cingular INTERACTIVE ~~EX PARTE OR LATE FILED~~

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December 15, 2005

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Federal Communications Commission
Office of Secretary

ORIGINAL

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Notice of **EX PARTE** Presentation
CG Docket No. 04-208; CC Docket No. 98-170

Dear Ms. Dortch:

On December 13, Beth Swett-Executive Director External Affairs; Michael W. Bennett-Executive Director External Affairs; and Ben Almond-Vice President Federal Regulatory Affairs, all of Cingular Wireless, met with Jay Keithley-Deputy Chief, Consumer and Governmental Affairs Bureau (CGB); Leon Jackler-Legal Advisor to the Bureau Chief-CGB and Richard Smith, Attorney Policy Division-CGB, in order to discuss issues related to the referenced docket proceedings.

Attachment 1 contains the presentation document used for discussion purposes. The discussion centered on the need of the FCC to establish a national regulatory framework on CMRS billing in light of the increasing patchwork of state regulations. The representatives discussed how wireless industry competition and market forces are working to proactively address customers' expectations related to billing and service issues. In particular, Cingular's sustained efforts on customer services and network quality are producing positive trends on reduced customer churn and complaints. Attachments 2-5 are documents discussed during the meeting associated with states' regulations on CMRS billing.

The representatives of Cingular mentioned recent changes in terms of addressing specific disclosure documents with customers at point of sale, in addition to enhancements of Cingular's interactive coverage mapping application.

Please associate the accompanying documents with the referenced docket proceeding.

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If there are any questions concerning this matter, please contact the undersigned.

Sincerely,

Ben G. Almond
Vice President-Federal Regulatory Affair

Attachments

Cc: Jay Keithley
Leon Jackler
Richard Smith

Truth In Billing Ex Parte
CC Docket No. 98-170 and CG Docket No. 04-208
December 13, 2005

Federal national framework and market forces are working; additional regulation is not necessary.

- Complaints are decreasing.
  - Cingular FCC complaint rate per million has significantly decreased in October and November as compared to 2nd quarter 2005.
- Churn is decreasing.
- Consumer calls to call center are decreasing.
- Individual complaints regarding billing format or line items for recovery of costs for government programs are minimal.

FCC should preempt state regulation of CMRS billing.

- National Regulatory framework is necessary.
- National framework and competition adequately protect consumers.
- Patchwork of state regulations would frustrate federal goals.
- States may not enforce federal billing regulations.

States are continuing to propose or implement rules affecting billing.

California

- Consumer Protection Rules were enacted December 2004.
- Commission subsequently stayed Rules in January 2005.
- Proceedings are ongoing and Commission changes are occurring.
- Requirements for billing of non-communications charges were enacted 2001.
  - Prescriptive rules for authorization, revocation of opt-in and complaint procedures
  - Requires use of PIN or other "equally reliable security procedures" for authorization, revocation of opt-in and complaint procedures
  - Requires separate section of bill

New Mexico Consumer Protection rules[1]

- On November 22, 2005, New Mexico Public Regulation Commission adopted Consumer Protection Rules to be effective February 1, 2006.
- Prescribed manner for disclosing rate or fee increases or decreases
- Detailed requirements for billing, including PRC's phone number
- Prescribed manner regarding billing disputes
- Detailed deposit requirements

[1] NMAC-Rp, 17-11-16.1 *et seq.* (enclosed – Attachment 2)

Minnesota HF 2151[2] (enclosed)

- 8th Circuit Court of Appeals recent Decision is enclosed. (Attachment 4)
- Law requires 60 days prior notice of "substantive change" in contract that could result in increase
- Under the requirements, an increase to USF percentage increase or imposition of Gross Receipts Tax would be a substantive change.
- Customer must affirmatively "opt-in" to the change; if customer does not "opt", the original contract terms apply.

Kentucky[3]

- On November 18, 2005, Cingular, Verizon Wireless, Sprint and T-Mobile filed action (Complaint enclosed) to enjoin enforcement of recently enacted House Bill 272 (HB 272)
- The law imposes a new gross receipts tax to be effective January 1, 2006 and prohibits carriers from passing on the cost of new tax in form of a line item.

If additional regulation is necessary, FCC should adopt rules consistent with the AVC.

- Disclosure requirements
  - Carriers should provide notice that government taxes apply and provide estimate or range of discretionary charges.
  - Commission should not mandate specific documents at point of sale
    - Customers have 30 days to terminate
    - Mandated and discretionary charges vary by locale and state and some customers are multi-state customers.
    - Complexity is increased through Website and telephone sales.
    - Commission should adopt definition of mandated charges and separation of mandated charges consistent with AVC
  - Commission should not adopt categories other than mandated charges.

Other Issues

- Line items identified as regulatory cost recovery charges are not misleading. Cingular:
  - Identifies that the charge is not a tax or mandated
  - Segregates from mandated taxes and mandated charges
  - Discloses in all summaries, advertising, plans
  - Commission should review individual carrier disclosures rather than make broad conclusion.

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[2] M.S.A. § 325F.695; MN ST 325F.695. (enclosed – Attachment 3)

[3] Cingular Wireless *et al* v. Rudolph *et al*, U.S.D.C., E.D.K., Civil Action No. 3.05—81 KKC (Nov. 18, 2005). (enclosed – Attachment 5)

- Carriers should have ability to recover multiple regulatory programs in single line item.
    - Combined items are simpler than multiple items.
    - Cingular adequately discloses purpose, segregates in billing and identifies not a tax.
    - Carrier has obligation to substantiate costs.
- FCC should clarify that CMRS providers may use line item to recover cost of Telephone Relay Service.
- Prior FCC statements were based on separation rules applicable to landline carriers.
- FCC should find that wireless carriers are still permitted to recover costs in general regulatory charge.

Cingular is continuing to respond to customer and FCC concerns by improving and simplifying customer information.

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES
CHAPTER 11 TELECOMMUNICATIONS
PART 16 CONSUMER PROTECTION

17.11.16.1 ISSUING AGENCY: New Mexico Public Regulation Commission.
[17.11.16.1 NMAC - Rp, 17.11.16.1 NMAC, 2-1-06]

17.11.16.2 SCOPE: This rule applies to all carriers, except incumbent rural telecommunications carriers, authorized by the commission to provide retail telecommunications services in New Mexico.

A. Where the commission has approved an alternative form of regulation plan for an ILEC, and a provision in the approved plan is inconsistent with a provision in this rule, the provision in the approved plan shall apply.

