Section 332 is consistent with the policy of nonjusticiability underlying the filed rate doctrine to

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<sup>56</sup> *Wireless Consumers Alliance*, 15 F.C.C.R. at 17034, ¶23.

<sup>57</sup> *Id.*

<sup>58</sup> Sprint Nextel *ex parte*, p. 5; *see also id.* at 4 (same).

<sup>59</sup> *AT&T v. Central Office Equipment*, 524 U.S. 214, 223 (1998); *see also, e.g., Bastien v. AT&T*, 205 F.3d 983 (7th Cir. 2000). The Seventh Circuit in *Bastien* – issued before the Commission's decision in *Wireless Consumers Alliance* – applied the broad pronouncements articulated under the filed rate doctrine to the wireless industry, concluding that the plaintiff's state law-based claims sounding in contract and tort theories were completely preempted by Section 332(c)(3)(A) because "[i]n practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service," and "a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." *Bastien*, 205 F.3d at 988, *citing Central Office*, 524 U.S. at 223. That Sprint Nextel's argument about "direct" and "necessary" effect flows from the logic and analysis of the filed rate doctrine is made clear in the two decisions it cites in support of that argument – *Chandler* and *Aubrey* – since both decisions relied on the Seventh Circuit's application of *Central Office*, and the filed rate doctrine, to the wireless industry.

<sup>60</sup> *See supra*, pp. 15-18.

the extent that Section 332 prohibits states from regulating CMRS rates. *However, the very structure of Section 332 limits the scope of its preemption by distinguishing nonjusticiable rates from terms and conditions which are subject to state jurisdiction. The distinction between the two is not part of the logic or analysis of the filed rate doctrine. Moreover, we find no evidence in the legislative history of Section 332, that it was the intent of Congress to impose the broad scope of the filed rate doctrine judicial analysis in cases dealing with CMRS services.*<sup>61</sup>

Accordingly, the Commission held that “[s]ince the economic and regulatory regime is different and the purposes behind the filed rate doctrine do not apply to the unregulated CMRS market . . . the analysis and logic found in the filed rate cases regarding the issue of whether the award of monetary damages are equivalent to rate regulation is not applicable.”<sup>62</sup>

In addition, in *Wireless Consumers Alliance* the Commission not only rejected the filed rate doctrine and its underlying logic, but also specifically eschewed the sweeping preemption sought by Sprint Nextel and the rest of the wireless industry in this proceeding. On this point, the Commission noted:

We read *Bastien* as standing for the more general proposition, with which we agree, that state law claims may, in specific cases, be preempted by Section 332. We also read *Bastien* as standing for the proposition that it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332. *We recognize the line between prohibited and permissible claims may not always be clear. While we provide legal guidance on this issue in this order, the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it.*<sup>63</sup>

In other words, whether a state law (or action) dealing with wireless ETFs is preempted by Section 332(c)(3)(A) must be decided on a case-by-case basis – not in a declaratory ruling extending broadly to any and all state laws applicable to wireless ETFs.<sup>64</sup>

Furthermore, it must be noted that the Commission’s ruling in *Wireless Consumers Alliance* was not limited solely to damages awards but extended to the application of tort and contract law generally to wireless carriers. On this point, the Commission observed:

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<sup>61</sup> *Wireless Consumers Alliance*, 15 F.C.C.R. at 17032, ¶19 (emphasis added).

<sup>62</sup> *Id.* at 17033, ¶21.

<sup>63</sup> *Id.* at 17036-37, ¶28 (emphasis added).

<sup>64</sup> *Id.* at 17040, ¶36 (“[W]e conclude that whether a specific damage award or damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case.”).

