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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Petition for Declaratory Ruling on Issues Contained in Count I of:	)	
	)	
JAMES J. WHITE, *et al.*,	)	
	)	WT 00-164
Representative Plaintiffs,	)	
	)	
v.	)	
	)	
GTE CORPORATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

COMMENTS OF
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
ON PETITION FOR DECLARATORY RULING IN
WHITE VS. GTE CORPORATION

The Cellular Telecommunications Industry Association ("CTIA")[1/] submits these comments in response to the Petition for Declaratory Ruling ("Petition") filed by the plaintiffs in the *White v. GTE* class action lawsuit ("Petitioners"). CTIA agrees with GTE that the Commission already has held that the practice of "rounding up" does not violate the Communications Act (the "Act"), and that the ruling requested by Petitioners would violate section 332(c)(3)'s prohibition on state rate regulation.

[1/] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all commercial mobile radio service ("CMRS") providers and manufacturers. CTIA represents more broadband

INTRODUCTION AND SUMMARY

The Commission already has determined that "rounding up" airtime for billing purposes and charging for incoming calls are simple, efficient billing practices that do not violate the Communications Act. Nothing in the Petition warrants reconsideration of that determination. Other practices Petitioners complain of -- such as "send to end" billing -- are likewise consistent with section 201 of the Act. Petitioners argue that they are challenging GTE's failure to abide by the terms of its contracts, rather than the practices *per se*, but their argument is belied by the fact that GTE's contract adequately discloses the contested practices. As the courts have found, a carrier's failure to explain "rounding up" on each bill is not misleading or fraudulent, since no reasonable customer could believe that each call they made on a bill ended precisely at the end of a full minute.

Finally, the relief sought by Petitioners in their state law claim against GTE is tantamount to rate regulation of commercial mobile radio service. Even though the claim is pending in federal court, it is preempted by section 332(c)(3) of the Act.

ARGUMENT

I. "ROUNDING UP" AND OTHER SIMILAR BILLING PRACTICES ARE CONSISTENT WITH THE REQUIREMENTS OF SECTION 201(b) OF THE COMMUNICATIONS ACT

The Commission already has clearly established that there is nothing *per se* unlawful about "rounding up" billing practices, and that such practices meet the requirements of section 201(b) of the Act (requiring carriers to impose only just and reasonable charges).[2/] Indeed, in

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Personal Communications Service carriers and more cellular carriers than any other trade association.

[2/] *In the Matter of Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls In Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19898 (1999) ("*Southwestern Bell*").

Southwestern Bell, the Commission agreed with CTIA and numerous wireless carriers that charging for calls based on the "rounding up" method is "a simplified method on which to base charges which still reflects general costs."[3/] Further, the Commission has acknowledged that rounding up billing is "the most common billing practice for interexchange services, as well as for CMRS,"[4/] and that moving to per-second, rather than per-minute billing, is an issue to be resolved by competition in the market, not government intervention.[5/]

In order to avoid the conclusive nature of this precedent, Petitioners claim that they are not challenging GTE's billing practices *per se*, but rather the way in which GTE disclosed those practices to its customers and the manner in which GTE applied those practices to calculating minutes used under its flat rate contracts.[6/] Petitioners' attempt to distinguish their case from *Southwestern Bell* is unavailing. Although the Commission in *Southwestern Bell* noted that a

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The Commission in *Southwestern Bell* further agreed that imposing a per minute charge for incoming calls was among those rate practices that CMRS providers "consistent with section 201(b) of the Act, have discretion to implement for their services." *Id.* at 19904 ¶ 14. The other practices Petitioners challenge (measuring calls from the time the "send" button is pushed and charging for unconnected calls) are similarly among those practices permissible under section 201(b). *See id.*

[3/] *Id.*

[4/] *Id.* Telephone users were introduced to the concept of rounding up long ago, in the context of pay phones. Pay phone operators impose a fixed charge for a specified number of minutes of connect time, regardless of whether the customer actually uses the full amount of time for which the charge is imposed.

