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## SUMMARY OF THE ARGUMENT

This is a case of widespread importance, one of a number of consumer class action cases nationwide against TPC arising out of its conduct in marketing its digital wireless services to millions of consumers. TPC itself has conceded that there are at least 800,000 Texans who may be members of the putative class. By raising its affirmative defense of preemption, TPC is trying to shield itself from responsibility for its fraud and deceptive practices. To do so, TPC must distort the plain meaning of section 332(c)(3)(A) of the FCA, which only prohibits state regulation of TPC's rates or entry into the market. Section 332(c)(3)(A) specifically allows states to "regulate the other terms and conditions of commercial mobile services" such as Smith's claims for deceptive trade practices, common law fraud, and breach of contract. 47 U.S.C. § 332(c)(3)(a).

TPC's affirmative defense of federal preemption must be stricken, and TPC's motion for summary judgment must be denied. This Court is obligated to give controlling weight to the Federal Communications Commission's interpretation of the Federal Communications Act. The FCC has specifically rejected TPC's argument that claims like Smith's are preempted. TPC made its argument directly to the FCC and lost. TPC made the same arguments to the California Court of Appeal in a very recent case involving the same challenges to TPC's quality of service and infrastructure. The California court, guided by the FCC's interpretation of the statute and having reviewed all the cases cited by TPC, also concluded that claims like Smith's were not preempted. This Court should follow the lead

of the FCC and the California appellate court and grant summary judgment striking TPC's affirmative defense of preemption and deny TPC's summary judgment motion.

TPC's assertion that Smith's claims require the Court to regulate TPC's entry into the Texas market, a market it entered many years ago, is also without merit. The FCC has determined that claims such as Smith's that directly challenge some other activity besides rates are not attempts to regulate rates or entry and are therefore not preempted. As a matter of common sense, Smith is not asking the Court to create any barriers to entry, such as forcing TPC to meet licensing requirements or other conditions prior to beginning to offer its service. Such decisions are clearly left to the FCC, and nothing in Smith's Petition has as its principle purpose or direct effect the regulation of TPC's ability to enter the marketplace, a market that it in fact has already entered. Granting relief will only punish TPC for its failure to disclose the limitations and conditions of its service, something the FCC has specifically stated is not preempted by federal law. This Court should grant summary judgment striking TPC's affirmative defense of preemption and deny TPC's motion for summary judgment.

## QUESTION PRESENTED

- 1 Section 332(c)(3)(A) of the Federal Communications Act prohibits a state from erecting barriers to entry or regulating rates of a wireless carrier, while reserving to the states the ability to regulate other terms and conditions of wireless services. Smith alleges that TPC has breached its contract with the putative class, committed fraud and engaged in deceptive trade practices, but Smith's claims will not require the Court to regulate rates or erect barriers to entry. Should the Court deny TPC's motion for summary judgment and grant Smith's cross-motion striking TPC's affirmative defense of federal preemption because Smith's claims are not preempted by section 332(c)(3)(A)?

## FACTUAL BACKGROUND

This is a class action brought on behalf of all persons residing in Texas who subscribe or who have subscribed to the digital wireless calling service offered by TPC from October 2, 19xx to the present. Smith alleges Texas state law claims for common law fraud and fraud in the inducement, negligent misrepresentation, deceptive trade practices, and breach of contract arising out of TPC's consumer-oriented conduct. In his First Amended Original Petition (the "Petition"), Smith alleges that TPC made misrepresentations and failed to disclose information regarding its digital wireless services, committed fraud and fraud in the inducement, and breached its contracts with the members of the putative class.

TPC began providing digital wireless service in Texas in 1996 and began enticing additional customers for its services by offering its Super Cheap service plan beginning in 1998. The Super Cheap plan has been very successful, attracting thousands of new customers every month. TPC encouraged its current wireless customers and new customers to switch to digital wireless service, although it knew, and did not disclose, that it could not provide the digital wireless service as advertised. TPC was unable to provide the reliable, nationwide service that it advertised, but TPC did not disclose this fact to its current or new customers. (Petition at ¶ 11.) Smith alleges that TPC was aware of the level of service that its digital wireless network could provide but chose to tout a more reliable service through advertising and marketing, and that TPC proceeded to market its services deceptively. (Petition at ¶¶ 11-15.) Specifically, Smith alleges, *inter alia*, the following causes of action:

Common Law Fraud and Fraud in the Inducement:

TPC voluntarily made misrepresentations about the availability, operations, and quality of its service through marketing and advertising to potential customers; TPC did not disclose information within its knowledge regarding the true level of service that could be expected; TPC failed to disclose its inability to provide the service as advertised; TPC made fraudulent representations and induced members of the putative class into entering contracts. (Petition at ¶ 26-34, 45-51.)

Negligent Misrepresentation:

TPC voluntarily made misrepresentations about the availability, operations, and quality of its service through marketing and advertising to potential customers. (Petition at ¶ 52-57).