It follows that, *if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts.* We also agree with commenters who assert that enforcement of such laws through a monetary remedy is compatible with a free market. *As Public Citizen asserts, “these duties fall no more heavily on CMRS providers than on any other business.”*<sup>65</sup>

Consistent with the Commission’s observation, to the extent generally-applicable state laws limit, or even prohibit, wireless carriers’ ETFs, those limits or prohibitions fall no more heavily on wireless carriers attempting to impose ETFs than they do on any other business seeking to impose ETFs on its customers. As the Commission noted, such regulation is perfectly compatible with a free market – and indeed, carving out a special exception for wireless carriers’ ETFs distorts that market by singling wireless carriers out for special treatment.<sup>66</sup>

## **2. The Commission Has Rejected The Notion That State Laws That May Lead To Rate Increases Constitute “Rate” Regulation.**

Sprint Nextel’s ex parte tacitly concedes that state laws regulating wireless carriers’ ETFs do not have the sort of direct effect on CMRS “rates” that could conceivably support a preemption determination by the Commission. For example, Sprint Nextel asserts that that, if states regulate wireless ETFs, carriers *may* respond by “either charg[ing] more per month for the service or they [can] increase the price of the handset provided to the subscriber.”<sup>67</sup> Similarly, Sprint Nextel claims that “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.”<sup>68</sup> In other words, even Sprint Nextel acknowledges, that wireless carriers may (or may not) increase their other charges imposed on customers, including (but perhaps not) **rates** for service. Likewise, Sprint Nextel acknowledges that a wireless carrier may (or again, may not) charge more for handsets and other wireless equipment (charges that are not “rates” for service in any event) if states restrict or prohibit carriers’ ETFs.

In other words, the carrier responses that Sprint Nextel predicts may result from state laws regulating ETFs are precisely the sort of incidental consequences that the Commission has previously concluded fall within states’ permitted authority to regulate under Section 332(c)(3)(A). An argument nearly identical to that proffered by Sprint Nextel here was presented to, and rejected by, the Commission in *Pittencrief*. In denying the declaratory ruling sought in that proceeding, the Commission made it clear that industry-specific laws and regulations that increase a wireless carrier’s operating costs and may result in the carrier passing those increased

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<sup>65</sup> *Id.* at 17034-35, ¶24 (emphasis added).

<sup>66</sup> In this regard, the Commission’s determination in *Wireless Consumers Alliance* is fully in accord with the Ninth Circuit’s ruling in *Ting v. AT&T*, 319 F.3d 1126, 1143 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) (“In deregulated markets, compliance with state law is the norm rather than the exception.”).

<sup>67</sup> Sprint Nextel ex parte, p. 4 (emphasis added).

<sup>68</sup> *Id.* at 5 (emphasis added).

costs through to customers in the form of higher rates are not preempted by Section 332(c)(3)(A), ruling:

The Commission has found the “rates charged by” language to prohibit states from prescribing, setting, or fixing rates of CMRS providers. We have not found, however, that it preempts state authority over matters which may have an impact on the costs of doing business for a CMRS operator. *In the Louisiana Preemption Decision the Commission found that state regulation of interconnection rates charged by local exchange carriers, which clearly has an impact on a CMRS provider's cost of doing business, is not prohibited per se by section 332(c)(3). Likewise the Commission has stated that section 332(c)(3) does not preempt other state regulatory activities, such as conducting complaint proceedings concerning disputes over billing practices and requiring informational filings, which impose costs on CMRS providers doing business in that state.*<sup>69</sup>

Thus, laws that **might** lead wireless carriers to increase the charges they impose on customers, perhaps through rates or perhaps through increased handset costs, are precisely the same type of laws that the Commission found were within states’ authority under Section 332(c)(3)(A).

### **3. Sprint Nextel’s “Direct Effect” Arguments Have Been Overwhelmingly Rejected By Courts As Well.**

Relying on only two federal district court decisions, Sprint Nextel claims that “[t]he district courts that have held that state law challenges to ETFs are preempted have recognized . . . that any challenge to the amount of a charge is necessarily a form of rate regulation.”<sup>70</sup> Those decisions, however, represent a disfavored, minority view that is based on the logic and analysis employed under the filed rate doctrine, which was clearly rejected by the Commission in *Wireless Consumers Alliance*. The vast majority of courts, both federal and state, have roundly rejected such arguments in the context of state law-based challenges to wireless carriers’ ETFs.<sup>71</sup> For example, the district court in *U.S. Cellular* held:

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<sup>69</sup> *Pittencrief*, 13 F.C.C.R. at 1745, ¶20 (emphasis added). The Commission also concluded that the state law was not preempted despite the fact that it “arguably indirectly regulate[d] entry by making it more difficult for some carriers to offer service,” noting that this was “true of many of the requirements that Congress intended to include within ‘other terms and conditions.’” *Id.* at 1746, ¶21.

