

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C. 20554

In the Matter of )  
)  
*White v. GTE* )  
Petition for Declaratory Ruling ) WT Docket No. 00-164  
Regarding Whether Certain )  
CMRS Practices Violate the )  
Communications Act )

**COMMENTS OF VERIZON WIRELESS**

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Date: October 20, 2000

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To: Chief, Wireless Telecommunications Bureau

**COMMENTS OF VERIZON WIRELESS**

Verizon Wireless<sup>1</sup> hereby submits Comments in response to the Commission's Public Notice<sup>2</sup> released on September 20, 2000, in the above-captioned proceeding. Verizon Wireless respectfully submits that the Commission should declare that the practices identified in the Public Notice are just and reasonable under Section 201(b) of the Communications Act ("the Act").

**I. SUMMARY OF THE PETITION AND *WHITE V. GTE* LITIGATION**

In its Public Notice, the Commission requests comment on the following billing practices of CMRS carriers: (1) charging for so-called "dead time;" (2) charging for unanswered or unconnected calls; (3) measuring the time of a call from the time the "send" button (or other similar button) is pushed; and (4) charging for each of the foregoing types of billing practices in whole-minute increments. The Commission

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<sup>1</sup> Verizon Wireless is the trade name for Cellco Partnership, which includes the former domestic cellular, paging, and PCS businesses of Bell Atlantic Mobile (BAM), Vodafone AirTouch, and GTE Wireless.

<sup>2</sup> See Commission Seeks Comment on Petition for a Declaratory Ruling Regarding Whether Certain CMRS Practices Violate the Communications Act, DA 00-2083 (released September 20, 2000).

requested comment on these practices in light of its earlier comprehensive rulings in the *Southwestern Bell Mobile Systems Order*<sup>3</sup> and the *WCA Order*.<sup>4</sup>

This proceeding arises out of a putative class action suit in the U.S. District Court for the Middle District of Florida, captioned *White v. GTE*.<sup>5</sup> In that suit, Plaintiffs challenged certain billing practices of GTE Wireless and moved the court to certify a class of GTE Wireless subscribers in Florida who had been billed for airtime in whole minute increments, from “send-to-end,” and for excessive ring time on unanswered calls.

Plaintiffs further requested that the court judicially regulate the method of calculation of rates and the rates charged by the defendant CMRS providers and enjoin them from using the challenged rate practices to bill customers. Finally, Plaintiffs specifically challenged the reasonableness of these billing practices under Section 201(b) of the Act. On October 20, 1999, the District Court granted GTE Wireless’s motion to dismiss in part, dismissed without prejudice Plaintiffs’ motion to certify a class of Florida subscribers, closed the case, and referred Plaintiffs’ Section 201 claims to the Commission. On February 2, 2000, Plaintiffs filed a Petition for Declaratory Ruling

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<sup>3</sup> Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-365, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 (1999) (“*SBMS Order*”).

<sup>4</sup> Petition of Wireless Consumers Alliance for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers for (a) Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, *Memorandum Opinion and Order*, FCC 00-292 (Aug. 14, 2000) (“*WCA Order*”).

<sup>5</sup> *White v. GTE*, No. 97-1859-CIV-T-26C (M.D. Fla. filed Oct. 29, 1998).

before the Commission, and on February 10, 2000, the GTE affiliates named as defendants in the administratively closed lawsuit filed an Opposition.<sup>6</sup>

## **II. THE DISPUTED PRACTICES ARE JUST AND REASONABLE**

Verizon Wireless submits that the practices at issue in this Petition are just and reasonable. In the competitive CMRS marketplace, consumers may choose from among many different price plans and billing options. Carriers price their services and provide the billing options that maximize the demand for their services and provide a reasonable return on investment. In short, billing practices, such as those at issue in this case, are a major way that CMRS carriers can compete effectively in the marketplace.

The Act's requirement in Section 201 that carrier rates and practices be "just and reasonable" dates from the era of end-to-end telephone monopolies. The Commission has recognized in recent years that market forces accompanying the increased competition in various segments of the communications industry are more effective than regulation in assuring that rates and practices are just and reasonable. Indeed, where competition exists, the Commission has correctly held that there is little concern that carrier rates and practices will be unjust and unreasonable. For example, in its decision to deregulate non-dominant common carriers, the Commission stated:

[T]he economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking

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<sup>6</sup> See Opposition of GTE Corporation, GTE Wireless Incorporated, GTE Wireless of the South Incorporated, GTE Mobilnet of Tampa Incorporated, GTE Wireless of Houston Incorporated, GTE Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated, filed Feb. 10, 2000 ("GTE Opposition"). Verizon Wireless expressly incorporates each of the arguments made in the GTE Opposition in these Comments.