Deceptive Trade Practices:

TPC violated the Texas DTPA by passing off services as those of another, failing to provide services as agreed to; representing that services were of a certain quality when there were not; advertising with intent not to sell services as advertised; advertising services with intent not to supply a reasonable public demand; making deceptive representations about the availability of services; disseminating deceptive materials; breaching implied warranties; engaging in unconscionable acts. (Petition at ¶ 58-71.)

Breach of Contract:

TPC failed to provide the services promised under the contracts with the class members and failed to give proper credit for dropped calls or otherwise bill customers correctly. (Petition at ¶ 40-45.)

## **PROCEDURAL BACKGROUND**

Smith and the other named plaintiffs, on behalf of themselves and a class of similarly situated persons, brought their claims in this Court by filing their Original Petition on December 15, 19xx. TPC removed this action to federal court on the basis of diversity jurisdiction and on the grounds that Smith's claims gave rise to a federal question under the

complete preemption doctrine. This case was consolidated with a previously-filed federal action. TPC moved to dismiss in both actions, asserting that Smith's claims were defensively preempted under section 322 of the Federal Communications Act, 47 U.S.C. § 151 *et seq.* Smith filed a motion to remand for lack of federal subject matter jurisdiction, arguing that there was no diversity jurisdiction and that the complete preemption doctrine did not apply.

The United States District Court for the Northern District of Texas granted Smith's motion to remand and dismissed the previously-filed federal action due to a lack of subject matter jurisdiction. The federal court rejected TPC's argument that the Federal Communications Act completely preempted any regulation of wireless service providers. *Smith v. TPC*, xxx F. Supp. 2d xxx (C.D. Tex. 20xx). Because the cases were either remanded or dismissed, the federal district court never addressed the issue of whether any or all of Smith's claims were defensively preempted. *Smith*, xxx F. Supp. 2d at xxx.

### **SUPPORTING MATERIALS**

Smith is moving for summary judgment and opposing TPC's motion for summary judgment based on the pleadings filed by TPC and Smith. No facts are in dispute. In support of this Motion and in opposition to TPC's motion, Smith relies on the published authorities cited herein, as well as the supporting materials attached hereto as follows:

- Exhibit 1     *Spielholz v. Superior Court of Los Angeles County*, 104 Cal.Rptr.2d 197 (Cal. App. 2001)
  
- Exhibit 2     *In re Wireless Consumers Alliance, Inc.*, No. 99-263, 2000 WL 1140570 (FCC August 14, 2000)

## SUMMARY JUDGMENT STANDARD

The Court should enter summary judgment under Texas Rule of Civil Procedure 166a on TPC's affirmative defense of federal preemption and deny TPC's motion for summary judgment. This motion is based on the pleadings in the case. In its affirmative defense, TPC asserts that Smith's claims "are barred because they are preempted by the Federal Communications Act." (TPC Answer at 5.) To be entitled to summary judgment, the movant must establish that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Calvilla v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1996); *City of Houston v. Clear Creek Basin Auth.*, 598 S.W.2d 671, 678 (Tex. 1979). Questions of law, such as preemption and statutory interpretation, are proper matters for summary judgment. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999). A party may file a motion for summary judgment that, instead of proving or disproving facts, shows that the nonmovant has no viable affirmative defense based on the nonmovant's pleadings. *See, e.g., National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (no duty to defend insurance claim based on allegations in pleadings and term of policy); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994) (petition showed statue of repose had run); *Helena Lab Corp. v. Snyder*, 886 S.W.2d 767, 768-69 (Tex. 1994) (no cause of action for negligent interference with family relationship).

## ARGUMENT AND AUTHORITIES

**Point I - The Court Should Grant Summary Judgment Striking TPC's Affirmative Defense of Federal Preemption and Deny TPC's Motion for Summary Judgment Because Smith's Claims Do Not Require the Court to Regulate Rates or Market Entry, and They Are Therefore Not Preempted by Section 332(c)(3)(A).**

To be successful in asserting its affirmative defense of federal preemption, TPC must establish that Smith's claims require the Court to regulate TPC's rates or regulate TPC's entry into the marketplace. These are the only areas states may not regulate under section 332 of the FCA. The FCC has determined that claims such as Smith's which directly challenge some other activity besides rates do not require the Court to regulate rates and are therefore not preempted. Just last week, the *Spielholz* court decided the very issues before this Court. In that case, where TPC was also sued for false and deceptive practices related to the services it provided and where TPC made the same arguments it is making in this Court, the California court followed the FCC's interpretation and found that claims like Smith's do not require the Court to engage in rate regulation. Common sense also leads to the conclusion that nothing in Smith's Petition will require this Court to regulate TPC's entry into a market that it has already entered. The rationale of the FCC's decision and the California decision both support the conclusion that Smith's claims do not require the Court to engage in regulating TPC's entry into the market.