B. Where the commission has approved an alternative form of regulation plan for an ILEC, and the approved plan is silent with respect to the subject matter of a provision in this rule, the provision in this rule shall apply.
[17.11.16.2 NMAC - Rp, 17.11.16.2 NMAC, 2-1-06]

17.11.16.3 STATUTORY AUTHORITY: NMSA 1978 Sections 8-8-4, 8-8-15, 63-9A-8.2, 63-9B-4, 63-9B-6, 63-9G-4, and 63-9G-8.
[17.11.16.3 NMAC - Rp, 17.11.16.3 NMAC, 2-1-06]

17.11.16.4 DURATION: Permanent.
[17.11.16.4 NMAC - Rp, 17.11.16.4 NMAC, 2-1-06]

17.11.16.5 EFFECTIVE DATE: February 1, 2006, unless a later date is cited at the end of a section.
[17.11.16.5 NMAC - Rp, 17.11.16.5 NMAC, 2-1-06]

17.11.16.6 OBJECTIVE: The purpose of this rule is to ensure that carriers provide accurate and timely information to customers about their telecommunications services, and that their business conduct toward customers is courteous, efficient, and respectful of the customer's privacy. The rule also specifies procedures relating to discontinuance of basic local exchange service, the resolution of complaints and billing disputes, and customer deposits, and provides the commission with tools for monitoring carriers' compliance.
[17.11.16.6 NMAC - Rp, 17.11.16.6 NMAC, 2-1-06]

17.11.16.7 DEFINITIONS: As used in this rule:

A. **access line** means a dial tone line that provides local exchange service from a LEC's switching equipment to a point of termination at the customer's network interface;

B. **basic local exchange service** means the customer's voice grade access to the public switched network, dual tone multifrequency (DTMF) signaling or its functional equivalent, and access to emergency services (911 and E-911), operator services, toll services, directory assistance, and toll blocking services for qualifying low income customers, but does not include discretionary services;

C. **billing agent** means any person that submits bills for telecommunications services to a customer on behalf of a carrier;

D. **carrier** means any person that furnishes telecommunications service to the public subject to the jurisdiction of the commission, regardless of the facilities used and regardless of whether the person relies in part or entirely on another carrier's facilities, and includes wireless carriers;

E. **chronically delinquent** means the status of a residential customer who during the prior twelve (12) months has been disconnected by a carrier for nonpayment or who on three (3) or more occasions during the prior twelve months has not paid a bill by the date a subsequent bill is rendered;

F. **competitive local exchange carrier (CLEC)** means a carrier that provides competitive local exchange service in its service area and is not an ILEC;

G. **complaint** means an oral or written expression of dissatisfaction with a carrier's charges or services (including a request for repair) made to a carrier by or on behalf of a customer;

H. **customer** means a person that has applied for or is currently receiving telecommunications services;

I. **delinquent** means the status of a bill rendered to a residential customer for telecommunications service which remains unpaid after the due date of the bill;

J. **discontinuance of service** means the intentional cessation of basic local exchange service by a LEC not voluntarily requested by a customer;

K. **discretionary service** means voice mail, caller ID, caller name ID, call waiting, 3-way calling, call forwarding, call return, call blocker, and auto redial, and any similar service sold as an add-on to a customer's basic local exchange service;

L. **incumbent local exchange carrier (ILEC)** means a person that was authorized to provide local exchange service in New Mexico on February 8, 1996, or a successor or assignee of the person; a carrier will also be treated as an ILEC if the federal communications commission determines that such provider (or class or category of carrier) shall be treated as an ILEC pursuant to 47 U.S.C. Section 251(h)(2);

M. **incumbent rural telecommunications carrier (IRTC)** has the meaning given in NMSA 1978 Section 63-9H-3;

N. **local exchange carrier (LEC)** includes incumbent local exchange carriers and competitive local exchange carriers;

O. **medical professional** means a licensed physician, physician's assistant, osteopathic physician, osteopathic physician's assistant or certified nurse practitioner;

P. **network interface** means the point at which the network side of telecommunications service meets the customer side;

Q. **primary local exchange line** means the first exchange access line installed by any LEC to serve a customer at the customer's premises, as distinct from additional lines that may be ordered at the same or a subsequent time at the same premises;

R. **small business customer** means a customer subscribing to ten (10) or fewer exchange access lines;

S. **telecommunications service** has the meaning given to the term "public telecommunications service" in NMSA 1978 Section 63-9A-3;

T. **wire center** means a facility where local exchange access lines converge and are connected to a switching device which provides access to the public switched network, and includes remote switching units and host switching units;

U. **wireless carrier** means a telecommunications carrier licensed by the federal communications commission to provide wireless service in New Mexico.

[17.11.16.7 NMAC - Rp, 17.11.16.7 NMAC, 2-1-06]

17.11.16.8 DISCONNECTION OF BASIC LOCAL EXCHANGE SERVICE AND ALLOCATION OF PARTIAL PAYMENTS:

A. A LEC may not disconnect, or threaten to disconnect, either directly or through the use of ambiguous, deceptive, or misleading language, a customer's basic local exchange service for failure to pay charges for toll or discretionary services.

B. A LEC shall offer toll blocking upon a customer's request.

C. A LEC may impose involuntary toll blocking on a customer's primary local exchange line for failure to pay charges for toll service. However, the toll blocking must be provided without charge and the LEC must remove the toll blocking when the bill is paid.

D. A LEC shall credit customer's partial payments for current bills or past due amounts first to basic local exchange service, unless the customer instructs the LEC to allocate the payment in a different manner. A LEC shall provide to the customer or the consumer relations division of the commission upon request of either written verification of oral instructions given by a customer.

[17.11.16.8 NMAC - Rp, 17.11.16.8 NMAC, 2-1-06]

17.11.16.9 ACCESS TO AND AUDIT OF DATA: Unless otherwise authorized by the commission, a carrier shall make all records required by this rule available to the commission, staff with the consent of the commission, or its authorized representatives at any time upon reasonable notice. A carrier shall make customer proprietary network information available to the commission to the extent allowed by law. A carrier shall retain all records required by this rule for at least two (2) years. The commission, or staff with the consent of the commission, may periodically audit the timeliness and accuracy of carriers' customer service and repair records.

[17.11.16.9 NMAC - Rp, 17.11.16.9 NMAC, 2-1-06]

17.11.16.10 CUSTOMER COMPLAINT TRACKING:

A. A wireline carrier shall maintain a record of all oral and written complaints, including informally resolved billing disputes, made by or on behalf of customers, which shall contain:

(1) the date the complaint was lodged;

(2) the class of customer (residential or business);

(3) the category of the complaint (based on the consumer relations division's list of complaint categories); and

(4) the region within the state (e.g., by wire center, exchange, county).

B. A carrier shall not retaliate against a customer for any complaint made by the customer to the commission or any other person.

C. Upon request of the commission or staff, and for a specified time period not to exceed two (2) years, a wireline carrier shall compile and submit to the commission reports that state the total number of complaints recorded pursuant to Subsection A of this section and the number of such complaints categorized by the:

(1) the category of the complaint;

(2) region within the state (e.g., by wire center, exchange, county); and

(3) class of customer (residential or business).

D. A carrier shall cooperate with the commission, the consumer relations division, and staff in resolving complaints.

[17.11.16.10 NMAC - Rp, 17.11.16.10 NMAC, 2-1-06]

17.11.16.11 ACCESS TO SERVICE AND RATE INFORMATION:

A. A carrier shall maintain comprehensive, understandable, accurate, and up-to-date service and rate information. A carrier:

(1) shall provide a toll-free telephone number by which customers can access such information and shall, upon request, mail written information to a customer;

(2) shall provide such information to disabled customers in a form accessible to them;

(3) shall provide such information in English and Spanish as requested by the customer; and

(4) may provide such information electronically (e.g., by email or text message) if a customer agrees in writing.

