

SECTION 3 - DESCRIPTION OF SERVICE (Continued)

3.4 Time Periods and Service Charges (Continued)

3.4.7 Monthly Minimum Charge

A Monthly Minimum Charge of \$3 will be assessed to new and existing Customers when Customer's actual monthly charges do not meet or exceed the specified amount. The Monthly Minimum Charge applies to both residential and business customers presubscribed to Carrier. If Customer's actual monthly charges do not equal to or exceed the Monthly Minimum Charge, the difference between the Monthly Minimum Charge and the actual monthly charges will be assessed on the Customer's main billed account. For example, if Customer incurs \$2.45 in monthly charges, the account will be assessed a \$.55 charge.

The Monthly Minimum Charge does not apply when the Customer's actual monthly charges equal to or exceed the Monthly Minimum Charge, or for Customers subscribing to affiliate interexchange carriers with whom Carrier has a joint marketing agreement.

All intrastate, interstate, and international charges, Carrier free minutes and discounts, MRCs, NRCs, operator handled calls, directory assistance, toll free calls, or calling card calls will contribute toward meeting the Monthly Minimum Charge.

Taxes and charges assessed by local, state or federal organizations are not included in the Monthly Minimum Charge calculations. Carrier's Anniversary Bonus and Loyalty credits are also excluded from the calculations.

For new Customers, the charge will be applied during the first full billing cycle. If a Customer disconnects service prior to the completion of the current billing cycle and the Monthly Minimum Charge was not met, the Monthly Minimum Charge will be assessed as described above.

The Monthly Minimum Charge for residential Customers is \$3.00. The Monthly Minimum Charge for business Customers is \$3.

(Issued under Transmittal No. 58)

Issued: June 22, 1990

Effective: June 28, 1990

SECTION 3 - DESCRIPTION OF SERVICE (Continued)

3.6 Service Offerings (Continued)

3.5.16 Switched Data Service (SDS)

Permits the transmission of data over the public switched network on a dial-up basis, in increments of 56 or 64 Kbps. subject to availability of necessary facilities, service can be originated in the continental U.S., and can be terminated in the continental U.S.

Provision of SDS requires local access and transport elements. A variety of options is available for local access, including ISDN-BRI (Basic Rate Interface), ISDN-PRI (Primary Rate Interface), or Switched 56 access. ISDN-BRI type access may be provided by Carrier where available, or Customer may arrange for ISDN-BRI with another local service provider. ISDN-PRI and Switched 56 type access may be obtained by Customer from another local service provider.

3.5.17 Primary Carrier Charge (PCC)

A monthly recurring charge which applies to business and residential services offered under this Tariff. Single-line residential customers will be charged \$1.51 per line per month; single-line business customers will be charged \$1.51 per line per month; multi-line business customers will be charged \$1.51 per line per month; Centrex customers will be charged \$1.51 per line per month; ISDN BRI customers will be charged \$1.51 per line per month; ISDN PRI customers will be charged \$1.51 per line per month. Multi-line residential customers subscribing to Service Combination Packages will be charged \$1.04 per line per month; single-line business customers subscribing to Service Combination Packages will be charged \$1.04 per line per month; multi-line business customers subscribing to Service Combination Packages will be charged \$4.31 per line per month; Centrex customers subscribing to Service Combination Packages will be charged \$4.47 per line per month; ISDN BRI customers subscribing to Service Combination Packages will be charged \$2.53 per line per month; ISDN PRI customers subscribing to Service Combination Packages will be charged \$21.55 per line per month.

The line determination is based on available GTEOC and/or LEC-provided information.

3.5.18 GTE One Easy Price

This plan is no longer available to new customers.

- A. This plan offers residential customers a flat rate for all direct dial calls. This plan is available to all existing and new customers. Rates are found in Section 4.18.
- B. Restrictions/Conditions: Directory assistance, operator handled, calling card and toll free calls are excluded from this offer. Customer cannot enroll in any other calling plan in conjunction with this plan.

(Issued under Transmittal No. 59)

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FACTSHEET

Presubscribed Interexchange Carrier Charge

What is the Presubscribed Interexchange Carrier Charge?

The Presubscribed Interexchange Carrier Charge is a charge that long distance companies pay to local telephone companies to help them recover the costs of providing the "local loop." Local loop is a term that refers to the outside telephone wires, underground conduit, telephone poles, and other facilities that link each telephone customer to the telephone network.