**A. The Federal Communications Act Only Preempts Regulation of Rates or Market Entry, Leaving All Other Matters to the States.**

TPC cannot overcome the presumption against preemption under Texas law. Section 332 of the FCA only preempts regulation of rates or entry into the marketplace, and state authority to oversee the operation of wireless carriers in other areas is preserved. The legislative history and the FCA's savings clause all support the conclusion that Texas may still protect its citizens from deceptive practices by enforcing its consumer protection ITPC and allowing plaintiffs to pursue common-law remedies.

1. To be Successful, TPC Must Overcome the Presumption Against Invoking the Preemption Doctrine.

TPC's affirmative defense of preemption is based on the claim that 47 U.S.C. § 332(c)(3)(A) of the FCA preempts state law, including this Court's ability to adjudicate Smith's claims.<sup>1</sup> "Preemption of state or local law by federal statute is disfavored

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<sup>1</sup> The preemption doctrine is based on the Supremacy Clause of the federal Constitution. *See Crosby v. National Foreign Trade Council*, 147 L.Ed.2d 352, 361 (2000); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Congressional intent to preempt may be expressly stated or implied where federal law manifests an intent to "occupy the field" or state law conflicts with a federal law. *Crosby*, 147 L.Ed.2d at 361. This intent to preempt must be "clear and manifest," particularly in areas traditionally reserved to the states such as the exercise of state police powers, and this rule creates a presumption against preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). State police powers include consumer protection, such as protection against fraud, misrepresentation, and deceptive practices. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1988). This Court must therefore apply the presumption against preemption in deciding whether Smith's Texas claims are preempted by section 332.

in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.” *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 93 (Tex. App. – Fort Worth 2000, pet. denied). Any preemption analysis “must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.” *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Given the presumption against preemption and the limited scope of section 332's prohibition of state regulation, as a matter of law Smith's claims are not preempted and TPC's affirmative defense must fail.

2. The Plain Meaning of Section 332 Only Prohibits State Regulation of TPC's Rates or Market Entry.

In 1993, Congress amended the FCA to deal with the rapidly growing wireless communications industry. Section 332 of the FCA was amended to provide that

no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3). In interpreting this provision, the FCC has stated that “Congress has explicitly permitted the regulation of ‘the other terms and conditions of mobile service’ by the states . . . [and there is no] general exemption for the [cellular] industry from the neutral application of state contractual or consumer fraud ITPC.” *In re Southwestern Bell Mobile Sys., Inc.*, No. 99-356 at ¶ 10 (FCC Nov. 24, 1999). The Fifth Circuit has stated generally that Section 332(c)(3) provides that “states: (1) in general can never regulate rates and entry

requirements for CMRS providers; (2) are free to regulate all other terms and conditions for CMRS providers . . . .” *Texas Office of Public Utilities Counsel v. F.C.C.*, 183 F.3d 393, 432 (5th Cir. 1999). Smith’s claims do not require this Court to regulate TPC’s rates or construct barriers to TPC’s entry into the market. They instead fall within the other terms and conditions that states are allowed to regulate, and Smith’s claims are therefore not preempted.

3. The Legislative History Demonstrates That Congress Intended to Preserve the States’ Ability to Protect its Consumers From Deceptive and Fraudulent Actions of Wireless Carriers.

The legislative history also indicates that Congress intended to preserve the states’ ability to regulate the wireless industry as long as rates and entry were not regulated. A Congressional House Report on the Omnibus Budget Reconciliation Act of 1993 states that “it is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By ‘terms and conditions,’ the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protections matters . . . .” H.R. Rep. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588; *see Tenore v. AT&T Wireless Serv., Inc.*, 962 P.2d 104, 110-11 n. 65 (Wash. 1998), *cert. denied*, 525 U.S. 1171 (1999); *In re Southwestern Bell Mobile Sys., Inc.*, No. 99-356 at ¶ 7 (FCC Nov. 24, 1999). This legislative history makes it clear that the states maintain authority to regulate the wireless industry as long as they do not regulate rates or market entry.

4. The FCA’s Savings Clause Also Establishes That Texas Courts May Protect Consumers.

This conclusion is also supported by the “savings clause” included in the FCA. Section 414 provides that nothing in the FCA “shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 47 U.S.C. § 414. The inclusion of section 414 “clearly reflects Congress’s determination that state law causes of action should not be subsumed by the Act, but remain as independent causes of action.” *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 958 (D. Del. 1997). In *Uniden America Corp. v. Trunking Associates*, 841 S.W.2d 522 (Tex. App. – Fort Worth 1992, no writ), the court, interpreting section 414, held that the provisions of the FCA governing interstate radio service did not preempt state law claims for fraud, breach of contract, and deceptive practices. *Uniden*, 841 S.W.2d at 525. When read with the limited scope of section 332, which only prohibits state regulation of rates and market entry, it is clear that section 414 preserves this Court’s authority to hear and adjudicate Smith’s claims.