<sup>70</sup> Sprint Nextel ex parte, p. 5-7, citing *Aubrey v. Ameritech Mobile Communications, Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. 2002) and *Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004). Sprint Nextel also discusses two other decisions that are either contrary authority to its proposition (*Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004)) or readily distinguishable (*MCI Telecommunications Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987)).

<sup>71</sup> **Federal courts:** *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, slip op. at \*35-37; *Iowa v. U.S. Cellular Corp.*, 2000 U.S. Dist. LEXIS 21656 at \* 4-6; *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000), *aff’d in part, rev’d in part*, 280 F.3d 874 (8th Cir. 2002). The Eighth Circuit, on appeal from the decision in *Cedar Rapids*, cited *Esquivel* in support of its decision affirming the district court’s determination that the plaintiff’s claims were not preempted. *See Cedar Rapids*, 280 F.3d at 880 n.2. **State courts:** *Pacific Bell Wireless, LLC v. California P.U.C.*, 44 Cal. Rptr.3d 733 (Cal. App. 4th Dist. 2006), *review denied*, 2006 Cal. LEXIS 12459 (Cal. 2006), *cert. dismiss’d sub nom.*, *AT&T Mobility v. California P.U.C.*, 127 S.Ct. 1931 (2007); *Spielholz v. Super. Ct. of Los Angeles Cty.* 104 Cal. Rptr.2d 197 (Cal. App. 2nd Dist.), *review denied*, 2001 Cal.

US Cellular further asserts that the State's claims “not only touch on, but go to the heart of rates.” This assertion is overly broad. *While there is a connection between the contracts which US Cellular may offer and the rates charged by the company, allowing a company to perpetrate frauds upon consumers was not Congress' intent when it enacted the statute.* Indeed, it appears to be just this concern that prompted Congress to include the exception clause to section 332. . . . *US Cellular would have this Court construe “rates” so broadly as to incorporate anything that might touch upon U.S. Cellular’s business. . . . This is problematic. Inherently, any interference with U.S. Cellular’s business practices will increase its business expenses. These increased business expenses would likely be passed on to customers as rate increases. If “rate” included any action that indirectly induced rate increases, the exception would be swallowed by the rule. This could not have been Congress’ intent. . . .*<sup>72</sup>

Courts considering other contractual remedies employed by wireless carriers in the event of customer breach (e.g., late payment penalties) have reached precisely the same conclusion.<sup>73</sup> Courts have also concluded that state laws, under which customers challenged carriers’ line item charges as illegal attempts to avoid triggering customers’ contractual right to terminate service in response to “rate” increases without penalty, were not preempted by Section 332(c)(3)(A).<sup>74</sup>

Courts have likewise rejected the notion of what constitutes “direct” regulation of “rates” that Sprint Nextel advocates here. The Eighth Circuit in *Cellco v. Hatch*,<sup>75</sup> for instance, invalidated a state law prohibiting wireless carriers from unilaterally making “substantive changes” – defined to include “an increase in the charge to the customer under that contract” – without a customer’s affirmative consent. The *Cellco* court found the state law was preempted

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LEXIS 3519 (2001); *Ayyad, v. Sprint Spectrum, L.P.*, Case No. RG03-121510 (Sup. Ct. Alameda Cty., July 28, 2008); *Hall v. Sprint Spectrum, L.P.*, Case No. 04L113 (Ill. Cir. Ct., Madison Co., Aug. 10, 2004).

<sup>72</sup> *U.S. Cellular*, 2000 U.S. Dist. LEXIS at \* 14-15 (emphasis added).

<sup>73</sup> *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d at 423 (“*While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment.* Defendants argue that late fee charges are completely preempted because a reduction in late fee charges will result in an increase in rates. However, any legal claim that results in an increased obligation for Defendants could theoretically increase rates. . . . Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.”).