The monthly service fee that consumers pay for local telephone service is not enough to cover all of the costs of the local loop. Historically, the local telephone companies have recovered the shortfall through per-minute charges to long distance companies. Now, however, part of these costs are recovered through flat-rated charges to long distance companies, who use the local networks to complete their long distance calls. Because the costs of the local loop do not depend on usage, this flat-rated charge better reflects the local telephone company's costs of providing service.

A long distance company pays this charge for each residential and business telephone line presubscribed to that long distance company. If a consumer or business has not selected a long distance company for its telephone lines, the local telephone company may bill the consumer or business for the Presubscribed Interexchange Carrier Charge.

Has the PICC Increased?

Yes. As of July 1, 1999, the Presubscribed Interexchange Carrier Charge went up - but the per minute charge long distance companies pay to local companies for each call made by their customers was reduced by an even greater amount. Consumers should therefore expect to continue to see reductions in the per-minute rates they pay for long distance calls.

What is the maximum PICC for residential telephone lines and single-line business lines?

As of July 1, 1999, the maximum Presubscribed Interexchange Carrier Charge paid by the long distance companies for primary residential lines and single-line business lines is \$1.04 per line per month. For non-primary residential lines, the maximum Presubscribed Interexchange Carrier Charge paid by the long distance companies will be \$2.53 per line per month. (Local telephone companies treat a line as non-primary when it serves the same address as the primary line, even if the bill is in a different name at the same address.)

It is important to remember that these amounts represent **maximum** Presubscribed Interexchange Carrier Charge levels. The actual Presubscribed Interexchange Carrier Charge paid by the long distance companies may vary, based on the actual cost of providing local phone service in each area, and may be less than this maximum amount.

What is the maximum Presubscribed Inter-exchange Carrier Charge paid by long distance companies for multi-line business lines?

As of July 1, 1999,, the maximum Presubscribed Interexchange Carrier Charge paid by the long distance companies for each multi-line business line is **\$4.31**. Like the residential Presubscribed Interexchange Carrier Charge, this is a maximum; the actual charge may be less than this maximum amount.

Each year, the maximum multi-line business Presubscribed Interexchange Carrier Charge will increase by \$1.50, as adjusted by inflation. However, as various phases of the FCC's plan are implemented, it is estimated that the **average** Presubscribed Interexchange Carrier Charge for multi-line business lines will dip below \$1.00 in 2001 and, in most places will eventually be zero.

Did the FCC require long distance companies to bill consumers for Presubscribed Interexchange Carrier Charges?

No. The FCC does not require long distance companies to put the Presubscribed Interexchange Carrier Charge -- or any other charges or surcharges -- on your telephone bill.

Because the long distance market is competitive, the FCC does not directly regulate long distance company charges for service. As a result of this flexibility, long distance companies are taking very different approaches to whether and how they are changing charges to their customers to reflect the Presubscribed Interexchange Carrier Charges they pay. Some long distance companies may not charge any separate fees related to the Presubscribed Interexchange Carrier Charge. Others have added charges to their customers' bills -- such as a "national access fee" -- to recover the Presubscribed Interexchange Carrier Charges they pay to local telephone companies.

The maximum Presubscribed Interexchange Carrier Charge long distance companies pay to local telephone companies is generally lower for primary residential lines than it is for non-primary residential lines. Many long distance companies, however, are charging all of their residential customers the same rate. Other long distance companies are charging monthly fees that match the Presubscribed Interexchange Carrier Charge they pay to the local companies.

Increases in per-line and other charges paid by the long distance companies, such as the Presubscribed Interexchange Carrier Charge, have been offset by reductions in per-minute charges paid by the long distance companies to local telephone companies.

If I don't have a long distance company, do I have to pay the fees?

A long distance company pays the local phone company a Presubscribed Interexchange Carrier Charge for each residential and business telephone line presubscribed to that long distance company. If a consumer or business has not selected a long distance company for its telephone line, the local telephone company may bill the consumer or business for the Presubscribed Interexchange Carrier Charge. ("see **Tips for Lowering Your Long Distance Bill Fact Sheet**)

It is important to remember that:

- The long distance companies' interstate access charge payments did not increase. Their Presubscribed Interexchange Carrier Charge payments, and payments they make to ensure that all Americans have affordable access to telephone services, are largely offset by reductions in the amount of per-minute charges the companies pay for each call made by their customers.
- Because there is competition for long distance service, the FCC does not regulate how long distance companies compute their charges or the amount of those charges. The FCC did not tell the long distance companies how to adjust their customers' rates in response to changes to access charges, including the companies' new Presubscribed Interexchange Carrier Charge payments. The long distance companies have decided what to do, and some have implemented charges significantly different from other companies.