**B. Smith’s Claims Do Not Require the Court to Regulate Rates.**

TPC’s preemption argument was recently rejected in a case involving the precise question presented by TPC’s affirmative defense – whether any state law claim that challenges or attacks, even indirectly, the quality of TPC’s service requires the court to regulate rates? Section 332, by its plain language, does not prohibit indirect challenges to quality of service. In a rhetorical sleight of hand, TPC asserts that when Congress said that

a state could not “regulate rates,” Congress meant that no state claim could challenge TPC’s quality of service in any fashion. Because Smith has not asked this Court to prescribe, set, or fix TPC’s rates, TPC’s entire preemption argument rests on the erroneous construct that any discussion of or challenge to quality of service equals regulation of rates. This argument has been specifically rejected by the FCC, the California Court of Appeal, as well as in the applicable United States Supreme Court cases, and this Court should similarly reject it.

In its briefing before this Court, TPC asserts that “the Court will need to analyze the quality of service provided, and determine whether the level or quality of service is worth the rates charged . . . and granting relief would involve a determination of what the appropriate rate would be. This, as a matter of law, would involve the court in the regulation of rates.” (TPC Brief in Support of Summary Judgment at 17.) This precise argument, that any claim that involves a challenge to a wireless carrier’s quality of service requires a court to engage in rate regulation, has now been rejected by the FCC, and under Texas law, this Court must defer to the FCC’s interpretation of the FCA. The authorities relied on by TPC have also been rejected by the California Court of Appeal. While TPC continues to rely on *Bastien*, *Central Office*, and *Union Ink*, the most persuasive authority, as well as the controlling opinion of the FCC, both categorically repudiate TPC’s rate-regulation argument. As a matter of law, Smith’s claims do not require the Court to engage in rate regulation, and TPC’s affirmative defense of preemption must be stricken and the Court must deny TPC’s motion for summary judgment.

1. The Recent California Appellate Decision on the Precise Issue Before This Court Establishes That Smith’s Claims Do Not Require the Court to Regulate Rates.

The *Spielholz* court rejected TPC’s contention that a state court, by making a monetary damages award that may involve a determination of the value of services provided, would necessarily be engaged in rate regulation. The court first noted that the plain meaning of rate regulation referred to direct price controls, that section 332(c)(3)(A) prohibited a state from imposing such controls, and that this meaning was “clear and manifest [while] the meaning advocated by [TPC] is not.” *Spielholz v. Superior Court*, 104 Cal.Rptr.2d 197, 199 (Cal. App. 2001). The court explicitly rejected the contention that a state court award of damages could be construed as prohibited rate regulation. Specifically, the court stated that

Section 332(c)(3)(A) does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not directly regulate rates. We presume if Congress had intended to preempt such state law remedies, it would have expressly so stated.

*Spielholz*, 104 Cal.Rptr.2d at 199. The court noted that if a state cause of action directly challenged a rate as unreasonable or sought to control or limit a rate prospectively or retrospectively, such a claim would be preempted. *Id.* In contrast, a claim like Smith’s “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.” *Id.* That principle is directly applicable to this case.

Smith’s claims involve deceptive practices, fraud, misrepresentation, and breach of contract. None of them “directly challenge the rate charged.” *Spielholz*, 104 Cal.Rptr.2d at 200. Instead, they involve direct challenges to other activities and seek “damages arising from that activity,” and the claims are “not an attempt to regulate rates and [are] not expressly preempted under section 332(c)(3)(A).” As the *Spielholz* court stated, the “principle purpose and direct effect” of the remedies requested by Smith is “to prevent false advertising and compensate an aggrieved customer,” and therefore “any prospective or retrospective effect on rates is merely incidental.” *Id.* The result is not changed even where, as TPC asserts, the court may need to determine the value of services provided in making a damages calculation. *Id.* As the *Speilhotz* court stated in directly rejecting the argument advanced by TPC in this case, “contrary to TPC’s argument, an award of damages or restitution for false advertising that requires the court to determine the value of services provided is not rate regulation.” *Id.* Smith’s claims do not require the Court to engage in rate regulation, and they are therefore not preempted by section 332.<sup>2</sup>

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<sup>2</sup> The Washington Supreme Court also rejected arguments similar to those raised by TPC in this case. In *Tenore v. AT&T Wireless Services, Inc.*, 962 P.2d 104 (Wash. 1998), *cert. denied*, 525 U.S. 1171 (1999), customers brought a class action suit against cellular service providers, including TPC, making claims under state law that the providers failed to disclose in their advertising that they rounded up airtime charges to the nearest minute. *Tenore*, 962 P.2d at 106. TPC claimed in *Tenore* that the claims were preempted, asserting that the monetary relief sought by the plaintiffs would necessarily require a court to engage in rate regulation. The court concluded that the claims for misrepresentation and deceptive practices were not preempted, as they did not require any determination regarding reasonableness of rates or otherwise impact the rates charged by the