<sup>74</sup> See, *Moriconi v. AT&T Wireless PCS*, 280 F.Supp.2d 867, 876 (E.D. Ark. 2003) (“To be sure, any challenge to a wireless service provider's practices, if successful, is likely to impact rates and the manner in which services are delivered, but this indirect result does not convert such challenges into a direct challenge to rates and market entry contemplated by the preemptive language of the statute.”); see also *Nixon v. Nextel West Corp.*, 248 F.Supp.2d 885, 892 (E.D. Mo. 2003); *Hohne v. Nextel West Corp.*, 2003 U.S. Dist. LEXIS 26181 \*11-12 (N.D. Ohio 2003); *Solomon v. Sprint Spectrum*, 2003 U.S. Dist. LEXIS 26068, \*9 (N.D. Ohio 2003); *Gregory v. Sprint Spectrum, L.P.*, 2003 U.S. Dist. LEXIS 10943, \*6 (S.D. Cal. 2003); *In re Wireless Telephone Federal Cost Recovery Fee Litigation*, 343 F.Supp.2d 838, 851-52 (W.D. Mo. 2004).

<sup>75</sup> *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005), cert. denied 127 S.Ct. 433 (2006).

because it necessarily “prevents providers from raising rates for a period of time,” possibly the remainder of the contract’s term if customer consent to the change was withheld, and “require[d] providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts.”<sup>76</sup> Likewise, the California appeals court in *Spielholz* defined state laws that directly affect wireless “rates” as follows:

*A judicial act constitutes rate regulation only if its principal purpose and direct effect are to control rates.* For example, an injunction that prevents a wireless telephone service provider from charging specified rates would directly regulate rates. Similarly, if a cause of action directly challenges a rate as unreasonable, an award of damages or restitution to compensate a customer for the difference between the rate paid and what the court determines to be a reasonable rate would directly regulate rates. In general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates and therefore is preempted under section 332(c)(3)(A); a claim that directly challenges some other activity, such as false advertising, and requires a determination of the value of services provided in order to award monetary relief is not rate regulation.<sup>77</sup>

Applying the foregoing pronouncements, a different California appeals court rejected Cingular’s argument that the state utility commission’s imposition of monetary liability and penalties for unreasonable practices – including the imposition of ETFs – directly regulated the carrier’s “rates,” holding instead that:

[T]he challenge to [Cingular’s] ETF and [its] policy of permitting no grace period, combined with the misrepresentations regarding service, is not a preempted regulation of rates or of market entry. The principal purpose and direct effect of the penalties imposed by the Commission are to prevent misrepresentations by Cingular and to compensate the wireless customers who paid ETF’s. The effect of these penalties on Cingular’s rates is incidental, and the [state commission’s] decisions are therefore not preempted by [47 U.S.C. § 332(c)(3)(A)].<sup>78</sup>

Finally, the Eleventh Circuit’s decision in *NASUCA v. FCC*, rejecting the Commission’s attempt to preempt state laws regulating wireless carriers’ line item charges on the basis of their supposed direct effect on wireless rates, is consistent with both the Eighth Circuit’s decision in *Cellco* and the state court decisions in *Spielholz* and *Pacific Bell*. The Eleventh Circuit found the Commission’s attempt to articulate a reason why state laws requiring or prohibiting wireless carriers’ use of line items “directly” affected carriers’ “rates” completely unpersuasive, concluding:

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<sup>76</sup> *Id.* at 1082.

<sup>77</sup> *Spielholz*, 104 Cal. Rptr.2d at 204 (citations omitted) (emphasis added).

<sup>78</sup> *Pacific Bell*, 44 Cal. Rptr. 3d. at 745 (emphasis added).

We can discern no logical distinction between what the Commission terms a “direct effect” caused by the regulation of line items and the alleged “indirect effect” caused by the imposition of universal service charges. The Commission fails to explain why the imposition of universal service charges, which increases the amount a consumer is charged, is more attenuated to the amount a consumer pays for service than the regulation of line items, which affects the presentation of matters on a bill. The Commission is unable to articulate a logical distinction between these two outcomes.<sup>79</sup>

Limits, or even prohibitions, on wireless carriers’ ETFs are typically imposed on grounds that such fees violate statutory or common law-based contract or other consumer protection principles embodied in laws that apply generally to any business operating within the state. The principal purpose and direct effect of such laws is generally to prevent the use of business practices that state legislatures or courts have concluded are unconscionable, unreasonable or unjust. As the court noted in *Pacific Bell*, such laws do not, either by intent or application, directly challenge wireless carriers’ rates, nor do they require carriers to make any specific changes to their rates. Nor do such laws prohibit carriers from adjusting their rates if the ETF is disallowed or limited – as the state statute struck down in *Cellco* was found to do. In short, such state laws do not directly impact the “rates charged” by CMRS providers.