Federal Communications Commission Consumer News Alert

Federal Subscriber Line Charge

What is the "federal subscriber line charge" you see on your phone bill?

Local phone companies recover some of the costs of telephone lines connected to your home or business through a monthly charge on your local telephone bill. This charge is usually called the "subscriber line charge." It is sometimes called the "federal subscriber line charge" because it is regulated and capped - by the FCC and not by state public utilities commissions. Although this is sometimes termed a "federal subscriber line charge" this is not a charge by the government. The government receives no money from this charge. *It is not a tax.*

WHY ... the price cap / Increase?

To ensure that all Americans can afford at least a minimal level of basic telephone service, the FCC capped the subscriber line charge for primary residential lines at \$3.50 per month. Under the FCC's access reform plan, the monthly \$3.50 maximum subscriber line charge for primary residential lines will not increase. This cap was set at a time when the vast majority of homes had only one telephone line. The maximum \$3.50 subscriber line charge consumers pay for residential telephone lines does not cover the local telephone companies' average local loop costs for those lines and is a subsidized rate. With the increased use of the Internet and other data services, the number of secondary lines to homes is increasing.

As part of its access charge reform effort, the FCC reduced the subsidies for residential customers by increasing the cap on the subscriber line charge on these lines.

In 1998, the FCC increased the maximum amount that phone companies could charge for additional lines to \$5.00 per line per month.

Starting January 1, 1999, the maximum amount the FCC allows phone companies to charge for additional lines went from \$5.00 to \$6.07. Again, if the telephone company's average interstate costs of providing the line are less than \$6.07 per month, the company can only charge the consumer the amount of its costs.

WHAT ... are primary and secondary lines?

The second and any additional telephone lines connecting consumers' residential telephone service to the telephone network are called "non-primary" lines. Each local telephone company, at present, sets its own definition of what constitutes a primary and non-primary line, subject to FCC review. Some companies changed their definition of primary line effective January 1, 1999. Most local telephone companies are now using a service location (address) definition, meaning that any additional line billed to the same address is considered a second or additional line, subject to the higher subscriber line charge, even if the bill is in a different name at the same address. Effective July 1, 1999, the FCC's rules will require all local telephone companies to use this definition.

For information on other telephone-related issue, visit the FCC's website at: <http://www.fcc.gov>

For information about how to file a complaint about a telephone company, visit the FCC's Enforcement Website at: <http://www.fcc.gov/ccb/enforce/>

WHO ... is affected?

Telephone customers with more than one phone line will see the affects of the price cap increase. The **FCC's** access reform plan reduces, and in many cases eliminates, subsidies for consumers who have more than one residential telephone line. It does not impose a tax on those additional lines.

The access reform plan reduces subsidies for non-primary residential telephone lines and shifts the method by which local telephone companies recover the costs of providing local loops. This is part of an overall plan to substantially reduce per-minute long distance phone rates. Many consumers with more than one residential telephone line will be better off under the new system -- especially those who make a substantial amount of long distance calls.

The FCC decided to allow the local telephone companies to raise the flat fee on non-primary residential telephone lines **so** that those lines are no longer subsidized, or at least receive less subsidy. The increase in permitted charges for non-primary telephone lines is intended to help ensure that consumers pay for the cost of the facilities they use.

HOW ... are long distance calls affected?

The federal subscriber line charge has nothing to **do** with the number or type *of* calls a customer places or receives. It is not a charge for making or receiving long distance calls. **All** local telephone networks can be used for making and receiving local and long distance calls.

WHAT ... is the maximum fee for business customers?

The maximum subscriber line charge for single-line business customers will remain capped at a maximum charge of \$3.50 per line per month.

The maximum subscriber line charge for multi-line business customers is the local company's average interstate cost of providing a line in that state or \$9.21 per line per month, whichever is lower. The current average subscriber line charge for multi-line business lines is \$7.17 per line per month.