2. The FCC Has Determined That Claims Such as Smith’s do not Require the Court to Regulate Rates.

The FCC has completely dismissed TPC’s argument that claims such as Smith’s, which do not directly ask the court to regulate rates or entry, are generally preempted because they involve quality of service. Before reaching its decision, the *Spielholz* court turned to the FCC for guidance. The Wireless Consumers Alliance, Inc., a plaintiff in the *Spielholz* case, petitioned the FCC, asking whether the provisions of the FCA, including section 332, “serve to preempt state courts from awarding monetary relief against [wireless] providers: (a) for violating state consumer protection ITPC prohibiting false advertising and other fraudulent business practices, or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort ITPC.” *In re Wireless Consumers Alliance, Inc.*, No. 99-263, 2000 WL 1140570 (FCC 2000). The FCC sought to resolve conflicting state and federal court opinions on the issue of whether a monetary damages award could be made without involving a court in regulation of rates. *Wireless* at ¶ 3. As has been noted, the *Spielholz* case involved a challenge to TPC’s advertising of a “seamless calling area” when TPC knew that its system did not offer a seamless calling area. *Id.* at ¶ 4. Therefore, the factual scenario presented to the FCC in the *Wireless* matter and the *Spielholz* case is identical to the situation in this case – according to TPC’s definition, *Wireless/Spielholz* and this case are both “quality of service” cases.

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service provider. *Tenore*, 962 P.2d at 115.

Before the FCC, TPC made the same argument it is making here, that non-disclosure and consumer fraud claims such as Smith’s were “disguised attacks on the reasonableness of the rate charged for service.” *Wireless* at ¶ 27; TPC Brief in Support of Summary Judgment at 17. The FCC vindicated the ability of state courts to consider consumer tort and contract claims and made it clear that, contrary to TPC’s wishes, TPC is not immune from damages for misrepresentation, fraud, deceptive practices, and other state law causes of action simply because those claims may directly or indirectly implicate TPC’s quality of service:

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

Id. at ¶ 27 (emphasis added). The FCC also specifically rejected TPC’s argument that any damages award “is necessarily equivalent to both retroactive and prospective rate regulation.” *Wireless* at ¶ 32. Relying on the United States Supreme Court’s decision in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), the FCC concluded that “the imposition of a state damage award has merely an incidental effect upon the prices charged by a carrier.” *Wireless* at ¶ 32. The FCC stated that “courts across this nation have for many years awarded damages based on breach of contract and consumer fraud claims for all types of products and services. Such litigation costs and awards are simply a cost of doing

business,” not a regulation of rates. *Wireless* at ¶ 33. Any damages award in this case will be a cost to TPC of deceiving consumers and failing to honor its commitments, not a regulation of TPC’s rates. TPC, like any other company, is duty-bound to abide by the consumer-protection ITPC of Texas, and, as the FCC has stated, “these duties fall no more heavily on [wireless] providers than on any other business.” *Wireless* at ¶ 24.

In its brief in this case, TPC distorts the FCC’s *Wireless* decision. TPC improbably claims that the FCC ruled that if a court analyzes TPC’s quality of service as a part of making a damages award, it is engaging in rate regulation. (TPC Brief in Support of Summary Judgment at 17.) As noted, the FCC rejected that precise argument when TPC made it before the commission, and the *Wireless* decision cannot be construed in that fashion. The passage from the decision cited by TPC as support merely reiterates the FCC’s conclusion that there may be cases where a court is asked to do a regulatory-type analysis of a past rate or set a prospective rate, a far different proposition than considering rates and service incidentally as part of making a damages award for state law claims.<sup>3</sup>

3. The Court Must Give Deference to the FCC’s Interpretation of the Federal Communications Act.

The Court is required under Texas law to follow the lead of the *Spielholz* court in giving deference to the FCC’s interpretation of the FCA. The United States Supreme Court

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<sup>3</sup> Specifically, the FCC has defined rate regulation as any effort by a court “to prescribe, set or fix wireless rates.” *Wireless* at ¶ 38. Nothing in Smith’s Petition would involve this Court in prescribing, setting, or fixing TPC’s rates.

requires courts to give deference to an federal administrative agency's interpretation of its governing statute. *Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984) (“we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer ....”) The Supreme Court recently reiterated this rule of deference, noting that where a federal statute does not answer the precise question at issue, a court must defer to the agency empowered to administer the federal statute as long as that agency's interpretation is reasonable. *Lopez v. Davis*, 121 S. Ct. 714, 722-23 (2001). In the absence of any legitimate challenge to the reasonableness of its interpretation, the FCC's interpretation of section 332 must be given deference.

In fact, a Texas court must go even further and give “controlling weight” to a federal agency's interpretation of its governing statute. *See Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 95 (Tex. App. – Fort Worth 2000, pet. denied). In *Legend*, the appellees asserted that the federal Airline Deregulation Act did not preempt route and service restrictions imposed on Love Field by a local bond ordinance, a position contrary to that taken by the federal Department of Transportation. The court noted that “even if we are inclined to agree with appellees' position, we are not empowered to substitute our judgment for that of the DOT in this case.” *Legend*, 23 S.W.3d at 95. Noting that the DOT had concluded such local restrictions were preempted, the court, citing *Chevron* and other cases, stated that “under the clear mandate of the United States Supreme Court, we must give

‘controlling weight’ to reasonable” federal agency interpretations of the agency’s governing statutes. *Id. at 95*. The Court must therefore give controlling weight to the FCC’s guidance that claims such as Smith’s are not preempted.

