

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the matter of

Petition for Declaratory Ruling on
the issues in Count I of:

White, Krantias, et.al.

v.

GTE Corporation, et. al

WT DOCKET NO. 00-164

REPLY COMMENTS OF THE WIRELESS CONSUMERS ALLIANCE, INC.

Under section 207 of the Communications Act, a person claiming to be damaged by a common carrier may make a complaint to this Commission, or may bring suit for the recovery of damages in any U.S. District Court, but may not pursue both remedies. The petitioners filed suit in United States District Court in Tampa, Florida against GTE for damages claiming, in Count I of the complaint, that GTE's billing practices violated section 201(b) of the Act.¹ Specifically, petitioners say that GTE's process of charging for CMRS service from the moment the "send" button is pushed to the next full minute after the "end" button is pushed, without regard to whether or not the call is answered or connected, are unjust and unreasonable billing practices.

The court referred this question to the Commission under the doctrine of primary jurisdiction and stayed its proceedings pending a Commission decision. The Commission issued a focused public notice asking for comments "on whether the following practices

¹ Section 201(b) of the Act provides: "All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . ."

are unjust and unreasonable . . .: (1) charging customers for 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) the practice of rounding up any of the foregoing types of charges to the next minute.”²

Comments were filed by two consumers and eight CMRS parties. Most of the comments from the CMRS parties ignore the call of the question

The Commission has not decided that the billing practices in question are reasonable.

The CMRS providers claim that this issue was laid to rest in the *Southwestern Bell Mobile Systems Order*.³ This is simply not true. Southwestern distinguished between “calls” and “call initiation” in its petition. Call initiation was described by Southwestern as “pressing the ‘SEND’ button, to either place an outgoing call or accept an incoming call.”⁴ In the *SWB Order*, the Commission said “we do not reach any conclusion with regard to Southwestern’s request to the extent that it relates to a carrier’s charging for incoming calls as part of call initiation.”⁵

With regard to the practice of rounding up charges for calls themselves, the Commission was asked by Southwestern to declare that charging for completed CMRS *calls* in whole-minute increments is not unjust or unreasonable.⁶ In reaching its conclusions in the *SWB Order*, the Commission noted that “[I]nterexchange telephone

² DA 00-2083, September 20, 2000. (“Public Notice”).

³ *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling, Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19904 (1999). (“*SWB Order*”).

⁴ See paragraph 12 of the petition.

⁵ At § 17.

⁶ See Section II of the SWB petition starting at page 6.

services historically have been billed on a rounded-up, whole minute basis” and this is a common billing practice in the CMRS industry as well.⁷

The analogy to interexchange telephone service as providing a basis for the understanding and expectation of consumers to determine whether or not billing practices are unreasonable is instructive and appropriate here because interexchange carriers **do not** charge their customers for: (1) for dead time; (2) for unanswered or unconnected calls; or, (3) from the moment that the customer goes off hook. Thus, it cannot be said that consumers have a reasonable expectation, based on their wireline telephone experience, that such charges will be made. In fact, they have just the opposite understanding.⁸

Preemption is not an issue

The CMRS parties attempt to ensnare the Commission into a discussion of preemption of state laws under the guise that it is an issue in this proceeding.⁹ It is not. The *White* District Court found that the state laws which form the basis for the state law claims in Count II, et. seq. are not preempted by the Act and that issue is not before the Commission. The Petitioner expressly states that the “instant petition specifically limits the requested declaratory finding to the issues contained in Count I,” the 201(b) claim.¹⁰ Finally, the Public Notice does not call for a discussion of preemption. Thus, the

⁷ Section 14.

⁸ See comments from consumer Donald. “Consumers expect wireless billing practices to be similar to those of the wireline industry. When consumers compare the offering of various carriers they probably expect each to measure calls in the same, rational way they know from the wireline industry. When one carrier chooses to charge differently, and does not fully, clearly and completely disclose this fact, confusion is created in the consumer’s mind. It is the exploitation of this confusion that I feel is unjust and unreasonable, and not the billing practices, themselves.”

