

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

In the matter of)
)
Petition for Declaratory Ruling on)
Issues Contained In Count I of:)
)
IN THE UNITED STATES DISTRICT COURT)
FOR THE MIDDLE DISTRICT OF FLORIDA)
TAMPA DIVISION)
Case No. 97-1859-CIV-T-26C)
)
JAMES J. WHITE, PERRY KRANIAS,)
RALPH DELUISE and WALL STREET)
CONNECTIONS, INC.)
)
Representative Plaintiffs,)
)
vs.)
)
GTE CORPORATION, et. al.)
)
Defendants.)
)
CLASS ACTION COMPLAINT)

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PETITIONERS' REPLY TO COMMENTS

This proceeding began when Judge Lazzara of the United States District Court for the Middle District of Florida referred Count I of the subject class action complaint (hereinafter referred to as the "White Action" or "White Complaint") to the Federal Communications Commission (hereinafter referred to as the "FCC" or "Commission") under the doctrine of primary jurisdiction. Count I of the White Complaint seeks relief from GTE for unjust and unreasonable billing practices under the Federal Communications Act, 47 U.S.C. § 201(b).

- I. COMMENTORS MISCHARACTERIZE THE CLAIM OF PETITIONERS AS A RATE ISSUE TO MISLEAD THE COMMISSION FROM THE REAL ISSUE OF GTE'S UNJUST AND UNREASONABLE CONTRACT PRACTICES.

In requesting the Commission to issue a declaratory ruling that GTE's practices of 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 by “rounding up” all time charges, constitute unjust and unreasonable billing practices in violation of 47 U.S.C. §201(b), the Petitioners specifically stated:

Th[e] practice of “rounding-up” is not adequately, fully, and conspicuously disclosed to any GTE cellular customer in contracts (customer service agreements), monthly billing statements, advertising and marketing materials, brochures, or any points of sale.

.....

[T]he Petitioners allege the GTE has failed to abide by the terms of its contracts, which it drafted, and in failing to do so, violated Florida’s consumer protection statute, as well as the Communications Act, **because its past and continuing breach of the contracts is unjust.** As to Count I of the Complaint, all that has to be decided by the FCC is whether GTE’s admitted conduct of rounding up the time of each call to the next whole minute and charging for that whole minute: (1) breached the unambiguous Contract, drafted by GTE, **because such charges were not permitted by, and were in conflict with, the terms of said Contract;** and (2) were “unjust” practices, in violation of § 201(b) of the Communications Act, **because (i) such charges were not permitted by, and were in conflict with, the terms of the Contract, (ii) such charges result in the consumer paying for phantom services not received, and (iii) such charges result in unjust and arbitrary billing to the consumer (charging the same price for calls of different length is unreasonable)** . . .The Petitioners’ Class Action suit challenges GTE’s contract practices, not GTE’s rates.

.....

The questions of law and fact in the GTE class action lawsuit are [with respect to Count I]:

- (e) Whether Defendants violated 47 U.S.C. Sect. 201(b) by deceptively promoting, contracting, and billing Petitioners and class members for cellular service by rounding up calls to the next higher minute. . .

The above excerpts of the Petition clearly and unmistakably identify the issue before the Commission as the reasonableness of GTE’s contract and billing practices, not rates. Yet, the

commentors insist on characterizing the issue as one of rate setting, which for one purported legal reason or another, is not in the purview of the Court or the Commission. The Petitioners respectfully request that the Commission not fall prey to this tired high school debating tactic of purposefully changing or modifying the issue presented, then attacking the modified issue as being meritless. To illustrate the attempts of the commentors to change the issue from the reasonableness of GTE's contract and billing practices to one of rates, the following (untrue) Comment excerpts are presented:

“Plaintiffs. . .requested that the court judicially regulate the method of calculation of *rates* and the *rates* charged by the defendant CMRS providers. . .” (Comments of Verizon Wireless). (Emphasis added).

.....