B. A carrier shall provide:

(1) information regarding the rates for direct dialed calls;

(2) information regarding all relevant charges and rates for calls using a credit card or calling card;

(3) details on all advance payments or termination procedures and charges that may apply;

(4) information regarding where and how a customer may subscribe to the carrier's services;

(5) an explanation of charges on customers' bills;

(6) information regarding proposed changes in services and rates;

(7) information regarding the availability of service; and

(8) information describing the commission's procedures for resolving slamming and cramming disputes, as set forth in 17.13.8 NMAC, Slamming and Cramming Protection.

C. A LEC shall also provide information regarding:

(1) the timing of installation of primary local exchange lines or additional lines; and

(2) rates for repair work done on the customer's side of the network interface.

D. A carrier shall provide notice of a rate or fee increase or a new charge for an existing service prior to the implementation of the rate increase or new charge. The notice shall be provided in a bill, a bill insert, or by separate mailing, in a form and manner that clearly identifies every rate or fee increase or new charge as such. A carrier shall provide notice of a rate decrease by no later than the next bill following the billing cycle in which the rate decrease was implemented. This notice requirement shall not apply to increases or decreases in taxes or other government-related fees.

E. When a customer initially subscribes to basic local exchange service, a LEC shall inform the customer, in English or Spanish, as requested by the customer:

(1) that a low income telephone assistance program (LITAP) is available to qualifying residential customers and shall ask if the customer would like to receive further information about the program. If the customer answers affirmatively, the LEC shall inform the customer:

(a) that applications are available at its billing offices or that the LEC will mail an application to the customer;

(b) that the customer must submit to the LEC a completed application and proof that the

customer meets the eligibility requirements for one or more need-based assistance programs administered by the human services department;

(c) if the customer does not have such proof, the LEC shall advise the customer to contact his or her local human services department income support division office or call the HSD customer help desk at its toll free telephone number for information on how to obtain proof of eligibility;

(d) of other community assistance programs that may be available; and

(e) that the customer may obtain additional assistance from the commission's consumer relations division and the LEC shall provide the toll-free telephone number of the commission's consumer relations division.

(2) that a third party notification program is available to residential customers; and

(3) of the existence of "900" number calling, specifically noting that the calling party incurs a charge each time a "900" number is called, and shall offer "900" number blocking at no charge to the customer.

F. The commission strongly encourages each carrier to make service and rate information accessible to customers on its website and at its business offices or customer service centers open to the public, where these exist.

[17.11.16.11 NMAC - Rp, 17.11.16.11 NMAC, 2-1-06]

17.11.16.12 FAIR MARKETING PRACTICES:

A. Any carrier subject to the commission's jurisdiction shall, in all oral or written contacts with customers:

(1) provide timely, courteous, and accurate information;

(2) explain services, and switching and discontinuance of service, accurately and unambiguously;

(3) not represent discretionary services as essential;

(4) not engage in any unfair or deceptive trade practice, including but not limited to the unfair or deceptive trade practices and unconscionable trade practices defined in NMSA 1978 Section 57-12-2;

(5) upon a customer-initiated inquiry about services, make a good-faith effort to identify the service that is the most economical for the customer, based on the customer's representation of his or her telecommunications requirements.

B. Upon request of the commission or staff, a carrier shall provide its sales scripts, marketing materials, and sales and marketing practices and procedures to the commission for review. A carrier may petition for a protective order pursuant to the commission's rules of procedure prior to providing the requested information.

[17.11.16.12 NMAC - Rp, 17.11.16.12 NMAC, 2-1-06]

17.11.16.13 TARIFFS AND BOUNDARY MAPS:

A. Unless specifically exempted by the commission, a LEC shall file with the commission tariffs containing rates, charges, terms, and conditions for all intrastate services that specifically set forth:

(1) the conditions and circumstances under which the LEC, or entities under contract to the LEC, will make line extensions or extensions of service to customers within the exchange area;

(2) minimum standards for discontinuance of residential basic local exchange service;

(3) the LEC's deposit policy; and

(4) charges for service connections, extensions and line mileage.

B. Where possible, a LEC shall post tariffs on its website and make copies available for inspection by the public during regular business hours at its business offices in New Mexico.

C. Each ILEC shall file with the commission an exchange area boundary map for each of its exchanges in New Mexico. Each map shall clearly show the boundary lines of the exchange area the ILEC holds itself out as serving. Where a portion of the boundary line is not located on section lines, waterways, railroads, etc, the exchange boundary lines shall be located by appropriate measurement to an identifiable location. Maps generally shall contain the detail shown on county highway maps. The map shall be to a scale and in sufficient detail to permit a person in the field to locate the exchange service area boundaries.

[17.11.16.13 NMAC - Rp, 17.11.16.13 NMAC, 2-1-06]

17.11.16.14 BILLS: A carrier shall provide easily readable, readily understandable detailed bills that:

A. itemize services, usage, and charges, including quantities of units and per-unit charges, unless the customer selects an alternative billing option offered by the carrier;

B. separately identify each nonrecurring and recurring charge;

C. describe and itemize charges for repair work on the customer's side of the network interface

according to whether they are for labor, materials, travel, or other necessary expenses which must be specified;

D. include the name and toll-free number of the carrier;

E. include, where applicable, the name and toll-free number of the billing agent;

F. include a statement, in English or Spanish, as requested by the customer, advising customers that if they have a question about their bill, they should first contact the carrier; and

G. include the toll-free number of the consumer relations division of the commission together with a statement advising customers that they may contact the commission if they are unable to resolve a billing inquiry with the carrier.

[17.11.16.14 NMAC - Rp, 17.11.16.14 NMAC, 2-1-06]

17.11.16.15 INFORMATION REQUIRED SEMI-ANNUALLY:

A. A LEC shall semi-annually provide information to customers in English and Spanish. A LEC need not provide all of the information at the same time and may choose to provide it in a prominent place on a customer's bill or in a bill insert. The following information is required:

(1) the statement described in paragraph (6) of subsection A of 17.11.16.19 NMAC;

(2) a statement, using commonly understood descriptions and examples, that basic local exchange service will not be discontinued for failure to pay charges for toll or discretionary services;

(3) notification that a third party notification program is available to residential customers;

(4) notification that up-to-date service and rate information is available as provided in subsection A of 17.11.16.11 NMAC; and

(5) notification that a low income telephone assistance program (LITAP) is available to qualifying residential customers; that applications for the program are available at the LEC's billing offices or that the LEC will mail an application to a customer if the customer calls the customer service department of the LEC at [insert toll-free telephone number of the customer service department] to request an application; that the customer must submit to the LEC a completed application and proof that the customer meets the eligibility requirements for one or more need-based assistance programs administered by the human services department; that if the customer does not have proof of eligibility, the customer should contact his or her local human services department income support division office or call the HSD customer help desk at its toll free telephone number for information on how to obtain proof of eligibility that other community assistance programs may be available; and that the customer may obtain additional assistance from the commission's consumer relations division and the LEC shall provide the toll-free telephone number of the commission's consumer relations division.