4. *Bastien*, Which was Decided Before the FCC Opinion in *Wireless*, Relies on Filed-Rate Doctrine Cases That Cannot be Applied to Wireless Carriers.

As it did in the federal district court that rejected its application, TPC relies on the Seventh Circuit’s decision in *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000), for the proposition that a challenge to quality of service necessarily requires the Court to regulate rates. (TPC Brief at 17.) The FCC and the *Spielholz* court have both rejected the premise advanced in *Bastien* that by asking for an award of damages, Smith is necessarily challenging TPC’s rates. *Spielholz*, 104 Cal.Rptr.2d at 199; *Wireless* at ¶ 33. The *Bastien* decision was issued five months before the FCC’s *Wireless* decision and nearly a year before the *Spielholz* decision, and the *Bastien* court did not have an opportunity to consider the FCC’s interpretation of section 332, which rejected this proposition.

The *Bastien* opinion is also questionable authority because it is based on an incorrect premise – that TPC’s rates are subject to FCC approval. The *Bastien* court relied on *AT&T Co. v. Central Office Telephone, Inc.*, 118 S. Ct. 1956, 1963 (1998), in support of its determination that a damages award equaled rate regulation. As TPC notes in a footnote, *Central Office* involves application of the filed rate doctrine and did not involve a wireless

carrier. (TPC Brief in Support of Summary Judgment at 18 n.14.)<sup>4</sup> The *Bastien* court was apparently under the mistaken impression that the FCC had approved a tariff filed by TPC establishing rates for its wireless service. *Bastien*, 205 F.3d at 983, 984 (“AT&T Wireless, a subsidiary of AT&T, entered the market in the late 1990s, after receiving approval of its rates and infrastructure arrangements from the Federal Communications Commission, as required by federal law.”) This is incorrect. Wireless service providers do not file rate tariffs with the FCC – they are exempt from the filing of tariffs and are actually prohibited from filing them with the FCC. 47 C.F.R. § 20.15(c). Cases involving tariffed rates are therefore not applicable. The *Bastien* court was therefore mistaken in relying on filed-rate doctrine cases such as *Central Office*. See *Tenore*, 962 P.2d at 110 n. 51; *Wireless* at ¶¶ 15-22; *Spielholz*, 104 Cal.Rptr.2d at 199. *Bastien* also erred by ignoring *Nader*, where the court held that, in the absence of a filed rate, an award of damages by a court did not involve the court in rate regulation. See *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 292-94 (1976). Accordingly, the *Bastien* court was wrong in concluding that if a claim attacks quality of service, a court will be regulating rates.

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<sup>4</sup> The filed rate doctrine developed out of the requirement that telecommunications carriers file a “tariff” with the FCC. A tariff is a listing of the terms and conditions under which they would provide service to their customers. 47 U.S.C. § 203(a)-(b). Once the tariff has been filed, it exclusively controls the rights and liabilities of the parties as a matter of law, superseding any privately-negotiated rates that depart from the tariff. See 47 U.S.C. § 203(c); *Fax Telecomm. Inc. v. AT&T*, 138 F.3d 479, 488 (2d Cir. 1998). Under the filed-rate doctrine, a customer cannot enforce contract rights that contradict the governing tariff or assert estoppel against a carrier. See, e.g., *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 438 n. 5 (D. N.J. 1996)

Nevertheless, TPC asserts that, under the analysis found in filed rate cases, courts have concluded that merely calculating and awarding damages constitutes rate regulation, and TPC argues that this analysis should be applied to wireless carriers because section 332 prohibits state regulation of rates. (TPC Brief in Support of Summary Judgment at 17-19.) Specifically, TPC cites *Central Office*, a filed-rate case, for the proposition that an attack on quality of service requires the court to engage in rate regulation. (TPC Brief in Support of Summary Judgment at 17-19.)

The FCC has rejected extending the filed-rate analysis to cases involving wireless carriers. While section 332 does prohibit state regulation of rates, “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.” *Wireless* at ¶ 19. The FCC also determined that Congress did not intend to “impose the broad scope of the filed rate doctrine judicial analysis in cases dealing” with wireless providers. *Id.* In rejecting application of the filed-rate analysis, the FCC also pointed out that filed rates are subject to regulatory review, while wireless rates are governed by the competitive marketplace, and the purposes of the filed-rate doctrine therefore “do not have the same relevance” in wireless cases.” *Wireless* at ¶ 19. Other cases, ignored by TPC, establish that where there is no filed rate, an indirect attack on quality of service does not constitute rate regulation.