Federal Communications Commission
Public Service Division
Mail Stop 1160A2
Washington, DC 20554

IDENTIFICATION OF TARIFFED CHARGES ON PLAINTIFF'S TELEPHONE BILLS

Carrier and Tariff	Subscriber Line Charge	Common Carrier Line Charge	Presubscribed Interexchange Carrier Charge	Monthly Minimum Charge	Other
GTE Florida FCC Tariff No. 1 (Exh. 1), filed by GTE Telephone Operating Companies on behalf of GTE Florida	Section 13.11 — Establishes \$3.50 per month charge for primary residence line and \$6.07 charge per month for non-primary residence line.	Section 12.2.1 and 13.11 — Establishes rate to be charged on a per-minute basis for calls made to long distance network.	Section 12.4.5(A) and (B) — Establishes \$2.53 PICC for non-primary residence line	Not applicable	
AT&T FCC Tariff No. 27 (Exh. 2)	Not applicable	Sections 3.5.12 and 24.1.18 — Per-minute charge replaced by fixed monthly charge per line	Section 3.5.12 and 24.1.18 — Fixed rate charge called "Carrier Line Charge"	Sections 4.1.1 and 24.1.1.U	"Universal Connectivity" charge set forth in Sections 3.5.12.B and 24.1.18.8.
GTE Communications Corporation ("GTECC") FCC Tariff No. 1 (Exh. 3)	Not applicable	Not applicable	Section 3.5.17 — Fixed monthly charge of \$1.51, called "FCC Primary Carrier Charge"	Section 3.4.7 — Sets monthly minimum charge of \$3.00 per access line, effective June 28, 1999	STECC is not a defendant here, but Plaintiff's bills indicate that she chose this entity as her Presubscribed interexchange Carrier in March 1999

EXHIBIT "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



LINDA THORPE,

Plaintiff,

Case No.: 8:00-CV-1231-T-17C

vs.

GTE CORPORATION, GTE FLORIDA
INCORPORATED, AT&T CORP.,
SPRINT-FLORIDA, INCORPORATED,
and MCI WORLDCOM NETWORK
SERVICES, INC.,

Defendants.

**RESPONSE TO GTE FLORIDA INCORPORATED AND
AT&T CORP.'S DISPOSITIVE MOTION TO DISMISS**

COMES NOW, Representative Party Plaintiff, LINDA THORPE, on her own behalf and on behalf of all others similarly situated, and files this, her Response to GTE FLORIDA INCORPORATED and AT&T CORP.'s Motion to Dismiss.

I. INTRODUCTION/FACTUAL BACKGROUND

Sometime in 1997 or 1998, at the request of Plaintiff, GTE installed an extra phone line in her home. It was Plaintiff's intention to use the line almost exclusively for an answering machine and not for making telephone calls. Upon the installation of said line, GTE, without discussion or communication of any kind with Plaintiff, arbitrarily assigned AT&T as the Long Distance Service Provider. In or about December of 1998, Plaintiff acquired a computer system and elected to use the subject phone line as a "dedicated line" to be used exclusively over her computer modem for

local computer services. Upon receipt of her January 4, 1999 bill relating to the subject phone line, Plaintiff noted that she had been charged for a long distance phone call. Since she would no longer be needing long distance service over the subject line as it would then be used exclusively for dialing local computer services, Plaintiff phoned GTE and requested that her long distance service be terminated as to the subject line. Representatives and agents of GTE misrepresented to Plaintiff that she was required to have long distance service associated with the subject line, whether or not she had any use **for** it. Sometime in early March of 1999, Plaintiff received her March 4, 1999 phone bill from GTE. Although Plaintiff had used the subject line exclusively for local modem dial-ups, this bill reflected charges from AT&T for long distance services identified as "Carrier Line" and "Universal Connectivity". Once again, Plaintiff phoned GTE to complain that she was being billed for long distance service even though she was not using it and had no use for it. Agents and representatives of GTE, again, misrepresented to Plaintiff that long distance service is required, however, they advised Plaintiff that if she would switch to GTE as her long distance service provider, there would be no minimum monthly service charge such as that charged by AT&T.

Plaintiff elected to switch to GTE as her long distance service provider. GTE acknowledged this change by way of letter dated March 31, 1999. For the four months next ensuing, Plaintiff was not billed for long distance service, however, her September 4, 1999 bill and all subsequent bills reflect a \$3.00 minimum charge for long distance service.