B. In the event a court of competent jurisdiction determines that Subsection B of 17.11.16.30 NMAC is invalid, a LEC shall semi-annually notify customers that they have the right to request that the carrier not disclose to any person, other than to employees of the carrier who have a need for the information in the course of providing telecommunications services, information about the customer, including the customer's calling patterns.

[17.11.16.15 NMAC - Rp, 17.11.16.15 NMAC, 2-1-06]

17.11.16.16 BILLING DISPUTES AND ERRORS, GENERAL REFUNDS AND BILL CREDITS:

A. In the event of a dispute between a customer and a carrier concerning a bill for telecommunications services, the carrier may require the customer to pay the undisputed portion of the bill to avoid discontinuance of service for non-payment. The carrier shall make an investigation appropriate to the case, and report the results to the customer. In the event the dispute is not reconciled, the carrier shall advise the customer that the customer may file a complaint with the commission for disposition of the matter.

B. Whenever the billing for service has not been determined accurately because of a carrier's omission or negligence, the carrier shall:

(1) notify customers that an adjustment has been made;

(2) explain the reasons for the adjustment;

(3) offer and enter into reasonable payment arrangements in accordance with the following criteria:

(a) whenever a carrier has overbilled a customer for service and the customer has paid the overbilled amount, the carrier shall credit the total overbilled amount within a reasonable time, but in no event later than the second bill after the carrier becomes aware of the error;

(b) whenever a carrier has underbilled a customer for service, the carrier may add the underbilled amount to the customer's next regular bill, unless the amount exceeds the customer's average bill for the preceding six (6) months, in which case the customer may elect to make payments, without interest, over a time period equal to the period over which the errors were accumulated;

(4) upon request, send the customer written verification of the payment arrangements agreed to by the

customer and the carrier; a carrier may provide written verification electronically if the customer agrees.
[17.11.16.16 NMAC - Rp, 17.11.16.16 NMAC, 2-1-06]

17.11.16.17 DISCONTINUANCE OR INTERRUPTION OF SERVICE:

A. Discontinuance without prior notice. A LEC may discontinue basic local exchange service to a customer without prior notice in the event of:

(1) a condition determined by the LEC to be hazardous;

(2) a customer's use of equipment in such manner as to adversely affect the LEC's service to others;

(3) a customer's tampering with, or negligently or intentionally damaging or destroying equipment furnished and owned by the carrier; or

(4) unauthorized use of service provided by the carrier.

B. Discontinuance with prior notice. Pursuant to 17.11.16.18 and 17.11.16.19 NMAC, a LEC may discontinue basic local exchange service to a customer with prior notice:

(1) for nonpayment of a delinquent account for basic local exchange service; or

(2) for failure to post a security deposit or guarantee.

C. Temporary interruption without notice. A LEC may temporarily and without notice interrupt service for an operational emergency, necessary and unavoidable network maintenance, or reasons related to the public safety and welfare.
[17.11.16.17 NMAC - Rp, 17.11.16.17 NMAC, 2-1-06]

17.11.16.18 PROHIBITIONS ON DISCONTINUANCE OF SERVICE: A LEC shall not discontinue basic local exchange service:

A. to any residence where a seriously or chronically ill person resides, or will re-establish service to such a residence, if, at least two (2) days prior to the proposed service discontinuance date specified in the notice:

(1) the LEC receives a medical certification, valid for thirty (30) days, on the form prescribed by the commission in 17.11.16.33 NMAC or a substantially similar form, from a medical professional stating that discontinuance of service might endanger the customer's life or health;

(2) the LEC receives a financial certification, valid for ninety (90) days, on the form prescribed by the commission in 17.11.16.34 NMAC or a substantially similar form, from the customer stating that the customer does not have the financial resources to pay the charges for telecommunications services; and

(3) the residential customer enters into a payment plan with the LEC;

B. for nonpayment of the disputed portion of a bill; or

C. for delinquency in payment for service to a previous occupant of the same premises unless the previous occupant continues to reside at the premises or the new customer is legally liable for the debt of the previous occupant.
[17.11.16.18 NMAC - Rp, 17.11.16.18 NMAC, 2-1-06]

17.11.16.19 REQUIREMENTS PRIOR TO DISCONTINUANCE OF SERVICE:

A. Fifteen day notice. At least fifteen (15) days before a LEC discontinues basic local exchange service to a customer, the LEC shall mail written notice to the customer stating its intent to discontinue service and setting forth the customer's rights regarding discontinuance of service. The notice shall be in English and Spanish, shall be dated, and shall be in simple, nontechnical language. The notice shall be sent by U.S. Mail, postage prepaid, to the last address for the customer known to the LEC. A fifteen-day notice of discontinuance shall contain:

(1) the toll-free telephone number and working hours of LEC personnel responsible for administering the procedures in this section;

(2) the amount owed and the specific date service will be discontinued unless the customer pays the amount due or makes other arrangements with the LEC concerning payment of the charges; upon request, the LEC shall provide information to the customer concerning the outstanding charges, including the dates of the service interval over which the outstanding charges were incurred and the date and amount of the last payment;

(3) a statement that basic local exchange service cannot be discontinued for failure to pay charges for toll or discretionary services;

(4) a statement that, if the customer pays the portion of the bill which the customer does not dispute, the LEC shall review the portion of the bill which the customer does dispute;

(5) a statement that a customer may file a complaint with the consumer relations division of the commission if the customer disagrees with the LEC's determination concerning discontinuance of service;

(6) a statement in capital letters of the cost of reconnection;

(7) for residential customers, a statement that:

(a) the LEC will not discontinue basic local exchange service to a residence where a seriously or chronically ill person resides, or will re-establish service to such a residence, if, at least two (2) days prior to the proposed service discontinuance date specified in the notice:

(i) the LEC receives a medical certification, valid for thirty (30) days, on the form prescribed by the commission in 17.11.16.33 NMAC or a substantially similar form, from a medical professional stating that discontinuance of service might endanger the customer's life or health;

(ii) the LEC receives a financial certification, valid for ninety (90) days, on the form prescribed by the commission in 17.11.16.34 NMAC or a substantially similar form, from the customer stating that the customer does not have the financial resources to pay the charges for telecommunications services; and

(iii) the residential customer enters into a payment plan with the LEC;

(b) if service has been discontinued, the LEC shall reestablish service within twelve (12) hours after the residential customer has satisfied the requirements of subparagraphs (a)(i) through (a)(iii) of paragraph (6) of this subsection;

(c) the residential customer will not be relieved of the obligation to pay for services rendered if service is continued or reestablished under the provisions of this paragraph; and

(d) timely delivery by a residential customer to the LEC of duly executed medical certification and financial certification forms shall be adequate to delay discontinuance of service for at least thirty (30) days and that the LEC may, in its discretion, delay the discontinuance for a longer period;

(8) for residential customers, blank copies of the medical certification form prescribed by the commission in 17.11.16.33 NMAC and the financial certification form prescribed by the commission in 17.11.16.34 NMAC, or substantially similar forms; these forms include an agreement to enter into a payment plan with the LEC;

(9) for residential customers, the following statement in capital letters, "If you have difficulty paying this bill, and feel you may qualify for assistance from the low income telephone assistance program (LITAP), contact a customer service representative at [insert toll-free telephone number of the carrier's customer service department]. You may obtain an application for the low income telephone assistance program at our billing offices or we can mail an application to you. You should return the completed application and proof that you meet the eligibility requirements for one or more need-based assistance programs administered by the human services department to us at [insert name and mailing address of carrier's office]. If you do not have such proof, you should contact your local human services department income support division office or call the HSD customer help desk at its toll free telephone number for information on how to obtain proof of eligibility."