“[Plaintiffs/Petitioners] attack the calculation of GTE's *rates*. . .” (Comments of U.S. Cellular Corporation). (Emphasis added).

.....

“In this case, the entire essence of Petitioners' claim and the relief Petitioners seek is *rate* relief.” (Comments of Cellular Telecommunications Industry Association). (Emphasis added).

.....

“The Issue Before The Commission is the Reasonableness of Certain *Ratemaking* Practices.” “...[T]he only issue properly presented for the Commission's consideration under Count I of the Complaint is the reasonableness of CMRS *ratemaking* practices...” (Comments of Excel Communications). (Emphasis added).

.....

“This statute and this Commission ruling dispose of the *rate* structure claims that the White plaintiffs/petitioners advance.” (Comments of Sprint PCS). (Emphasis added).

It is abundantly clear that the commentors need the Commission to concentrate on the issue of rates rather than unjust and unreasonable contract practices because they perceive the rate issue as

favorable to them. However, because much of their argument is based upon an issue not presented to the Commission, the Commission should afford commentors' rate arguments little to no weight.

II. COMMENTORS IGNORE THE IMPACT OF THE WCA RULING AND MISCHARACTERIZE THE SCOPE OF THE SBMS ORDER, AND CONSEQUENTLY, THE "MARKET FORCES" ARGUMENT IS MERITLESS.

Conspicuously absent from many of the comments is a discussion of the impact of the Order of this Commission in the Matter of Wireless Consumers Alliance, Inc., WT Docket No. 99-263. The Wireless Consumer Alliance, Inc. (hereinafter referred to as "WCA") had petitioned the Commission for a declaratory ruling concerning whether the provisions of the Communications Act or the jurisdiction of the Commission thereunder, serve to preempt state courts from awarding monetary relief against 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. The WCA petition concerns and involves the same issues presented in the White Action. The Commission's ruling thereon was generally favorable to consumers -- hence, it is quite understandable how the commentors would choose to ignore or de-emphasize this ruling. In the WCA Order, the Commission stated, "We hold that Section 332 does not generally preempt the award of monetary damages by state courts based on **state consumer protection, tort, or contract claims.**" WCA Order at 2. (Emphasis supplied).

Perhaps more importantly, the Commission held:

[W]e find that the filed rate doctrine is inapposite because there are no filed rates or tariffs for CMRS services. We also conclude that, because the purposes behind the filed rate doctrine do not apply to CMRS services, the analysis and logic of the filed rate cases regarding **the issue of whether awarding monetary damages is tantamount to ratemaking are inapplicable.** . . ." (Emphasis added).

WCA Order at 6.

The Commission further held:

[W]e reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. A carrier may charge whatever price it wishes and provide a 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.** We thus do not agree with those commentators who allege that, for consumer protection claims, any damage award or damage calculation, including and refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

WCA Order at 16-17 (Emphasis added).

Finally, our conclusions regarding the scope of Section 332 are not effected by the availability. . .of remedies under Sections 207 and 208 of the Communications Act. Under the statutory scheme, **CMRS providers remain obligated to comply with Sections 201 and 202 of the Act.** These alternate avenues of relief supplement rather than replace claims under state law, particularly those common law claims for fraudulent or tortious behavior.

WCA Order at 19-20 (Emphasis added). Consequently, Plaintiffs/Petitioners’ claim under Section 201(b) of the Act is maintainable, and the Commission should remand Count I of the White Action to the district court.

The Petitioners wish to point out that the WCA Order was entered after the SBMS Order. In fact, the Commission considered (the industry’s heavily relied upon) SBMS Order in arriving at the holdings and conclusions set forth above: “[I]n light of both the WCA Petition and the SBMS Petition, we can and should address the legal question of whether Section 332 of the Federal Communications Act generally preempts state courts from awarding monetary relief as a remedy for state consumer protection, tort or contract claims.” WCA Order at 6.