#### **4. *Aubrey and Chandler* Are Of Dubious Precedential Value Since They Were Based On The Filed Rate Doctrine Rejected By The Commission.**

The *Aubrey* and *Chandler* decisions Sprint Nextel relies on in its ex parte presentation are of dubious precedential value for several reasons. First, both decisions were explicitly based on the Seventh Circuit’s decision in *Bastien v. AT&T*,<sup>80</sup> which applied case law developed under the filed rate doctrine in concluding Section 332(c)(3)(A) completely preempted state law claims for fraud and breach of contract for purposes of federal removal jurisdiction.<sup>81</sup> As previously noted, the Commission has declared the filed rate doctrine, and decisions based on it, **to be inapplicable to the wireless industry.**<sup>82</sup> Likewise, numerous federal courts<sup>83</sup> and state courts<sup>84</sup>

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<sup>79</sup> 457 F.3d at 1256.

<sup>80</sup> *Chandler*, 2004 U.S. Dist. LEXIS 14884 at \*4, citing *Bastien v. AT&T*, 205 F.3d 983 (7th Cir. 2000); *Aubrey*, 2002 U.S. Dist. LEXIS 15918 at \*9, citing *Bastien*. Moreover, the district court judge in *Chandler*, Patrick Murphy, further based his decision upon his earlier ruling involving a similar challenge to wireless ETFs. See *Redfern v. AT&T Wireless Services, Inc.* 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. 2003). The *Bastien* decision was likewise central to Judge Murphy’s decision in *Redfern*. See 2003 U.S. Dist. LEXIS 25745 at \*2-3. Significantly, Judge Murphy’s earlier decision in *Redfern* was, in essence, a default judgment since it was issued after the opposing party’s attorney failed to appear or otherwise controvert the wireless carrier’s preemption argument. For obvious reasons, default judgments are rarely assigned any precedential value. In addition, it is worth noting that Judge Murphy’s came to exactly the opposite conclusion in *Kinkel v. Cingular Wireless*, deciding that ETFs in that case were liquidated damages rather than “rates.” See n.24, *supra*.

<sup>81</sup> *Id.* at 988-90, citing *Central Office Telephone*, *supra*, 524 U.S. at p. 223.

<sup>82</sup> See *supra*, at pp. 15-18 (discussing *Wireless Consumers Alliance*).

<sup>83</sup> See *Smith v. GTE Corp.*, 236 F.3d 1292, 1312-13 (11th Cir. 2001); *Marcus v. AT&T*, 138 F.3d 46, 53 (2nd Cir. 1998); *Quayle v. MCI WorldCom, Inc.*, 2001 U.S. Dist. LEXIS 17450, \*5-10 (N.D. Cal. 2001); *Braco v. MCI*

have rejected the *Bastien* court’s expansive interpretation of what sorts of actions “necessarily affect” wireless carriers’ “rates,” and the complete preemption that interpretation compelled. Even the Seventh Circuit has subsequently limited *Bastien*.<sup>85</sup>

### C. THERE IS NO BASIS FOR IMPLIED PREEMPTION.

Sprint Nextel’s fallback argument – that preemption of state laws regulating ETFs ought to be implied even if such laws do not regulate or directly affect wireless “rates” – likewise fails. As an initial matter, Sprint Nextel inappropriately attempts to “mix and match” two different doctrines of implied preemption to achieve the results it seeks. First, Sprint Nextel asserts that the Commission should find state laws governing ETFs preempted because grounds they “undermine[] the achievement of federal goals”<sup>86</sup> – commonly referred to “obstacle” preemption. Then, in support of that claim, Sprint Nextel quotes elements of two decisions decided under the doctrine of “conflict” preemption. Neither doctrine, however, properly applied, supports the implied preemption Sprint Nextel seeks.

#### 1. State Laws Governing Wireless ETFs Are Not An Obstacle To Congress’ Purposes.

Under “obstacle” preemption, state law or regulations that stand as an obstacle to the full realization of the purposes of Congress in enacting a federal statute are deemed preempted.<sup>87</sup> “Obstacle” preemption is generally acknowledged as problematic because: (a) Congress often has multiple purposes in enacting a statute; (b) individual members of Congress may have widely differing, even mutually contradictory, purposes; and (c) the “mere fact that Congress enacts a statute to serve certain purposes . . . does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes.”<sup>88</sup> In this particular case, the problems underlying Sprint Nextel’s assertion that state laws regulating ETFs stand as an obstacle to the full achievement of Congress’ purposes are insurmountable.