market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act . . . . [A] non-dominant competitive firm, for example, will be incapable of violating the just and reasonable standard of 201(b). If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable.<sup>7</sup>

Indeed, Congress affirmed the preference for market forces over regulation when it enacted Section 332 of the Act preempting state and local regulation of CMRS rates. Implementing this mandate, the Commission found that “in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power.”<sup>8</sup>

It then rejected a series of state petitions that sought to preserve state authority to regulate rates and found that market conditions were sufficient to protect against unjust or unreasonable CMRS rates and practices.<sup>9</sup>

The Commission has also recognized that the CMRS marketplace is becoming increasingly competitive. As the Commission recently noted in its annual review of the competitive conditions of the CMRS marketplace: “In the year 2000, the CMRS

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<sup>7</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, First Report and Order, 85 FCC 2d 1, 31 (1980). See also *Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934*, Second Report and Order, 11 FCC Rcd. 20730, 20752-53, ¶ 42 (1996) (“Just as we believe that competition is sufficient to ensure that non-dominant interexchange carriers’ charges for interstate, domestic, interexchange services are just and reasonable, and not unreasonably discriminatory, and to protect consumers, we believe that competitive forces will ensure that non-dominant carriers’ non-price terms and conditions are reasonable.”).

<sup>8</sup> *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, ¶ 15 (1994).

<sup>9</sup> See, e.g., *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd. 7486 (1995).

industry continues to benefit from the effects of increased competition as evidenced by lower prices to consumers and increased diversity of service offerings.”<sup>10</sup> The Commission has also affirmed that CMRS providers “lack significant market power” and are “non-dominant.”<sup>11</sup> Accordingly, although CMRS providers remain subject to Section 201, the Commission’s application of that provision has and should continue to reflect the reliance on market forces over regulation.

The Commission’s *SBMS Order* embodies this principle. There, the Commission analyzed the justness and reasonableness of a specific billing practice under Section 201(b) by determining (1) whether the challenged practice emulates the competitive market and (2) whether that practice reasonably reflects how a carrier incurs costs. The challenged billing practices here are clearly reasonable when viewed in light of the *SBMS Order* and the Commission’s and Congress’ preference for market forces over regulation. The Commission should therefore deny the Petition and declare the practices just and reasonable under Section 201(b).

**A. The Disputed Rate Practices Are Just And Reasonable Under Commission Precedent**

Each of the practices that Petitioners challenge is just, reasonable, and entirely consistent with Section 201(b) of the Communications Act. In its earlier *SBMS Order*,

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<sup>10</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, FCC 00-289, p. 4 (rel. August 18, 2000) (“Fifth Competition Report”).

<sup>11</sup> *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Fourth Report and Order, FCC 00-253, ¶¶ 12, 20 (rel. July 24, 2000) (also noting “the steady growth of competition in CMRS markets.”)

the Commission already in large part rejected the declaratory relief sought by the Petitioners. There, the Commission recognized that billing in whole minute increments is the most common billing practice for interexchange and CMRS services and represents a simplified method for billing that fairly reflects the costs incurred in providing service.<sup>12</sup>

In the *SBMS Order*, the Commission started its analysis from “a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.”<sup>13</sup> The Commission then reviewed the reasonableness of the particular rate elements at issue in light of whether they are “reasonably related to the cost of providing service” and “reflect or emulate competitive market operations.”<sup>14</sup>

The Commission next applied this general preference and analysis to rates charged in per-minute increments and to charges for incoming calls. The Commission noted that it “has never questioned the lawfulness of this industry practice for the provision of CMRS, and rounded-up, whole minute billing has never been found by the Commission to be violative of Section 201(b).”<sup>15</sup> Indeed, it specifically stated that

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<sup>12</sup> *SBMS Order* at ¶ 14.

<sup>13</sup> *Id.* at ¶ 9.

<sup>14</sup> *Id.* at ¶ 12. See also *In re United States Transmission Systems, Inc. (Revisions to FCC Tariff No. 1)*, 66 F.C.C.2d 1091, ¶ 5 (1977) and *In re Petition of New York State Public Serv. Comm’n to Extend Rate Regulation*, 10 FCC Rcd. 8187, ¶ 17 (1995) (setting forth standards for Section 201(b) reasonableness adjudication). The Commission has also recognized that in the context of CMRS rates, a Petitioner must show that “market conditions fail to produce rates that fall within a ‘zone of reasonableness’” for a rate to violate Section 201(b). See *Petition of Arizona Corp. Comm’n to Extend Rate Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, 10 F.C.C.R. 2873, 7826 (1995).