It is particularly noteworthy that the Commentors concertedly de-emphasized the portions of the SBMS Order which are unfavorable to them. In particular, most commentors improperly mischaracterized the Commission's holding regarding billing in whole-minute increments. Some did not make a distinction between whole-minute increments and next-minute increments. Some commentors inferred that billing in rounded-up, whole-minute increments is permissible in all circumstances. For example, Verizon Wireless stated, "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)' . . . [T]he 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." Comment of Verizon Wireless at 6-7. The Commission did not so hold in the SBMS matter. Rather, the Commission held that such a practice was not unjust or unreasonable *per se*. Again, the CMRS providers wish the Commission to focus on the rates and the whole minute billing practice itself, rather than the conduct of certain CMRS providers that violate state consumer protection laws. It is this conduct when coupled with next-minute billing that may make it unlawful.

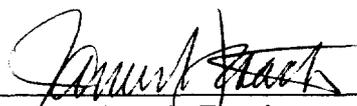
The Petitioners generally do not deny that the market should control pricing and quality of service. However, consumer protection laws exist to prohibit deceptive, unfair, unjust and/or unreasonable practices from influencing the market. Similarly, Section 201(b) is designed to prohibit deceptive, unfair, unjust and/or unreasonable practices from influencing the market. Consequently, the commentors' argument that competition is preferred to regulation (by the courts or the Commission) in all matters concerning pricing and quality of CMRS service is meritless.

III. COUNT I OF THE WHITE ACTION IS NOT A BREACH OF CONTRACT CLAIM, BUT SEEKS RELIEF FOR UNJUST AND UNREASONABLE CONTRACT PRACTICES UNDER SECTION 201(b) OF THE COMMUNICATIONS ACT.

Several commentors have indicated that because the Plaintiffs have claimed that the conduct and billing practice of the GTE defendants are inconsistent with the contract, the claim is simply for breach of contract, and does not expose CMRS carriers to liability under Section 201(b) of the Act. These commentors ignore the allegations of the White Complaint, which clearly focus on the defendants' conduct that violated Florida's consumer protection statute, as well as the Communications Act, i.e., that their past and continuing breach of the contracts is unjust.

WHEREFORE, the Petitioners respectfully request the Federal Communications Commission (FCC) to remand Count I of the White Action to the United States District Court for the Middle District of Florida, so that the Court may try the issues contained therein, and for all further relief that is consistent with the Petition.

Respectfully submitted,



James A. Staack, Esquire
STAACK, SIMMS & HERNANDEZ, P.A.
Trial Counsel for Petitioners/Representative Plaintiffs
121 N. Osceola Avenue, Second Floor
Clearwater, FL 33755
Ph: (727) 441-2635
Fax: (727) 461-4836
Fla. Bar No. 296937

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail, to the following parties, on this 30 day of November, 2000:

Howard J. Symons
Ghita Harris-Newton
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Douglas I. Brandon
President, External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue NW
Washington, DC 20036

Magalie R. Salas
Office of the Secretary
Federal Communications Commission
445 - 12th Street, SW, Room TW A325
Washington, DC 20554

Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C252
Washington, DC 20554

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C252
Washington, DC 20554

Balise Scinto
Deputy Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C124
Washington, DC 20554

Susan Kimmel
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C124
Washington, DC 20554

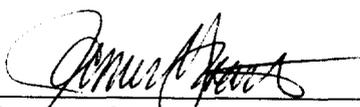
Andre J. Lachance
GTE Service Corporation
1850 M Street NW
Washington, DC 20036

Frederick M. Joyce
Alston & Bird LLP
601 Pennsylvania Avenue, NW
North Building, 11th Floor
Washington, DC 20004-2601

Peter Kontio, Esquire
William H. Jordan, Esquire
ALSTON & BIRD LLP
One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3424

Office of Media Relations
Public Reference Center
445 Twelfth Street, SW
Suite CY-A257
Washington, DC 20554

International Transcription Service, Inc.
1231 - 20th Street, NW
Washington, DC 20036


James A. Staack, Esquire