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*WorldCom Communications, Inc.*, 138 F. Supp. 2d 1260, 1268-69 (C.D. Cal. 2001); *Crump v. Worldcom, Inc.*, 128 F. Supp. 2d 549, 556-60 (W.D. Tenn. 2001); *Gattegno v. Sprint Corp.*, 297 F.Supp.2d 372, 376-77 (D. Mass. 2003); *Lewis v. Nextel Communications, Inc.*, 281 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2003); *Moriconi v. AT&T Wireless PCS, LLC*, 280 F. Supp. 2d 867, 876-77 (E.D. Ark. 2003); *Russell v. Sprint Corp.*, 264 F. Supp. 2d 955, 961 (D. Kan. 2003); *State ex rel. Nixon v. Nextel West Corp.*, 248 F. Supp. 2d 885, 891-93 (E.D. Mo. 2003); *TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1100 (C.D. Cal. 2002); *Threadgill v. Cingular Wireless, LLC*, 223 F. Supp. 2d 786, 788-89 (E.D. Tex. 2002).

<sup>84</sup> See *Spielholz*, 104 Cal. Rptr.2d at 207-08; *Pacific Bell*, 44 Cal. Rptr.3d at 742-45.

<sup>85</sup> See *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1072-74 (7th Cir. 2004).

<sup>86</sup> Sprint Nextel ex parte, p. 9. This, of course, is a species of so-called “conflict” preemption.

<sup>87</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>88</sup> Caleb Nelson, “Preemption,” 86 Va. L. Rev. 225, 281 (2000).

For one thing, the Act’s provisions clearly express Congress’ intent to broadly preserve state law over wireless contractual matters generally. It is worth remembering that, prior to 1993, states and the Commission each had jurisdiction over wireless common carriers’ services, such carriers being regulated as “public mobile services,” while “private mobile services were largely unregulated by either states or the Commission.”<sup>89</sup> In 1993, Congress altered this regulatory framework by amending Section 332(c)(3)(A) to read, in pertinent part:

*Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*<sup>90</sup>

Despite the clarity of language used by Congress in delimiting the scope of preemption in Section 332(c)(3)(A), Sprint Nextel asserts that this “provision does not ‘preserve’ anything,” and that “Congress did not say that state regulation of those matters was inviolate, as section 2(b) essentially provides with respect to intrastate wireline service.”<sup>91</sup> Sprint Nextel’s assertion not only ignores the plain language of the statute, but it is internally inconsistent. Sprint Nextel correctly concedes that 47 U.S.C. § 152(b) provides that state regulation of intrastate wireline service is “inviolate” but then ignores the first clause of Section 332(c)(3)(A), which clearly preempts state authority over CMRS “entry” and “rates charged” is preempted “*notwithstanding* [47 U.S.C. §§ 152(b) and 221(b)].” In other words, having conceded that, pursuant to 47 U.S.C. § 152(b), states’ authority to regulate all intrastate aspects of wireless service would have continued “inviolate” but for the “rates” and “entry” preemption clause, Sprint Nextel incongruously asserts that this clause “opened the floodgates” to broader preemption notwithstanding Congress’ reference to the “inviolate” authority states retained over “other terms and conditions” of wireless service pursuant to 47 U.S.C. § 152(b).<sup>92</sup>

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<sup>89</sup> Prior to 1993, land mobile radio services (as wireless was then called) were subject to two, inconsistent, regulatory schemes based on whether the services were characterized as “public” or “private.” “Public mobile services” were subject to regulation as common carriers and were thus subject to all federal and state regulations applicable to such entities. The FCC regulated the interstate aspects of such services and States regulated their intrastate aspects, including certification, rates and other terms and conditions of service. “Private land mobile services,” *i.e.*, radio services that did not connect with the public telephone network except by direct agreement with a local carrier, however, were exempt from common carrier regulation altogether. *See, generally*, P. Huber, M. Kellogg, & J. Thorne, *Federal Telecommunications Law*, § 10.2, p. 867 (2d ed. 1999). The Commission had, however, previously assumed primacy over the licensing of wireless carriers, as well as the technical standards such carriers would be obligated to comply with. *See Cellular Communications Systems*, 86 F.C.C.2d 469 (1981). The Commission’s technical standards established rules governing the allocation of frequencies, licensing of wireless carriers, radio frequency emissions limitations, interoperability of wireless handsets, etc.