While *Central Office* is a filed-rate case, the United States Supreme Court has concluded that, in situations where there are no filed rates, a damages award does not involve the court in the regulation of rates. In *Nader*, plaintiff was denied boarding or “bumped” from a reserved and confirmed seat because the airline overbooked its flights. *Nader*, 426 U.S. at 292-94. Plaintiff sued for fraudulent misrepresentation but did not contest the validity or reasonableness of the overbooking practice itself, only the failure to disclose the practice. *Id.* at 294-95. Similarly, Smith is not directly attacking the validity or reasonableness of TPC’s rates, only TPC’s failure to disclose.

In reversing the court of appeals’ referral of the case to the FCC on primary jurisdiction grounds, the Supreme Court distinguished filed-rate doctrine cases, noting that there was no “irreconcilable conflict between the statutory scheme and the persistence of common-law remedies.” *Nader*, 426 U.S. at 299. The court contrasted the filed-rate cases, noting that in such cases, an award of damages could directly conflict with an agency’s ratemaking power. *Id.* Because *Nader* did not involve a filed rate, adjudicating the claims would not place a court in the position of second guessing an approved rate, and any “impact on rates that may result from the imposition of tort liability . . . would be merely incidental.” *Nader*, 426 U.S. at 300. Similarly, any impact on rates from an award of damages in this case would also be incidental, and TPC’s reliance on filed-rate cases is therefore unpersuasive where, as here, there is no filed rate.

5. The Unpublished *Union Ink* Decision is Contrary to the FCC's Interpretation of the Statute, Which is Controlling in Texas.

TPC's reliance on the unpublished transcript of oral argument from the New Jersey trial court in *Union Ink* is unpersuasive. In reaching its decision that the plaintiffs' claims were preempted, the New Jersey trial court deliberately chose to disregard the FCC's interpretation of the FCA, stating that "I decline to swallow whole the FCC determination." (TPC Appendix Tab G p. 31.) The New Jersey judge could ignore the FCC because, under New Jersey law, a state court "is, however, in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." *Mayflower Securities Co., Inc. v. Bureau of Securities*, 312 A.2d 497, 501 (N.J. 1973). This Court, in contrast, is not free to disregard the FCC's determination that a damages award does not require a court to regulate rates, that the filed-rate cases relied on by the *Union Ink* court are inapplicable, or that indirect quality-of-service challenges do not involve the court in rate or entry regulation. A Texas court must give "controlling weight" to a federal agency's interpretation of its governing statute. *See Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 95 (Tex. App. – Fort Worth 2000, pet. denied). *Union Ink* ignored the FCC, which this Court may not do. Under the FCC's interpretation of the statute, Smith's claims are not preempted.

**C. Smith's Claims do not Require the Court to Regulate TPC's Entry Into the Market.**

The FCC and the *Spielholz* court have also rejected TPC's argument that Smith's claims require the Court to regulate TPC's entry into the market. As in *Spielholtz* and the

*Wireless* decision, Smith’s claims do not require the Court to set, prescribe, or fix the conditions under which TPC was to begin offering its service in Texas. TPC’s theory, that any claim involving quality of service creates a barrier to entry, is unsupportable and should be rejected.

1. The Plain Meaning of Section 332 Establishes That Smith’s Claims do not Require the Court to Regulate the Conditions Under Which TPC Could Enter the Market.

Under the plain meaning of the statute, TPC’s entry argument has no merit. The plain meaning of “entry” prohibits a state from creating any additional requirements to enter the market beyond those imposed by the FCC, such as licensing schemes or fees. This meaning is “clear and manifest” and should be controlling. *See Medtronic*, 518 U.S. at 484. A state court damages award based on conduct occurring only after a carrier has entered the market would impose no such barrier to entry. TPC is already in the marketplace, and the neutral application of state consumer protection and contract law only imposes the same duties that state law requires of “any other business.” *Wireless* at ¶ 24.

2. Under *Wireless* and *Spielholz*, By Asking the Court to Evaluate TPC’s Quality of Service, Smith is Not Requiring the Court to Regulate Entry.

The FCC’s *Wireless* decision and the California Court of Appeal decision in *Spielholz* also establish that by adjudicating Smith’s claims, the Court will not be required to regulate TPC’s entry into the marketplace. TPC asserts that any examination of the quality of service necessarily involves creation of a barrier to entry. (TPC Brief in Support of Summary

Judgment at 14-15.) This is no different than the argument TPC makes with respect to rates. The FCC in *Wireless* rejected this argument in the context of rates, and, by implication, has also rejected it with respect to entry into the marketplace, and the *Spielholz* court specifically rejected this argument. *Wireless* at ¶ 32-33; *Spielholz*, 104 Cal.Rptr.2d at 199.