⁹ AT&T Wireless, p. 2; Alloy, p. 6; CTIA, p. 5; Sprint, p. 10; and U.S. Cellular, p. 1.

¹⁰ Reply of Petitioners to opposition of GTE, p. 5.

erreoneous and nugatory preemption arguments that some of the CMRS parties have made in this proceeding should be disregarded.

The court's use of the doctrine of primary jurisdiction was appropriate

AT&T argues that the Commission has given enough guidance to the courts and should decline to decide the reasonableness of the billing practice in this matter.¹¹

Pushing the envelope of absurdity even further, Sprint argues that “as a matter of law, rate structures set by competitive carriers .. cannot be unreasonable under section 201(b) of the Communications Act.”¹² Under Sprint’s rationale the Commission should advise the court that 201(b) has been revoked by Section 332(c). Both of these contentions are inane.

The state law claims of fraudulent misrepresentation are matters for determination by the court without regard to whether or not the billing practice is found to be reasonable.¹³ Count I of the complaint alleges that GTE’s billing practice “is unjust and unreasonable” under 201(b) of the Act and that precise issue is squarely and properly before the Commission

The justness and reasonableness of GTE’s billing practice depends on the reasonable expectations of consumers.

The CMRS parties argue that charging for the time elapsed from send to end, and then rounding up that time, is reasonable because their airtime and system resources are

¹¹ AT&T Wireless, p. 5 – 6. Interestingly, on October 18, 2000, AB Cellular Holding, LLC, d/b/a AT&T Wireless Services told the California Court of Appeal in the *Spielholz* matter that “[w]hile courts may, in appropriate circumstances, look to administrative decisions for guidance, the Court should not afford undue weight to the FCC’s decision in *Wireless Consumers Alliance*. As discussed above, the decision is not final.” *Opposition to Petition for Writ of Mandate*, p. 12. The decision is final and the well known, oft cited rule with regard to deference to the FCC’s decisions is set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) which instructs the courts to afford substantial deference to the FCC’s interpretation of the language of the Communications Act.

¹² Sprint, II, p. 3.

used without regard to whether or not the calling party is connected to the called party. The same is true for interexchange carriers whose system and plant is used when a call is not connected. Allocation of the cost of plant as a basis for determining the fairness of rates is a vestige of the prior regulatory scheme and need not be considered here. The problem with the GTE billing practices herein is that the reasonable expectations of consumers, based on their wireline telephone experience, is that they will not be charged for dead time, not connected or not answered calls – much less charged a rounded up amount for these non-call items.¹⁴ Thus, it is unjust and unreasonable to exploit consumers who have this expectation by not telling them that the CMRS rate which includes “___ hours of talk time” does not mean talking time.

STPCS argues that “lawfulness is determined through an examination of the totality of the circumstances.”¹⁵ That if the customer was informed “when the subscriber relationship was established” of the billing practice it is “not unjust or unreasonable.”¹⁶ We agree. The converse of this proposition is that such billing practices violate section 201(b) of the Act *if the customer was not so informed*. We also agree with Excel when it says “any unreasonableness of the implementation of rates in any particular case should be left to resolution under state contractual or consumer fraud laws.”¹⁷ This would leave the courts to determine whether or not CMRS customers were adequately informed.

¹³ CTIA goes off on a flight of fancy to argue that petitioners have not proved GTE’s misrepresentation. Comment, p. 4.

¹⁴ Consumer Malcom Waring asks that if reasonableness is dependent upon use of the CMRS system then how can rounding up be reasonable? Under the regulated rate paradigm the cost of providing service was relevant – today it is not.

¹⁵ Comments, p. 8 – 9.

¹⁶ *Id.*, p. 9.

¹⁷ Comments of Excel Communications, p. 4.

Conclusion

The Commission should find that the billing practices described in the Public Notice are unreasonable *per se*. However, the Commission should also find that such billing practices may become lawful if full and fair disclosure was made to the customer prior to signing the CMRS subscription agreement. We would leave it to the courts to decide the individual factual questions of whether or not there was full and fair disclosure to the CMRS customer.

Very Respectfully submitted,

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