In **or** about April of 1999, Plaintiff arranged with Defendant GTE for computer Internet services over the subject line. All Defendants offer similar "online access" services either directly or through affiliates. All Defendants are fully aware that home computers using phone lines as

modem lines are nearly exclusively used by persons such as Plaintiff utilizing Internet and other services which require a local dial up only and do not require long distance service.

Defendants, Local Service Providers, make no effort to disclose to consumers that it is not necessary to have long distance service for a phone line being used for a computer modem, instead, they routinely and arbitrarily assign such lines to Defendants, Long Distance Providers. Only where a consumer discovers a charge on a monthly bill, contacts Defendants and insists that the long distance service be terminated will Defendants cancel the long distance service, but without refund. Such “negative option” or “default” sales for the said unnecessary and unwanted long distance service are made on an ongoing basis by Defendants. Defendants’ customers who did not affirmatively request to have services discontinued were deemed to have “contracted” for and were charged for the unnecessary and unwanted long distance service in their monthly bills.

In none of these purported “contracts” did Defendants set forth the essential terms, conditions, limitations, and exclusions in such a manner as to form a definite and certain contract offer capable of acceptance. Defendants are fully aware that because they use the deception of a “negative option” or “default” contract for the unnecessary and unwanted long distance service, the customer, statistically, may not realize that he or she is being billed for and is paying for the unnecessary and unwanted long distance service for an extended period of time. Defendants were fully aware that they were charging Plaintiff for the unnecessary and unwanted long distance service although Plaintiff had not requested or contracted for same. As a consequence of Defendants’ conduct, Representative Plaintiff filed the complaint alleging a violation of Florida’s Unfair and Deceptive Trade Practices Act for both injunctive relief and damage (Count I and II of the

Complaint, respectively), for restitution (Count III), for breach of contract (Count IV), and for breach of duty of good faith and fair dealing (Count V). It is clear from the factual allegations contained in the complaint, that at no time does the Plaintiff raise any issues regarding rate-setting or tariffs. Nonetheless, the Defendants GTE FLORIDA INCORPORATED and AT&T CORP, have filed a Dispositive Motion to Dismiss on the basis that the Plaintiffs claims directly challenge its rates and tariffs. By this diversion, they attempt to argue that Plaintiffs claims are pre-empted by the Federal Communications Act (“the Act”). As discussed more fully below, the Act does not pre-empt the type of claims brought by the Plaintiff. In fact, as recently as October of 1999, this Court found that there is no pre-emption by the Act for the relief sought by the Representative Plaintiff (*See* Attachment No. 1: Order dated October 31, 1999, in the matter of *White vs. GTE Corp, et al.*, Case No. 97-1859-CIV-T-26C).

The Defendants also claim that the Federal Communications Commission has primary jurisdiction to determine national telecommunications policy in connection with the provision of and the charges imposed by long distance service companies. Careful review of the Complaint clearly shows the Plaintiff is complaining not of the right of a long distance service provider to provide a fee for long distance services over a phone line, but rather, is complaining of the failure to disclose the imposition of a long distance service charge on a phone line knowing that said line was being used for local calls only. Therefore, it is clear the Plaintiff is not challenging the charge itself, but is challenging the practice of the Defendants in “slamming” a long distance fee when not consented to by the customer, i.e., through a negative option. Therefore, this Court may decide the legal and factual issues presented in the Complaint because it has the ability to adjudicate issues regarding

trade practices, breach of contract and of good faith and fair dealing, and restitution. Adjudication of the issues set forth in the Complaint do not require any particular federal expertise.

II. PLAINTIFF'S CLAIMS ARE NOT PRE-EMPTED BY THE FEDERAL COMMUNICATIONS ACT

Defendants argue that Plaintiffs' claims are preempted by the Federal Communications Act, 47 U.S.C. § 151 et seq., notwithstanding the fact that Defendants in similar suits have previously argued in United States District Courts for the exercise of federal jurisdiction and federal preemption of class actions contending that federal law, specifically the Federal Communications Act, completely preempts state law claims challenging the deceptive practice of common carriers which provide interstate telephone service. In fact, the U.S. District Court for the Northern District of Texas held that "the FCA does not preempt the claims at issue in this case" and that "this action arises solely out of other terms and conditions of commercial mobile service and is not preempted by the FCA." (*See* Attachment No. 2 : Order, Judge Mary Lou Robinson, August 29, 1996). Further, both the plain language and legislative history of the Federal Communications Act clearly indicate that the statute was not intended to prevent the maintenance of this class action. H.R. Report No. **103-111**, 103rd Congress, 1st Session at 261. On the contrary, the statute contains a savings clause which expressly reserves the right to bring this type of action. 47 U.S.C. § 414.