<sup>15</sup> *SBMS Order* at ¶ 14.

“[[i]nterexchange telephone services historically have been billed on a rounded-up, whole minute basis, and this is still the most common billing practice for interexchange services, as well as for CMRS.”<sup>16</sup> These types of rate elements are reasonable because “the carrier incurs costs to switch and transport calls,”<sup>17</sup> and these “rate practices are clearly among those which CMRS providers, consistent with Section 201(b) of the Act, have discretion to implement for their services.”<sup>18</sup> For these reasons, the Commission held that charging for CMRS calls in whole-minute increments and charging for incoming calls are common CMRS industry practices and are not unjust or unreasonable.

Here, Petitioners dispute CMRS billing practices similar to those that were at issue in the *SBMS Order*. Petitioners purportedly challenge three practices — whether CMRS providers may bill in whole-minute increments, when carriers may begin charging for a CMRS call, and whether carriers can charge for allegedly excessive “ring time” for unanswered calls, or so-called “dead time.”<sup>19</sup> Yet undeniably, the Petition asks the Commission to dictate how and whether CMRS providers, in a highly competitive marketplace, can charge consumers for the costs incurred in using the capital-intensive, nationwide cellular and PCS networks. Based on established

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The Commission does not define “dead time” in the Public Notice, nor do the Petitioners define the term in their Petition for Declaratory Ruling or even refer to this term in the dismissed complaint in the district court. Verizon Wireless’s research has revealed no interpretation of this term in any other Commission proceedings. Verizon Wireless can only surmise that the Petitioners use the term “dead time” to mean any time period for which a caller may be billed but is not engaged in a conversation.

Commission precedent and its long-standing preference for competition over regulation, the Commission should deny the Petition.

**B. The Challenged Billing Practices Fairly Reflect The Competitive Marketplace**

In the *SBMS Order*, the Commission noted that billing in whole-minute increments and for incoming calls were widespread industry practices. The same is true of the billing practices challenged in this Petition. A review of the publicly available terms and conditions for service on various carriers' Internet sites demonstrates that most wireless carriers charge consumers for calls when the "Send" button is pressed or when a voice channel is seized. A few of these carriers' policies are set forth below:

<b>Carrier</b>	<b>Billing Practice</b>
AT&T Wireless	"Airtime is measured during the time you are connected to our system, which is approximately from the time you press SEND or other button to initiate or answer the call . . ."
Sprint PCS	"Charges for a completed call from your Number that is dialed manually begin when you press the TALK (or similar key) . . ."
Nextel	"Customer acknowledges that chargeable time for telephone calls . . . originated by a unit begin when a connection is established with Company facilities."
BellSouth Mobility	"Chargeable time is measured from time of channel seizure . . ."

With respect to excessive ring time on busy or unanswered calls, some carriers

charge for calls in excess of a particular duration while others do not. For example, AT&T Wireless states: “there is no charge for busy or unanswered calls if you end the call within one minute . . . ,” while Sprint PCS charges only for completed calls. Verizon Wireless bills calls from “channel seizure,” and in the vast majority of cases, Verizon Wireless does not charge for unanswered calls since it bills for ring time only for unanswered calls in excess of 60 seconds.<sup>20</sup>

This is the way competition should work — allowing consumers to choose from the carrier that provides the best calling plan options and terms for their particular calling patterns. Moreover, in a marketplace with five or more nationwide competitors in most markets, an unjust or unreasonable rate practice would result in severe competitive repercussions.

As the Commission recently noted in its *Fifth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*,<sup>21</sup> there are now five CMRS operators with near-nationwide licensed coverage areas: AT&T Wireless Services (“AT&T”), Sprint PCS Group (“Sprint PCS”), Nextel, Verizon, and VoiceStream Wireless Corp. (“VoiceStream”), up from only three carriers in *Fourth Annual Report*. Indeed, since the report was released, BellSouth and SBC have combined their CMRS businesses to form a new national competitor, Cingular Wireless.

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<sup>20</sup> Verizon Wireless would also note that certain billing systems have technical limitations that govern how a carrier must measure calls. Here again this is a competitive issue because customers will choose the carrier with systems capable of meeting their needs.