B. Two-day notice. Each LEC shall take reasonable steps to communicate with a customer by telephone or personal contact at least two (2) days prior to the actual date of discontinuance of service to remind the customer of the pending date of discontinuance of service, advise the customer again of the availability of financial assistance for telecommunications services payments, and obtain payment of delinquent accounts. The LEC employee who personally contacts a residential customer shall note any information made known to the employee by the residential customer regarding any resident's serious illness or life endangering health condition, such as whether a resident is physically disabled, frail, or elderly. Such information shall immediately be reported in writing to a LEC employee authorized to prevent discontinuance. That employee shall either delay the discontinuance if it is apparent that the forms required by Subparagraphs (a)(i) and (a)(ii) of Paragraph (7) of subsection A of this section will be received or state in writing why discontinuance of service will not be delayed. The LEC and LEC employee shall be held harmless for errors made in good faith in noting, acting upon, or failing to act upon the information made known by the residential customer.

C. Third-party notification. Each LEC shall offer its residential customers a third party notification program and shall notify residential customers that such program is available. The LEC shall extend the third party notification program to those residential customers who notify the LEC in writing of their desire to participate in the program and designate a specific person, organization, or governmental agency that is ready, willing, and able to assist the residential customer with the payment of LEC bills. Upon receipt of such notice and designation from a residential customer, a LEC shall not discontinue service to a participating customer for nonpayment of past due charges without providing the fifteen (15) day notice and the two (2) day notice required by this section.

D. Hours when service may be discontinued. A LEC may discontinue service to a residential customer Monday through Thursday during the hours from 8:00 a.m. to two (2) hours before the LEC's business office regularly closes. A LEC may not discontinue service less than twenty-four (24) hours prior to a holiday or weekend unless the LEC's business office is open for receipt of payment of past due charges and LEC personnel are available to restore service during the holiday or weekend once payment is received.

[17.11.16.19 NMAC - Rp, 17.11.16.19 NMAC, 2-1-06]

17.11.16.20 PAYMENT PLANS:

A. A LEC shall attempt to arrange a plan for the payment of past due LEC charges when a residential customer who has not been chronically delinquent indicates an inability to pay the charges. The LEC shall not discontinue service to the residential customer while a payment plan is being negotiated.

B. The LEC shall also inform the customer that a low income telephone assistance program (LITAP) is available to qualifying residential customers and shall ask if the customer would like to receive further information about the program. If the customer answers affirmatively, the LEC shall inform the customer:

(1) that applications are available at its billing offices or that the LEC will mail an application to the customer;

(2) that the customer must submit to the LEC a completed application and proof that the customer meets the eligibility requirements for one or more need-based assistance programs administered by the human services department;

(3) that, if the customer does not have such proof, the LEC shall advise the customer to contact his or her local human services department income support division office or call the HSD customer help desk at its toll free telephone number for information on how to obtain proof of eligibility;

(4) of other community assistance programs that may be available; and

(5) that the customer may obtain additional assistance from the commission's consumer relations division and the LEC shall provide the toll-free telephone number of the commission's consumer relations division.

C. Each LEC shall provide a procedure for reviewing residential customer allegations that a proposed payment plan is unreasonable, that a LEC charge is not due and owing, or that the customer has not violated an existing payment plan. The procedure shall grant the reviewing employee authority to order appropriate corrective action. A LEC shall not discontinue service until the review is completed. If a residential customer fails to comply with a payment plan and the LEC decides to discontinue service due to such failure, the LEC shall notify the customer as prescribed in Subsection B of 17.11.16.19 NMAC. The LEC shall submit the procedure to staff for approval thirty (30) days prior to implementing the procedure. If staff and the LEC cannot resolve any differences regarding the procedure, staff will present the issues to the commission for determination.
[17.11.16.20 NMAC - Rp, 17.11.16.19 NMAC, 2-1-06]

17.11.16.21 RESTORATION OF SERVICE:

A. Upon request of a customer, a LEC shall promptly restore service that has been temporarily discontinued by the LEC when the cause for discontinuance of service has been eliminated, applicable restoration or reconnection charges have been paid, and, if required, satisfactory credit arrangements have been made. At all times, the LEC shall make a reasonable effort to restore service on the day restoration is requested, and shall restore service no later than the next business day following the day on which the cause for discontinuance of service has been eliminated.

B. A LEC shall restore service to a residential customer within twelve (12) hours of receipt of the medical certification form prescribed by the commission in 17.11.16.33 NMAC and the financial certification form prescribed by the commission in 17.11.16.34 NMAC, or substantially similar forms which include an agreement to enter into a payment plan with the LEC.
[17.11.16.21 NMAC - Rp, 17.11.16.20 NMAC, 2-1-06]

17.11.16.22 COMPLAINTS AND APPEALS:

A. A carrier shall fully and promptly investigate and respond to all complaints made directly to the carrier by customers. The carrier shall make a good faith attempt to resolve the complaint and shall notify the customer promptly of its proposed disposition of the complaint. Upon request, the carrier shall send written confirmation of its proposed disposition of the complaint to the customer.

B. If a carrier's customer representatives cannot resolve a complaint to a customer's satisfaction, the carrier shall provide the complainant with the name, address and current local or toll-free telephone number of the consumer relations division of the commission.

C. Upon receipt of a complaint forwarded by the commission on behalf of a customer, a carrier shall make a suitable investigation. A carrier shall provide an initial response to the commission within ten (10) business days after the carrier receives the complaint. When the carrier has concluded its investigation of a complaint, the carrier shall provide a written response to the commission detailing the results of the carrier's investigation and its proposed resolution. A complaint forwarded by the commission on behalf of a customer shall not be considered resolved until the Consumer Relations Division closes the complaint.

[17.11.16.22 NMAC - Rp, 17.11.16.21 NMAC, 2-1-06]

17.11.16.23 CUSTOMER DEPOSIT POLICY: 17.11.16.23 NMAC through 17.11.16.28 NMAC apply only to wireline carriers that require deposits of residential and small business customers for services regulated by the commission and to wireless carriers that require deposits of their customers.

A. A carrier that requires deposits shall develop a written deposit policy that allows applicants for service to establish credit, and existing customers to reestablish credit, and shall make a copy of its policy available to any customer who inquires about the criteria for deposits.

B. A carrier shall determine credit worthiness in an equitable and nondiscriminatory manner. The decision to require a deposit shall be based solely on the customer's credit history and shall not be based upon location, income level, source of income, occupation, race, creed, sex, sexual orientation, national origin, marital status, or number of dependents.