Defendants have argued that the subject billing practice is lawful, just and reasonable, and that there is complete federal preemption of any state law causes of action challenging such deceptive practices. That theory is dead wrong: numerous courts have held that federal law does not preempt claims like the Plaintiffs. In order to be completely preemptive of state law, a federal

statute must do more than simply preempt state law which is inconsistent with the federal statutory scheme; the federal statute must occupy the entire field of regulation. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476,2481,115 L.Ed.2d 532,542-43 (1991). Far from occupying the field of regulation at issue in the present case, the federal statute upon which Defendants rely *expressly preserves* the kind of state law claims which Plaintiff has brought.

The statute in question is the Federal Communications Act. The Communications Act, passed in 1934, was enacted to “make available, as far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio service with adequate facilities at reasonable charges . . .” 47 U.S.C. § 151. To that end, Congress placed common carriers providing interstate telephone service under the jurisdiction of the Federal Communications Commission (the “FCC”) and enacted a comprehensive regulatory scheme governing common carriers. For example, carriers are required to furnish telephone service upon reasonable request. § 201(a). They are also required to file tariffs regarding their rates, to charge reasonable rates, and to avoid unreasonable or discriminatory practices. *Id.* § 201-203. Congress also provided a *general* jurisdictional grant for federal courts to adjudicate controversies arising under the Communications Act:

Any person claiming to be damaged by any common carriers subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Id. § 207.

However, the Communications Act also has a “savings clause”, which provides that “*nothing in this chapter contained 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. (emphasis added). The savings clause thus preserves state law “causes of action for breaches of duties distinguishable from those created under the Act, as in the case of a contract claim” *Comtronics, Inc. v. Puerto Rico Telephone Company*, 553 F.2d 701,708 n.6 (1st Cir. 1977); *accord Am. Inmate Phone System*, 787 F.Supp. 852 at 856 (N.D.Ill. 1992) (explaining that the Communications Act does not preempt a state law contract claim where “the duties created by the verbal contract are distinct from the duties created by the Communications Act”).

Courts, including the United States District Court for the Middle District of Florida (*See* Attachment No. 1: Order dated October 31, 1999, in the matter of *White vs. GTE Corp, et al.*, Case No. 97-1859-CIV-T-26C) have consistently held that the Communications Act does *not* preempt state court claims **for** breaches of independent duties that neither conflict with specific provisions of the Act nor interfere with the Act’s regulatory scheme. *See Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996) (where court remanded consumer case complaining of non-disclosure of “rounding -up” billing practices because it was not an attack on billing rates); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627,633 (6th Cir. 1987) (holding that the Communications Act preserved state law claims for fraud and deceit against a telecommunications carrier); *Bruss Company v. Allnet Communication Services, Inc.*, 606 F. Supp. 401,410-11 (N.D.Ill. 1985) (holding that the Communications Act preserved state common law and statutory fraud claims); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428,493 N.E.2d 1045,1051, 98 Ill. Dec. 24 (Ill. 1986)

(holding that the Communications Act preserved state law claims arising out of defendant's allegedly false advertising practices); *Am. Inmate Phone Systems, supra*, 787 F.Supp. At 856-59 (N.D.Ill. 1992) (holding that the Communications Act preserved state law contract and consumer fraud claims); *Cooperative Communications v. AT&T Corp.*, 867 F.Supp. 1511, 1515-17 (D.Utah 1994) (holding that the Communications Act preserved state law claims for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition).

As the foregoing cases demonstrate, the plain purpose of both the Act in general and the savings clause in particular is to preserve the right to bring state law claims, provided that maintenance of such suits does not interfere with the Communications Act's requirement for the provision of uniformly reasonable, non-discriminatory telecommunications service to all Americans. *Comtronics, supra*, 553 F.2d at 708 n.6 (1st Cir. 1977). State law claims based upon the breach of duties *not* imposed by the Communications Act, *e.g.*, breach of contract or unfair trade practices claims, obviously do not detract from the uniformity of the duties which the Act does impose.