<sup>90</sup> *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. 103-66, 107 Stat. 312, § 6002(b)(2)(A) (1993); 47 U.S.C. § 332(c)(3)(A) (emphasis added).

<sup>91</sup> Sprint Nextel *ex parte*, p. 10.

<sup>92</sup> In addition, Sprint Nextel’s suggestion that Section 332(c)(3)(A) did not “preserve” any state authority is inconsistent with the Act’s numerous “savings” provisions that expressly preserve preexisting rights and remedies under state statute or common law. *See, e.g.*, 47 U.S.C. §§ 152(b), 221(b), 253(c), 254(f), 256(c), 261(b) & (c), 414 and 601(c).

Moreover, Sprint Nextel's suggestion that Congress did not intend to preserve states' authority over intrastate wireless matters is contradicted by later provisions of Section 332(c)(3)(A) and (B) of the Act. Those provisions first provide that "[n]othing in this subparagraph" exempted CMRS providers from state requirements "to ensure the universal availability of telecommunications service at affordable rates" where CMRS is a substitute for wireline service for a substantial portion of the State, and then authorize states to continue, or to reassert, their authority to regulate wireless "rates" under certain conditions. The notion that Congress "preserved nothing" when it preempted state authority over wireless "rates" simply cannot be reconciled with Congress authorizing states to reassert their prior authority over wireless "rates." Under Sprint Nextel's reading of the Section 332(c)(3)(A), states could still regulate wireless "rates" under some circumstances, but would not have authority over "other terms and conditions" if the Commission decided to strip them of that authority. The Commission cannot presume that Congress intended such a bizarre state of affairs.

Nor can Sprint Nextel's assertion that Congress did not "preserve" state authority over "other terms and conditions" of wireless service be reconciled with the legislative history of the 1993 amendments. While Sprint Nextel claims to agree with NASUCA that the Commission should address the legislative history of Section 332(c)(3)(A),<sup>93</sup> it utterly fails to address that history, except to suggest that "it is not clear that any substantial weight should be given to that report, representing the view of members of a committee of one body."<sup>94</sup> Sprint Nextel's attempt to minimize the import of the House Report in question is unfounded because *both* chambers of Congress had the House Report before them when the 1993 amendments to Section 332(c)(3)(A) were passed, and *the conference committee of both chambers agreed* to the first sentence of Section 332(c)(3)(A) without discussion.<sup>95</sup>

Sprint Nextel also attempts to cast doubt upon what the House Committee meant when it included "the bundling of services and equipment" within the scope of matters included within "other terms and conditions of wireless service." Noting that the House Report's discussion of "other terms and conditions" did not expressly mention ETFs, Sprint Nextel suggests committee members might have intended a more limited meaning for "bundling of services and equipment."<sup>96</sup> Despite Sprint Nextel's efforts, the Commission is not free to limit Congress' intent by engaging in unfounded speculation. For one thing, "bundling of services and equipment" is broad enough to cover state regulation of *all* the issues associated with carriers' practice of selling wireless equipment in conjunction with wireless service, not just ETFs or the issues Sprint Nextel identifies. Moreover, the limited interpretation urged by Sprint Nextel is contrary to the House Committee's specific instruction that the scope of matters reserved to state authority under "other terms and conditions" included "*such other matters as fall within a state's lawful authority,*" and that the "list of matters [specified] *is intended to be illustrative only and*

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<sup>93</sup> Sprint Nextel ex parte, pp. 8-9.

<sup>94</sup> *Id.*

<sup>95</sup> See H.R. Conf. Rep. 103-213 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1088, 1181.

<sup>96</sup> Sprint Nextel ex parte, p. 9.