<sup>21</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile*

These and other wireless carriers use various methods of billing to compete for customers. Some carriers offer nationwide roaming and long distance included in a package of minutes or at a reduced rate. Other carriers offer free incoming minutes. Bellsouth Mobility, now Cingular Wireless, offers “rollover minutes” on some plans where unused bundled minutes are carried over from month-to-month. Nextel offers billing in one-second increments. Given the competitive dynamics of this robust competition, the marketplace effectively disciplines practices that do not benefit consumers. Particularly with the billing practices challenged by Petitioners, a finding that the practices are unjust or unreasonable could chill the very competition that Congress and the Commission have unleashed in the CMRS industry.

**C. The Rate Practices At Issue Are Reasonably Related To The Costs Incurred In Providing Service**

The Commission and the commentors noted in the *SBMS* proceeding that rounding-up and charging for incoming calls were reasonably related to general costs. The Commission appropriately did not require a full and comprehensive cost analysis. Instead, consistent with a competitive marketplace, it simply noted that billing in whole-minute increments “is a simplified method on which to base charges which still reflects general costs,” and charging for incoming calls “is reasonable because the carrier incurs costs to switch and transport calls for incoming calls.”<sup>22</sup> The same analysis applies to each of the rate elements at issue here.

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*Services*, Fifth Report, FCC 00-289, p. 9 (rel. August 18, 2000).

**1. “Rounding-Up” and Charging for Interval Time**

Petitioners seek to reargue the *SBMS Order* in this proceeding by labeling their challenge to per-minute billing as a challenge to billing for “dead time.” Regardless of the moniker the Plaintiffs wish to attach to it, the Commission’s *SBMS Order* has already fully and finally determined that the common industry practice of rounding-up calls to the next higher minute increment is lawful. Based upon the Commission’s *SBMS Order*, the Commission should simply declare again that per-minute billing is a just and reasonable practice under Section 201(b).

**2. “Send-to-end” Billing and Charges for Excessive Ring Time on Unanswered Calls**

The Commission’s analysis of the reasonableness of per-minute billing applies equally to “send-to-end” billing and for excessive ring time on unanswered or busy calls. In each case, carriers incur network costs to set up calls regardless of whether the call is completed. Although billing for airtime before a call is answered or connected is often referred to as billing for “send-to-end,” the following technical analysis will explain more precisely how a wireless network handles calls and the costs that are incurred even when a call is not completed.

When a caller pushes the “SEND” or similar button, a complex process ensues to set up the call. Depending upon the type of mobile telephone, communications protocol (*e.g.*, analog, TDMA, CDMA, etc.), switch type, and other factors, one to six seconds after a customer presses the “SEND” or “TALK” button on the mobile

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<sup>22</sup> *SBMS Order* at ¶ 14.

telephone, the caller "seizes" a voice channel. This is the technical point in the call set-up process when a subscriber occupies a voice channel, which is then unavailable for use by other subscribers. This process occurs every time a caller pushes the "SEND" or similar button, regardless of whether the call is ever completed and before the caller connects to the called party or receives a busy signal or the call rings unanswered.

After a channel has been seized, the switch continues the complex process of connecting the call, using in-band or out-of-band signaling, seizing a trunk for interconnection with the LEC or IXC, engaging answer supervision, and billing or rating the call as connected, busy, or unanswered.

There are two different types of costs that CMRS carriers incur when subscribers place a call: network costs and opportunity costs. First, there are costs associated with each of these call set-up elements regardless of whether the call is actually connected. For example, carriers incur costs in seizing a channel, setting up the trunk, interconnecting with the LEC, in-band or out-of-band signaling, answer supervision, and recording the detail information for each call (attempted and completed). There are also network costs related to switching the voice channel to another available channel as a caller moves from cell to cell.

In addition to the network costs, CMRS providers incur opportunity costs associated with the transmission of a cellular or PCS phone call. If users remain "on line" and allow a phone to ring unanswered, this ties up a voice channel. This prevents other users from accessing that channel.

Just as in the case of rounding-up, “send-to-end” billing and billing from channel seizure represent simplified billing practices that reasonably reflect the time that the customer uses the wireless network. Both practices provide fair recovery mechanisms for the actual costs a CMRS provider incurs during the transmission of a cellular/PCS telephone call.

### III. CONCLUSION

Consistent with the Commission's precedent in the *SBMS Order* and its unambiguous preference for market forces over regulation, the Commission should deny the relief requested in the Petition and find that the disputed practices are just and reasonable. To rule otherwise would reimpose regulatory constraints on a dynamic, highly competitive sector of the economy.

Respectfully submitted,

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October 20, 2000

**CERTIFICATE OF SERVICE**

I, Roni Blakeney, a legal secretary in the law firm of Alston & Bird LLP, do hereby certify that on this 20th day of October, 2000, copies of the foregoing Comments of Verizon Wireless were mailed, postage prepaid, to the following:

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