[5/] *See In re Application of Pittencrieff Communications, Inc., Transferor, and Nextel Communications, Inc., Transferee, For Consent to Transfer Control of Pittencrieff Communications, Inc. and its Subsidiaries*, 13 FCC Rcd 8935, 8965-66 ¶ 70 (1997); *see also Southwestern Bell* at 19902 ¶ 9 ("as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.'").

[6/] The District Court found that "at least in count I, Plaintiffs do not appear to be challenging the reasonableness of the rates or the failure to disclose a particular billing practice, but rather are challenging the reasonableness of the billing practice itself." Order at 5 (Petition, Exh. B). As demonstrated below, however, the relief sought by Petitioners in their state law claims, which

carrier using "rounding up" billing could violate section 201(b) if the carrier employed unreasonable practices,[7] there is no evidence in this case that GTE engaged in such practices.

Petitioners' unsupported assertion that GTE should have disclosed its "rounding up" practice on each bill, and explained on each bill how minutes used under flat rate plans were calculated, does not bring their case within the area reserved for further decision in *Southwestern Bell*. Courts considering virtually identical arguments in cases brought under various state consumer protection laws consistently have concluded that such disclosure is not necessary. *See, e.g.*, *Alicke v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (MCI's failure to disclose rounding up on the bill itself does not constitute fraud, negligent misrepresentation or deceptive acts or practices in violation of DC statute because "there is nothing in the way MCI reports the length of long-distance phone calls that could mislead a reasonable customer;" "no reasonable customer could actually believe that each and every phone call she made terminated at the end of a full minute;" and thus, "the customer must be aware that MCI charges in full-minute increments only."). *See also Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. 1996), aff'd, 138 F.3d 46 (2d Cir. 1998) (AT&T's failure to disclose rounding up anywhere except in FCC tariffs was not fraudulent, deceptive, false advertising, or otherwise unlawful under New York law, because "no consumer reasonably could believe that a designation of a call in whole minutes accurately reflects the length of the call. The only reasonable conclusion is that the carrier must round up or down . . .".). For the reasons set forth in *Alicke* and *Marcus*, GTE's practices are neither unjust nor unreasonable under section 201(b) of the Communications Act.

Petitioners have placed before the Commission as part of the "entire record" of the case, do amount to an improper demand for rate regulation.

[7] *Southwestern Bell* at 19905 ¶ 15.

II. SECTION 332(c) OF THE ACT PREEMPTS STATE REGULATION OF RATES, INCLUDING REGULATION OF "ROUNDING UP" BILLING

Petitioners claim they are not seeking a ruling on whether their claims are in effect demands for state ratemaking, in violation of section 332(c)(3) of the Act,[8/] but their own Petition contradicts their claim in this regard.[9/] To avoid any confusion, the Commission should reaffirm that Petitioners' state law causes of action challenging "rounding up" and similar billing practices are preempted by section 332(c)(3).

The Commission has ruled that while asking a state court to award monetary damages is not necessarily equivalent to rate regulation, "[i]f a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332."[10/] That is precisely the relief sought here:

> [Petitioners] specifically request the FCC to declare that: billing its customers for dead air time, billing its customers for unanswered calls, billing its customers for time when their mobile phone is not in use and billing its customers for an arbitrary amount of time following the completion of a call *are practices which are unjust or unreasonable under Section 201(b) of the Communications Act.*[11/]

[8/] *See* Petitioners' Reply Comments at 2-4. Section 332(c)(3) prohibits state and local authorities from regulating the rates charged for CMRS. 47 U.S.C. § 332(c)(3).

[9/] Indeed, Petitioners entitle their second argument, "State Law Causes of Action for Rounding-Up Billing Practices Are Not Preempted by § 332(c)(3) of the Communications Act." Petition at 7. Petitioners' argument that federal statutes do not preempt state law unless they occupy the entire field of regulation is inapposite where, as here, a specific statutory provision preempts states from exercising regulatory authority in a particular area.