C. A carrier may, in accordance with 17.11.16.24 NMAC, at any time require from a customer a deposit intended to guarantee payment for services provided by the carrier.

D. The carrier shall establish a mechanism for internal review of a deposit requirement in the event a customer challenges the initial determination of the terms of such deposit. Should a customer continue to challenge the proposed terms of the deposit after such review is completed, the carrier shall provide the customer with the name, address and current local or toll-free telephone number of the consumer relations division of the commission for further review.

E. The carrier shall provide:

(1) a copy of its written deposit policy and associated procedures to each of its employees who process applications for service; and

(2) either a copy of its written deposit policy and associated procedures or a specific tariff cite, if such policy and procedures are included in tariffs filed with the commission, to the director of the consumer relations division of the commission.

[17.11.16.23 NMAC - Rp, 17.11.16.22 NMAC, 2-1-06]

17.11.16.24 CRITERIA FOR ESTABLISHING THE NEED FOR AND AMOUNT OF A DEPOSIT:

A. A LEC shall use the criteria in this subsection to determine whether to require a deposit or other guarantee of payment as a condition of new or continued service.

(1) A LEC may require an existing customer to make a deposit if the customer's payment record shows substantial nonpayment for intrastate services provided by the LEC in any two (2) of the last six (6) months, or any three (3) of the last twelve (12) months. A LEC may require a deposit even if such customer has paid part of the amount owed before the date service is to be discontinued for nonpayment.

(2) A LEC may, without notice, require an existing customer to pay a deposit in full before service is restored whenever service has been disconnected for non-payment of outstanding charges.

(3) A LEC shall not require a deposit if the customer furnishes, to the LEC's satisfaction, a written guarantee from a third party to secure payment of the customer's bills for intrastate services provided by the LEC. A LEC shall not require the guarantee amount to exceed the maximum amount of the deposit that would otherwise have been required. The guarantee shall remain in effect until terminated in writing by the guarantor, or until the customer has achieved a satisfactory payment record for services for twelve (12) consecutive months. A LEC shall terminate the guarantee five (5) business days after receiving written notice from the guarantor or five (5) business days after a twelve (12) month period of satisfactory payment.

(4) A LEC shall not require a deposit if the customer has been a customer of the LEC for a similar type of service within a preceding twelve (12) consecutive month period, and the customer's credit was satisfactory and is not otherwise impaired.

B. The commission may authorize a LEC to waive deposit requirements for low-income customers eligible for tariffed discount programs.

C. A carrier shall not require a deposit of a customer that exceeds three (3) times the average monthly bill for telecommunications services provided by that carrier for the same class of customers; wireless carriers may instead use three (3) times the monthly plan fee for wireless services for that customer. An estimate of monthly billing may be used for the purpose of determining a deposit if the carrier can reasonably demonstrate that the customer's usage may be substantially different than the average usage for the same class of service or the monthly plan fee.

D. A carrier may adjust the amount of deposit at the request of the customer or at the carrier's initiative at any time the character, purpose, or degree of the customer's use of the service has materially changed, or

there are indications it will change.

E. A LEC may require a deposit in addition to any advance, contribution, or guarantee it may require in connection with the construction of lines or facilities, as provided in the line extension policy of the LEC's tariffs on file with the commission.

F. If a customer files a complaint regarding a proposed discontinuance of service, the commission may, upon motion by the carrier, require the customer to deposit cash or post bond with the carrier, in an amount deemed reasonable by the commission, pending resolution of the disputed proposed discontinuance.

[17.11.16.24 NMAC - Rp, 17.11.16.23 NMAC, 2-1-06]

17.11.16.25 LIMITATIONS ON THE USE OF DEPOSITS:

A. The making of a deposit shall not relieve any customer of the obligation to pay current bills when due. A carrier may require a deposit for services provided by another carrier only if the carrier is the billing agent for that carrier. The carrier shall not apply deposits for services provided by the carrier to an account for services provided by another carrier, even if the carrier is the billing agent for the other carrier. A LEC shall not require a deposit for, or refuse to connect, basic local exchange service because of a customer's indebtedness for toll or discretionary services.

B. A carrier shall not require any security for payment of intrastate or wireless services other than a cash deposit or a third-party guarantee. In no event shall any indebtedness related to the furnishing of intrastate or wireless services or the extension of facilities result in a lien, mortgage or other security interest in any real or personal property of the customer, unless the indebtedness has been reduced to a judgment by a court of law.

C. If requested by the customer that has made the deposit, a carrier may, in its discretion, transfer a deposit to another customer.

[17.11.16.25 NMAC - Rp, 17.11.16.24 NMAC, 2-1-06]

17.11.16.26 INTEREST ON DEPOSITS: A carrier shall accrue simple interest on deposits at the interest rate the carrier charges for late payment of bills or the rate specified in NMSA 1978 Section 62-13-13, whichever is greater. A carrier shall accrue interest on a deposit for the time it holds the deposit, calculated from the date the carrier receives the deposit to the date the carrier refunds the deposit or credits the amount of the deposit to the customer's account. The carrier may, at its option, pay interest directly to the customer or credit the interest to the customer's account.

[17.11.16.26 NMAC - Rp, 17.11.16.25 NMAC, 2-1-06]

17.11.16.27 DEPOSIT RECORDS:

A. A carrier shall maintain a record of each deposit until one (1) year after the deposit is returned. The record shall contain:

(1) the name of each customer making a deposit;

(2) the premises occupied by the customer when making the deposit and each successive premise occupied while the deposit is retained by the carrier; and

(3) the amount of the deposit and the date it was received by the carrier.

B. Upon receipt of a deposit, a carrier shall provide to the customer a receipt showing the deposit date, the name and billing address of the customer, and the amount of the deposit.

[17.11.16.27 NMAC - Rp, 17.11.16.26 NMAC, 2-1-06]

17.11.16.28 REFUND OF DEPOSITS:

A. Upon discontinuance of service, or when a customer establishes credit by other means, a carrier shall promptly refund any deposit, plus accrued interest, or the balance of a deposit, if any, in excess of the unpaid bills for intrastate or wireless services furnished by the carrier. A transfer of service from one location to another within the area served by a carrier shall not be deemed a discontinuance of service if the character of the service remains unchanged.

B. When a deposit, plus accrued interest, is applied to the liquidation of unpaid bills, a carrier shall mail, or otherwise deliver to the customer, a statement showing the amount of the original deposit, plus any accrued interest, the amount of unpaid bills, plus any interest, liquidated by the deposit, and the balance remaining due either to the customer or the carrier.

C. A carrier shall annually review accounts of customers with deposits and, unless the carrier has obtained sufficient factual information to determine that a customer is an unsatisfactory credit risk based upon the criteria prescribed in 17.11.16.24 NMAC, the carrier shall promptly refund a customer's deposit, plus accrued

interest, upon satisfactory payment of all proper charges for twelve (12) consecutive months. A carrier may, at its option, refund a deposit plus accrued interest in whole or in part at an earlier time.

D. A carrier shall pay any balance due a customer within thirty (30) calendar days after service is discontinued and the carrier has rendered a final bill, without demand or notice from the customer.

E. When a carrier is unable to refund a deposit on the first attempt, the carrier shall continue its efforts to refund the deposit.