*not meant to preclude other matters generally understood to fall under 'terms and conditions.'*<sup>97</sup> Even if the House Report did not speak to ETFs specifically, Congress was aware of the broad range of carrier practices associated with “bundling of services and equipment” authorized in the Commission’s 1992 order and intended to keep all such practices within states’ authority.<sup>98</sup>

Finally, in suggesting that state laws governing ETFs are an obstacle to the full achievement of the purpose of the 1993 amendments to Section 332(c)(3)(A), Sprint Nextel focuses on only one goal of several identified by Congress in the legislative history of those amendments, namely “affordability.”<sup>99</sup> Sprint Nextel ignores the fact that eliminating the disparate treatment of “private mobile” and “public mobile” wireless services,” while at the same time preserving and extending state “consumer protection” laws were even more important goals of Congress. This is made clear, again in the legislative history that Sprint Nextel ignores:

The Committee finds that *the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private.* . . .<sup>100</sup>

Finally, Sprint Nextel ignores the fact that in *Southwestern Bell* the Commission itself broadly rejected the notion that Congress’ preference for the CMRS industry to be governed by competitive forces rather than by governmental regulation in *Southwestern Bell*, when it noted that:

We do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose *state and Federal* regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied.<sup>101</sup>

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<sup>97</sup> H.R. Conf. Rep. 103-111, 1993 U.S. Code Cong. & Admin. News at 588 (emphasis added).

<sup>98</sup> See *In re Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 F.C.C.R. 4028, 4029-30, ¶¶7 & 10 (1992). Anticompetitive risks associated with bundling services and customer premises equipment through such practices as long-term contracts and early termination penalties were generally understood in 1992, and indeed, the Commission’s 1992 order cited potential anticompetitive behavior and the availability of state and federal antitrust laws to curb it. See *id.* at 4028, ¶6 n.13, citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-10 (1984); *id.* at 4029, ¶12, citing *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); see also U.S. Dep’t of Justice & Fed. Trade Comm’n Report, “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, Chap. 5 (2007) (citing *U.S. v. Loew’s, Inc.*, 371 U.S. 38 (1962) and noting that courts have sometimes analyzed bundling under the rubric of tying arrangements.), available at [www.usdoj.gov/atr/public/hearings/ip/222655.pdf](http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf).

<sup>99</sup> Sprint Nextel ex parte, p. 12.

<sup>100</sup> H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) reprinted in 1993 U.S.C.C.A.N. 378, 586-87 587 (emphasis added).

<sup>101</sup> *Southwestern Bell*, 14 F.C.C.R. at 19903, ¶10 (emphasis added).

Thus, “obstacle” preemption is unwarranted where, as here, state laws regulating ETFs serve – rather than thwart – Congress’ expressed goals of protecting wireless consumers.

## 2. There Is No Basis For “Conflict” Preemption.

As noted above, Sprint Nextel inappropriately combines its “obstacle” preemption argument with cases decided under the doctrine of “conflict” preemption.<sup>102</sup> In both the *De la Cuesta* and *City of New York* decisions cited by Sprint Nextel, the Court considered the preemptive effect of federal regulations on state law.<sup>103</sup> Setting aside the question whether Sprint Nextel’s reading of the law regarding “conflict” preemption is correct, there is no question that the doctrine, and decisions applying it, is inapplicable here since there is no federal regulation governing ETFs upon which such conflict preemption can be based.

## CONCLUSION

For all the reasons previously set forth by NASUCA and herein, the Commission should deny CTIA’s March 15, 2005 petition for declaratory ruling in this proceeding and instead make it clear that states are authorized to regulate wireless ETFs pursuant to their authority to regulate “other terms and conditions” of wireless service under 47 U.S.C. § 332(c)(3)(A).

Very truly yours,

/s/

PATRICK W. PEARLMAN  
Deputy Consumer Advocate  
Consumer Advocate Division  
WV Public Service Commission  
723 Kanawha Boulevard East, Suite 700  
Charleston, WV 25301  
(304) 558-0526; Fax (304) 558.3610  
[ppearlman@cad.state.wv.us](mailto:ppearlman@cad.state.wv.us)

CHARLES ACQUARD  
Executive Director, NASUCA  
8380 Colesville Road, Suite 101  
Silver Spring, MD 20910  
(301) 589-6313; Fax (301) 589-6380

cc: Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell

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<sup>102</sup> See *supra*, at p. 23.

<sup>103</sup> Sprint Nextel *ex parte*, pp. 9-10.