[10/] *In the Matter of Wireless Consumers Alliance, Inc.*, 2000 FCC LEXIS 4287 (Aug. 3, 2000) ("*WCA*"). Although Petitioners brought suit in Federal court, section 332(c)(3)'s preemptive effect applies equally to federal courts standing in the shoes of state courts. *See, e.g., Promisel v. First Amer. Artificial Flowers*, 943 F.2d 251, 257 (2d Cir. 1991).

[11/] Petition at 4 (emphasis added).

Despite Petitioners' effort to disguise their complaint as a challenge to GTE's "practices,"[12/] in fact the relief they seek would force GTE to revise rate structures and quite possibly rate levels.[13/] The Commission has unequivocally held that the term "rates charged" in that provision "may include both rate levels *and rate structures* for CMRS" and "states are precluded from regulating either of these."[14/]

While Petitioners claim that their challenge falls within section 332(c)(3)'s exemption reserving states the authority to regulate "other terms and conditions" of CMRS, the Commission stressed in *WCA* that "it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332."[15/] In this case, the entire essence of Petitioners' claim and the relief Petitioners seek is rate relief. As the Commission has recognized, challenges to the manner in which telephone bills are calculated are equivalent to challenges to rates, since "a 'rate' has no significance without the element of service for which it applies"[16/] and rates "have meaning only when one knows the services to which they are attached."[17/] Thus, "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*

[12/] *See, e.g.,* Petition at 3 ("Petitioners allege that GTE's practice of charging for all airtime on a "rounded up" basis is unjust and unreasonable and therefore unlawful, under the provisions of [section 201(b)]"); *id.* at 4 (asserting that the Act "permits a claim for damages for the reasonableness of a particular business practice, such as the practice of rounding up").

[13/] *See* Complaint at 9 ¶ 44 (seeking the Court to "enter an Order permanently enjoining and restraining GTE from Rounding Up").

[14/] *Southwestern Bell* at 19907 ¶ 20.

[15/] *WCA* ¶ 28.

[16/] *Southwestern Bell* at 19906 ¶ 19.

[17/] *Id.*, quoting *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998).

CMRS services provided can be subject to charges by CMRS providers."[18] This is precisely what Petitioners demand, contrary to section 332(c)(3).

Congress preempted state rate regulation of CMRS "to foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[19] The Commission has consistently found no basis for state rate regulation of CMRS.[20] If Petitioners' claims were permissible under section 332, however, Congress and the Commission's goal of a uniform regulatory structure for CMRS would be frustrated by judicial ratemaking that varied from state to state and even within a single state. Such a result cannot be squared with the language and intent of section 332.

Against the backdrop of established case law and Commission decisions, Petitioners' challenge is clearly to GTE's rates. Because Petitioners seek to use state law to effect this challenge, their claims are preempted by federal law.

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[18] *Id.* at 19907 ¶ 20 (emphasis added).

[19] H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993).

[20] *See, e.g.*, Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut,* 10 FCC Rcd. 7025, 7031-32 (1995), *aff'd sub nom. Connecticut DPUC v. FCC,* 78 F.3d 842 (2d Cir. 1996); Report and Order, *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, 7499 (1995).

CONCLUSION

For the above reasons, the Commission should find that GTE's billing practice of rounding up satisfies the requirements of the Communications Act, and that state regulation of "rounding up" billing constitutes rate regulation in violation of section 332(c)(3) of the Act.

Respectfully submitted,

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October 20, 2000

CERTIFICATE OF SERVICE

I, Kathleen M. Birch, hereby certify that on this 20th day of October, 2000, I caused true and correct copies of the "Comments of Cellular Telecommunications Industry Association On Petition For Declaratory Ruling in White vs. GTE Corporation" to be served via first class mail, postage prepaid, or hand delivered (*), on the following:

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