*Spielholz* and *Wireless* both involved challenges to quality of service that are almost identical to Smith's. The claims at issue there arose out of an inadequate wireless network that left gaps, or dead zones. Under TPC's theory, the *Spielholz* claims were preempted because the challenge to infrastructure must necessarily have involved the court in regulation of entry. Neither the *Spielholz* court nor the FCC reached such a conclusion. Indeed, the FCC specifically linked the rates and service issues together, noting that "a carrier may charge whatever price it wishes *and provide the level of service it wishes*, as long as it does not misrepresent either the price or the quality of service." *Wireless* at ¶ 27. The *Spielholz* court was more direct, concluding that any discussion of inadequate infrastructure was incidental to the plaintiffs' claims and did not regulate entry. Specifically, the *Spielholz* court rejected TPC's argument that the plaintiffs' allegations that TPC misrepresented and failed to disclose the gaps in its network conflicted with the FCC's requirements. *Spielholz*, 104 Cal.Rptr.2d at 199. In reaching this conclusion, the *Spielholz* court stated that "the complaint adequately alleges several tort causes of action based on false advertising, and the allegations that [TPC's] infrastructure is inadequate *only support those causes of action*; they do not defeat them." *Id.* (emphasis added)

Similarly, Smith’s discussion of TPC’s service problems only supports the class claims that TPC misrepresented and failed to disclose the true state of its service. Smith has not asked the Court to order construction of any more towers or to change the manner in which it operates its service. As the FCC has stated, TPC is free to offer whatever level of service it chooses, subject to FCC approval, and that will not be changed by any judgment rendered by this Court. *Wireless* at ¶ 27. TPC will simply be held responsible for failing “to inform consumers of other material terms, *conditions, or limitations* on the service it is providing.” *Id.* (emphasis added). Smith’s claims do not in any way require the Court to erect any barriers to entry.

TPC incorrectly states that the FCC agrees with the holding in *Bastien* that “claims challenging quality of service bear directly on the areas reserved to the FCC.” (TPC Brief at 15.) The *Wireless* decision says nothing of the kind. It says only that a state may not regulate “the modes and conditions under which [TPC] *may begin offering service.*” *Wireless* at ¶ 28 n.90 (emphasis added). This distinction is crucial – only the FCC may determine when a carrier may enter a market and begin offering services. Smith’s claims have nothing to do with the conditions under which TPC was permitted to begin offering its services. But once a carrier has entered the market as approved by the FCC, that carrier is subject to consumer protection (TPC), and that has nothing to do with entry into the market.

3. *Bastien* is a Complete Preemption Case Whose Holding Has Been Rejected by the Federal District Court, and the Decision is Otherwise Unpersuasive.

In arguing that Smith's claims require the Court to regulate TPC's entry into the market, TPC is forced to rely on *Bastien*, a case that the federal district court has already rejected. In *Bastien*, the plaintiff alleged that TPC signed up subscribers without building the necessary infrastructure, resulting in unreliable connections and dropped calls. The *Bastien* court concluded that Bastien's claims were completely preempted by federal law. *Bastien*, 205 F.3d at 988-99. TPC relies on portions of the *Bastien* opinion in support of its entry argument. (TPC Brief in Support of Summary Judgment at 17-19.)

The *Bastien* decision should not be relied on by this Court because it is procedurally distinguishable from this case. The *Bastien* decision did not turn on the issue of defensive preemption but instead concluded that the plaintiffs claims were completely preempted. In sum, *Bastien* is of questionable precedential value in this case:

- *Bastien* was decided months before the FCC *Wireless* decision, and the *Bastien* court therefore had no opportunity to defer to the FCC's interpretation of the FCA, which allowed the *Spielholz* plaintiffs to proceed with their claims that, like the claims in *Bastien*, involved indirect challenges to TPC's quality of service.

- The FCC has concluded that *Bastien* did not decide the issue of whether an award of monetary damages was the equivalent of regulating rates or, by implication, entry. *Wireless* at ¶ 28.
- The FCC effectively rejected TPC’s reliance on *Bastien*, reading it as standing only for the proposition that “state law claims may, in specific cases, be preempted by Section 332” and that a court should consider the substance of a state remedy in determining whether a claim is preempted. *Wireless* at ¶ 28.
- The *Spielholz* court specifically rejected the language in *Bastien* that any challenge to the adequacy of service required a court to regulate entry into the market. *Spielholz*, 104 Cal.Rptr.2d at 199.
- *Bastien* ignored the Supreme Court’s *Nader* decision and, because it mistakenly believed that TPC filed tariffs, improperly relied on filed-rate cases. *Bastien*, 205 F.3d at 988.
- The plaintiff in *Bastien* failed to properly plead the case as one that only indirectly attacked TPC’s quality of service. *Bastien*, 205 F.3d at 988-99.

*Bastien* has been distinguished and discredited, and TPC can cite no other authority for its argument that by indirectly attacking the quality of its service, Smith requires the Court to erect barriers to TPC’s entry into the Texas market. Smith’s claims do not require the Court to regulate market entry, and summary judgment should therefore be granted striking TPC’s

affirmative defense of preemption, and TPC's motion for summary judgment should be denied.

**CONCLUSION AND PRAYER**

Plaintiffs pray that the Court grant their motion for summary judgment, strike TPC's affirmative defense of preemption, deny TPC's motion for summary judgment, and grant them such other and further relief as to which they may be justly entitled.