The Plaintiffs in this action are alleging that Defendants' "slamming" practices violate Florida's Deceptive and Unfair Trade Practices Act, and are *not* challenging the reasonableness of the rates charged by Defendants. Plaintiffs are challenging Defendants' deceptive practice of non-disclosure. As broad as it is, the Communications Act does not purport to regulate specific sales strategies and marketing devices employed by telecommunication carriers. On the contrary, as one district court recently concluded:

the Communications Act is primarily concerned with the quality, price, and availability of the underlying service. Because allowing Cellular Dynamics to recover damages for any injuries it suffered as

a result of MCI's allegedly fraudulent marketing strategies neither conflicts nor interferes with any provision, regulation, or policy underlying the Act, the court finds that plaintiffs' consumer fraud claim is not preempted.

Cellular Dynamics, Inc. v. MCI Telecommunications Corporation, Case No. 94C3 126, Northern District of Illinois, 1995 U.S. District LEXIS 4798.

In essence, Defendants complete preemption argument amounts to an arrogant assertion that the Communications Act gives common carriers like Defendants a federal license to defraud its customers with no fear of exposure under state law. Clearly, there is no inconsistency whatsoever between the Communications Act and Plaintiffs' state law claims directed to the deceptive practices set forth in Plaintiffs Complaint. Even if there were some such inconsistency, the Federal Communications Act, which expressly preserves the right to pursue state remedies consistent with the Act, obviously does not completely displace state law.

**111. PLAINTIFFS CLASS ACTION SUIT CHALLENGES
DEFENDANTS DECEPTIVE AND UNFAIR "SLAMMING" PRACTICES,
NOT DEFENDANTS RATES**

As touched on above, Plaintiffs' class action lawsuit challenges Defendants' deceptive practice of "slamming" a long distance service charge on a line known to be used solely for local calls, and not Defendants' rates charged to its customers. Not only have several federal courts already held that such class action lawsuits do not challenge Defendants' rates, but Plaintiffs' argument is no more clearly supported than in its class action complaint filed in this case. In its complaint, Plaintiffs allege, among other counts, breach of contract and violation of the Florida Deceptive and Unfair Trade Practices statute. The questions of law

and fact in the class action lawsuit are: (a) whether Defendants engaged in deceptive and unfair business practice; (b) whether Defendants acted willfully, recklessly, or with gross negligence in omitting to state and/or misrepresenting material facts regarding its billing practice; (c) whether Defendants violated the Florida Deceptive and Unfair Trade Practices Act; and (d) the nature and extent of damages and other remedies to which the conduct of Defendants entitles the Plaintiff and class members.

IV. ADJUDICATION OF THE ISSUES SET FORTH IN THE COMPLAINT DO NOT REQUIRE ANY PARTICULAR FEDERAL EXPERTISE, AND HENCE, PRIMARY JURISDICTION PRINCIPLES DO NOT APPLY.

The Plaintiff is not challenging the monthly long distance service charge itself, but is challenging the practice of the Defendants of “slamming” a long distance fee when not consented to by the customer, i.e., through a negative option. The Court is not asked to determine the reasonableness of a rate or tariff. Therefore, this Court may decide the legal and factual issues presented in the Complaint because it has the ability to adjudicate issues regarding trade practices, breach of contract and of good faith and fair dealing, and restitution. Adjudication of the issues set forth in the Complaint do not require any particular federal expertise.

V. THE FEDERAL COMMUNICATIONS ACT DOES NOT MANDATE THAT GTE FLORIDA PROVIDE LONG DISTANCE ACCESS TO ALL LINES OF A CUSTOMER

Notwithstanding the fact that the Plaintiff and class members have stated that the FCA does not apply to this cause of action, Plaintiff states that defendants falsely set forth the standard of 47 U.S.C. §251. Defendants have stated, “The FCA and the 1996TCA simply do not provide any LEC with the option of offering a “local-only” telephone line”. The statute, however, does provide a duty

of an LEC to provide *customers* with *access* to the interstate long distance network. Therefore, if Plaintiff and class members have another line in their residence or business that is already provided with access to the interstate long distance network, such “customers” have *already* been provided such access, and additional lines do not require long distance capability. Consequently, when the Plaintiff or other class members who already have long distance on a separate line, establishes an additional line for local calls only, the LEC is NOT required to provide long distance service on the additional line, since the LEC has previously complied with the statute.