F. When a carrier refunds a deposit, it shall, upon customer request, render to the depositor a statement showing the amount of the deposit, the period the deposit was held, and the amount of interest accrued.
[17.11.16.28 NMAC - Rp, 17.11.16.27 NMAC, 2-1-06]

17.11.16.29 PRIVACY: The commission hereby adopts by reference the federal communications commission's rules on customer proprietary network information codified at 47 CFR 64.2001-64.2009.
[17.11.16.29 NMAC - Rp, 17.11.16.28 NMAC, 2-1-06]

17.11.16.30 CONFIDENTIALITY; OPERATOR ASSISTED CALLS:

A. A carrier shall consider all communications by customers to be confidential in nature. A carrier shall take reasonable steps to minimize the potential for access by other entities to those communications. The carrier's operators and employees shall not listen to any conversation between customers, except when necessary to provide operator services, and shall not repeat or divulge the nature of any conversation or any information inadvertently overheard. A carrier shall ensure that its operators and employees comply strictly with this requirement.

B. A carrier shall adopt suitable rules and instructions to be followed by its operators and employees governing the language and methods to be used when providing assistance to customers. Specifically, operators and employees shall be courteous, considerate, and efficient in handling customer calls. For intrastate operator assisted calls, a carrier shall accurately record when a customer-requested connection is established and when it is terminated.
[17.11.16.30 NMAC - Rp, 17.11.16.29 NMAC, 2-1-06]

17.11.16.31 TROUBLE ISOLATION CHARGE PROHIBITED: If a customer reports trouble on a line, a LEC shall, without charge to the customer and by use of whatever means necessary, determine whether the trouble is on the LEC or customer side of the network interface. For a LEC subject to an alternative form of regulation plan on January 1, 2006, this section shall not be effective until the expiration of its alternative form of regulation plan.
[17.11.16.31 NMAC - N, 2-1-06]

17.11.16.32 EXEMPTION OR VARIANCE:

A. Any carrier may petition for an exemption or variance from any of the requirements of this rule. Such petition shall:

(1) identify the section of this rule for which the exemption or variance is requested;

(2) describe the situation which necessitates the exemption or variance;

(3) describe the effect of complying with this rule on the carrier and its customers, and on its competitive affiliates and their customers, if the exemption or variance is not granted;

(4) state how the exemption or variance will achieve the purposes of this rule and the New Mexico Telecommunications Act;

(5) state why the proposed alternative is in the public interest and is better than the requirement in the rule; and

(6) state why the exemption or variance would have no anticompetitive effect.

B. Such petition may include a motion that the commission stay the affected portion of this rule for the transaction specified in the motion.

C. Petitions for an exemption or a variance and motions for a stay must be supported by an affidavit signed by an officer of the carrier or other person with authority to bind the carrier.

D. The commission may, at its discretion, require an informal conference or formal evidentiary hearing prior to making its determination.
[17.11.16.32 NMAC - N, 2-1-06]

17.11.16.33 MEDICAL CERTIFICATION FORM:

MEDICAL CERTIFICATION FORM (VALID FOR 30 DAYS)

NOTE: You must complete both parts of this Medical Certification Form and a Financial Certification Form to continue receiving telecommunications service.

I, [insert printed name of residential customer], hereby certify that I am the person responsible for the charges for telecommunications service at [insert service address], that a seriously or chronically ill person, [insert name of seriously or chronically ill person] resides there, and that I am financially unable to pay my bill at this time. I understand that this certification does not relieve me of the responsibility to pay my bill, and that I must reapply for financial certification every 90 days. In addition, I understand that I must make arrangements for a payment plan with [insert name of LEC] in order to continue receiving telecommunications service.

[date] [customer's telephone number] [customer's signature]

I, [insert name of medical professional] certify that I am a licensed physician, physician's assistant, osteopathic physician, osteopathic physician's assistant or certified nurse practitioner who holds license number [insert license number] and that on [insert date] I examined [insert name of seriously or chronically ill person] who I am informed resides at [insert service address]. Said person is seriously or chronically ill with [describe condition]. Discontinuance of telecommunications service to this residence might endanger this person's health or life during the recovery period. This certification is valid for 30 days.

[signature of medical professional] [office address and telephone number of medical professional]

[17.11.16.33 NMAC - N, 2-1-06]

17.11.16.34 FINANCIAL CERTIFICATION FORM:

FINANCIAL CERTIFICATION FORM (VALID FOR 90 DAYS)

NOTE: You must complete this Financial Certification Form and a Medical Certification Form to continue receiving telecommunications service.

FINANCIAL SELF-CERTIFICATION (VALID FOR 90 DAYS)

I, [insert printed name] hereby certify that I am the person responsible for the charges for telecommunications service at [insert service address], that a seriously or chronically ill person, [insert name of seriously or chronically ill person], resides there, and that I do not have the financial resources to pay the charges for telecommunications service.

I understand that this certificate does not relieve me of the responsibility to pay my bill, and that I must submit another Financial Certification Form every 90 days.

I understand that if I provide false information, I could be denied medical emergency telecommunications services.

[customer's signature] [date]

[customer's social security number] [customer's telephone number] [service address]

[city] [state] [zip code]

[17.11.16.34 NMAC - N, 2-1-06]

HISTORY OF 17.11.16 NMAC:
Pre-NMAC History:
None.

History of Repealed Material:
17.11.16 NMAC, Customer Protection (filed 12-14-00) repealed 2-1-06.

NMAC History:
17.11.16 NMAC, Customer Protection (filed 12-14-00) was replaced by 17.11.16 NMAC, Consumer Protection, effective 2-1-06.

WIRELESS CONSUMER PROTECTION

7.5 Section 1. [325F.695] [CONSUMER PROTECTIONS FOR WIRELESS
7.6 CUSTOMERS.]
7.7 Subdivision 1. [DEFINITIONS.] The definitions in this
7.8 subdivision apply to this section.
7.9 (a) "Contract" means an oral or written agreement of
7.10 definite duration between a provider and a customer, detailing
7.11 the wireless telecommunications services to be provided to the
7.12 customer and the terms and conditions for provision of those
7.13 services.
7.14 (b) "Wireless telecommunications services" means commercial
7.15 mobile radio services as defined in Code of Federal Regulations,
7.16 title 47, part 20.
7.17 (c) "Provider" means a provider of wireless
7.18 telecommunications services.
7.19 (d) "Substantive change" means a modification to, or
7.20 addition or deletion of, a term or condition in a contract that
7.21 could result in an increase in the charge to the customer under
7.22 that contract or that could result in an extension of the term
7.23 of that contract. "Substantive change" includes a modification
7.24 in the provider's administration of an existing contract term or
7.25 condition. A price increase that includes only the actual
7.26 amount of any increase in taxes or fees, which the government
7.27 requires the provider to impose upon the customer, is not a
7.28 substantive change for purposes of this section.
7.29 Subd. 2. [COPY OF CONTRACT.] A provider must provide each
7.30 customer with a written copy of the customer's contract between
7.31 the provider and the customer within 15 days of the date the
7.32 contract is entered into. The provider may meet the requirement
7.33 to provide a written copy of the contract by providing an
7.34 electronic copy of the contract at the customer's request. A
7.35 provider must maintain verification that the customer accepted
7.36 the terms of the contract for the duration of the contract
8.1 period.
8.2 Subd. 3. [PROVIDER-INITIATED SUBSTANTIVE CHANGE.] A
8.3 provider must notify the customer in writing of any proposed
8.4 substantive change in the contract between the provider and the
8.5 customer 60 days before the change is proposed to take effect.
8.6 The change only becomes effective if the customer opts in to the
8.7 change by affirmatively accepting the change prior to the
8.8 proposed effective date in writing or by oral authorization
8.9 which is recorded by the provider and maintained for the
8.10 duration of the contract period. If the customer does not
8.11 affirmatively opt in to accept the proposed substantive change,
8.12 then the original contract terms shall apply.
8.13 Subd. 4. [CUSTOMER-INITIATED CHANGE.] If the customer
8.14 proposes to the provider any change in the terms of an existing
8.15 contract, the provider must clearly disclose to the customer
8.16 orally or electronically any substantive change to the existing
8.17 contract terms that would result from the customer's proposed
8.18 change. The customer's proposed change is only effective if the
8.19 provider agrees to the proposed change and the customer agrees