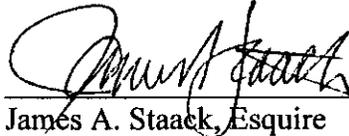
VI. PLAINTIFF AND CLASS MEMBERS ARE NOT REQUIRED TO PAY THE “CARRIER LINE” CHARGE OR THE “UNIVERSAL CONNECTIVITY” CHARGE

Assuming, *arguendo*, that a LEC and IXC can impose a “Carrier Line” charge **or** the “Universal Connectivity” charge on a consumer, such charges are not *mandated* by law or regulation. Rather, the LECs *may* recover costs for providing the “local loop” to a local line. Plaintiff and class members have complained that being slammed with these *discretionary* pass-throughs, without their knowledge or consent is a deceptive and unfair trade practice.

Further, to the extent that Defendants claim that these charge are “mandated”, Plaintiff refers to attached Attachment No, 3, entitled “ImportantNews for AT&T customers.” In said news update, the Plaintiff was informed that AT&T was eliminating the “Carrier Line” charge and the “Universal Connectivity” charge. If the charges were mandated, it is curious how the Defendants could elect not to charge its customers for same.

V. CONCLUSION

For the foregoing reasons, Plaintiffs requests that the Court deny Defendants, GTE FLORIDA INCORPORATED and AT&T CORP.'s, Dispositive Motion to Dismiss.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to the following this 2nd day of August, 2000:

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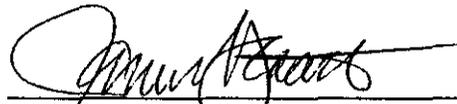
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION.

FILED
SEP 11 10 13 AM '97
TAMPA, FLORIDA

JAMES J. WHITE, PERRY KRANIAS, and
RALPH DELUISE,

Representative Plaintiffs,

v.

CASE NO: 97-1859-CIV-T-26C

GTE CORPORATION; GTE WIRELESS
INCORPORATED, f/k/a GTE MOBILNET
INCORPORATED; **GTE** WIRELESS OF
THE SOUTH INCORPORATED, f/k/a GTE
MOBILNET OF TAMPA INCORPORATED and
GTE MOBILNET OF THE SOUTH
INCORPORATED; GTE WIRELESS OF
HOUSTON INCORPORATED; GTE
MOBILNET OF CLEVELAND
INCORPORATED; and GTE MOBILNET OF
THE SOUTHWEST INCORPORATED,

Defendants.

ORDER

Before the Court are the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by GTE Wireless Incorporated and GTE Wireless of the South Incorporated and the supporting memorandum (Dkts. 72 and 73), the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated and the supporting memorandum (Dkts. 74

and 75), Plaintiffs' Responses (Dkts. 76 and 85), the Reply to Plaintiffs' Response to Defendants GTE Wireless Incorporated's and GTE Wireless of the South Incorporated's Dispositive Motion to Dismiss (Dkt. 86), the Memorandum Correcting Mistake Contained in Reply (Dkt. 87), Plaintiffs' Notices of Filing Supplemental Case Law (**Dkts. 88 and 93**). After careful consideration of the motions and the file, the Court **is** of the opinion that the motion to dismiss for failure to allege a claim for relief should be granted as to count **II** and denied as to counts **I, III, and IV**. The motion to dismiss for lack of personal jurisdiction should be denied.

Allegations of the Third Amended Complaint

Plaintiffs represent a purported class of individuals of Florida residents who were cellular service customers of Defendants (GTE).¹ (Dkt. 70 at para, 25). GTE allegedly concealed and failed to disclose its practices of charging on a "rounded **up**" basis. (Dkt. 70 at para. 26). "Rounding **up**" means that each call is billed in whole minute increments, with any fraction of a minute being billed as a whole minute. (Dkt. 70 at para. **14**). Each call begins at the time the "send" button is pushed, regardless of whether a connection is made. (Dkt. 70 at para. **14**). GTE charged Plaintiffs on a "rounded up" basis and Plaintiffs paid GTE the amount billed. The monthly bills do not disclose or explain the

¹ The Court will refer to all defendants as **GTE**. The part of this order addressing personal jurisdiction refers only to the non-resident defendants.