8.20 to any resulting changes in the contract. The provider must
8.21 maintain recorded or electronic verification of the disclosure
8.22 for the duration of the contract period.
8.23 Subd. 5. [EXPIRATION.] This section expires August 1, 2007.
8.24 Sec. 2. [EFFECTIVE DATE.]
8.25 Section 1 is effective on July 1, 2004, and applies to
8.26 contracts for wireless service entered into on or after May 1,
8.27 2004.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3198

Cellco Partnership, doing business as Verizon Wireless; Verizon Wireless, doing business as Verizon Wireless, (VAW) L.L.C.; Duluth MSA, doing business as Verizon Wireless, Limited Partnership; Midwest Wireless Holdings, L.L.C.; Midwest Wireless Communications, L.L.C.; American Cellular Corporation; Rural Cellular Corporation, doing business as Cellular 2000; Sprint Spectrum L.P.; AT&T Wireless Services of Minnesota, Inc.; Voicestream Minneapolis, Inc.; T-Mobile USA, Inc.,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Mike Hatch, in his official capacity as Attorney General of Minnesota and not as an individual,	*	
Appellee.	*	
Cellular Telecommunications & Internet Association; Federal Communications Commission,	*	
Amici on Behalf of Appellant,	*	

AARP; National Association of State Utility Consumer Advocates; National Association of Consumer Advocates,	*
Amici on Behalf of Appellee.	*

Submitted: May 11, 2005
Filed: December 9, 2005

Before WOLLMAN, BYE, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Cellco Partnership and its co-appellants (collectively, "Cellco") appeal from the district court's partial denial of their request for a preliminary injunction against implementation and enforcement of Minnesota Statutes § 325F.695 ("Article 5").[1] The district court ruled that Cellco's claims – that Article 5 was preempted and that the statute was unconstitutionally vague – did not have a likelihood of success on the merits, and dissolved the temporary restraining order it had previously entered. We reverse and remand for entry of a permanent injunction.

[1]The district court granted Cellco's request for a preliminary injunction barring Attorney General Hatch and employees of the State from "taking any action to prevent wireless communications providers from passing through to customers federally assessed fees," pursuant to its determination that Article 5 conflicted with 47 C.F.R. § 54.712(a), which authorized recovery of the fees. This portion of the district court's order is not challenged on appeal.

I.

On May 29, 2004, the Governor of Minnesota signed into law Article 5 of House File No. 2151, entitled "Wireless Consumer Protection." Article 5 imposes several requirements on Cellco and other providers of wireless telecommunications services. The statute forbids the providers to implement changes in the terms and conditions of subscriber contracts that "could result" in increased rates or an extended contract term, unless they first obtain affirmative written or oral consent from the subscriber. Minn. Stat. § 325F.695, subd. 3; *see id.* § 325F.695, subd. 1(d). Article 5 also requires providers to deliver copies of the subscriber contracts to the subscribers, *id.*, subd. 2, and, in the event a subscriber proposes a change to the contract, to disclose clearly any rate increase or contract extension that could result from the change. *Id.*, subd. 4. The statute further requires providers to maintain recorded or electronic verification of the "disclosures" required by the law. Article 5 was scheduled to take effect on July 1, 2004, but on June 16, Cellco filed suit in the District of Minnesota seeking a declaration that, among other things, Article 5 was preempted by the Communications Act of 1934, 47 U.S.C. §§ 151-614, and invalid under several provisions of the United States Constitution. Cellco also sought an injunction against enforcement of Article 5.

The district court first granted a temporary restraining order against enforcement of Article 5, ruling that Cellco had "shown an initial likelihood of success on at least a portion of [its] preemption argument." (Add. at 24). On consideration of Cellco's request for a preliminary injunction, however, the court reached a different conclusion. The district court concluded that Cellco had not satisfied the standard for preliminary injunctions set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), with respect to its claim that Article 5 is preempted, except to the extent that Article 5 applied to Cellco's attempts to pass along the costs of contributions to the Universal Service Fund pursuant to 47 C.F.R. § 54.712(a). The district court also determined that Cellco did

not meet the *Dataphase* test with respect to its claim that Article 5 is unconstitutionally vague. As a result, the district court dissolved its temporary restraining order effective September 15, 2004. We granted a stay pending appeal.

Although the district court analyzed the preemption question under the "likelihood of success on the merits" prong of the test for granting preliminary injunctions, *see Dataphase*, 640 F.2d at 113, Cellco now proposes without objection from the State that there are only legal issues unresolved on appeal. Accordingly, we consider Cellco's motion as one for a permanent injunction. *See Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

II.

Cellco urges that Article 5 is expressly preempted by a federal statute, § 332(c)(3)(A) of the Communications Act of 1934, which provides in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A). A "mobile service" is defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," *id.* § 153(27); *see id.* § 332(d), and it is undisputed that Cellco is a commercial mobile service ("CMRS" or "provider"). The parties also agree that Article 5 does not regulate market entry, so whether any part of Article 5 is expressly preempted by § 332(c)(3)(A) turns on whether the statute regulates "rates charged" by providers. Our interpretation of the scope of an express preemption clause "must rest primarily on a fair understanding of congressional purpose," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)

(internal quotation and emphasis omitted), and we presume that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose." *Id.* at 485.

Section 332(c)(3) was added to the Communications Act in 1982, *see* An Act to amend the Communications Act of 1934, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087, 1096 (1982), and its original preemption language provided that "[n]o State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 47 U.S.C. § 332(c)(3) (1992). An amendment in 1993 gave § 332(c)(3)(A) its current form, introducing the commercial/private mobile service distinction and providing for state regulation of "other terms and conditions." *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993).

The legislative history of the 1993 amendment speaks only briefly and indirectly about the meaning of "rate" regulation. A report from the House Budget Committee elaborated on the meaning of "other terms and conditions," which the statute distinguishes from the regulation of "rates" and "market entry":

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.