



# STATE OF MINNESOTA

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April 7, 2010

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

**Re: WTB Docket No. 10-42.**

Dear Ms. Dortch,

The Office of the Minnesota Attorney General (“Office”) submits the following written comments to the Federal Communications Commission (“Commission”) in response to the questions and issues raised in the Commission’s Public Notice entitled “Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Regarding Interpretation of Section 332(c)(3)(A) of the Communications Act of 1934, as Amended, as Applied to Fees Charged for Late Payments,” released on February 19, 2010 (“Petition for Declaratory Ruling”).

## **I. Late-Payment Fees Are Not “rates charged” Under 47 U.S.C. § 332(c)(3)(A).**

As I am sure the Commission has also noticed, this Office has observed a steady increase in the number and types of fees that providers of commercial mobile radio service (“CMRS providers”) regularly bill to consumers who utilize wireless devices. Notwithstanding Congress’s clear intent and ample other authority indicating that not all aspects of such fees amount to “rates charged” as used in 47 U.S.C. § 332(c)(3)(A) (“Section 332”) of the Communications Act of 1934 (“the Act”),<sup>1</sup> CMRS providers often argue that such is the case both in court<sup>2</sup> and before the Commission.<sup>3</sup> The current matter is no exception, and the Commission must now decide whether CMRS providers’ imposition of late-payment fees on

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<sup>1</sup> The relevant language of 47 U.S.C. § 332(c)(3)(A) for the purposes of these comments states: “[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.”

<sup>2</sup> See, e.g., *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057-58 (9th Cir. 2008) (rejecting CMRS providers’ contention that a consumer-protection statute regulating how certain state taxes must be disclosed to consumers is preempted by Section 332).

<sup>3</sup> See, e.g., *In the Matter of Sw. Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898, 19901 (1999) (seeking a declaration by the Commission that certain business activities were protected as rate making, in response to which the Commission noted that “CMRS providers have frequently asserted that . . . [law]suits seek relief that constitutes state regulation of rates”).

customers who neglect to timely pay their monthly bill amount to “rates charged” under Section 332—thereby preempting any state authority to regulate such fees—or are part of the “other terms and conditions” of the wireless service—and therefore would not preempt state regulatory authority. As explained further below, the facts and the law overwhelmingly indicate that such late-payment fees are no more than a *penalizing billing practice* going to the *manner* in which tardy customers pay the “rates charged” them for wireless service; such fees are *not* part of the underlying “rates” themselves. Accordingly, this Office urges the Commission to declare that late-payment fees are part of the “other terms and conditions” of wireless service, not a “rate,” under Section 332.

## II. The Presumption Against Preemption.

The starting point for the Commission’s legal analysis of whether the term “rates” as used in Section 332 encompasses late-payment penalties must be that “when the text of a pre-emption clause is susceptible of more than one plausible reading, [adjudicative bodies] ordinarily accept the reading that disfavors pre-emption.”<sup>4</sup> In other words, whenever possible the scope of ambiguous preemptive commands should be interpreted in a manner that avoids preemption of state law. Here, as evidenced by the present Petition for Declaratory Ruling, what amounts to “rates charged” under Section 332 is not explicit.<sup>5</sup> So recognizing, other adjudicative bodies from across the country have applied the presumption against preemption in the context of a dispute over what amounts to a “rate” under Section 332.<sup>6</sup> Accordingly, so too should the Commission approach the present question with the mindset that the ambiguous term “rate” is presumed to *not* encompass late-payment penalties, and thereby avoid the preemption of state law relating to such penalties.

President Obama recently echoed the Supreme Court’s caution in regards to the unfounded preemption of state law by executive departments and agencies. In a May 2009 directive, President Obama stated that it is the “policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full

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<sup>4</sup> *Altria Group, Inc. v. Good*, -- U.S. --, 129 S.Ct. 538, 543 (2008); *see also, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 1801 (2005) (“even if [an] alternative [reading of the law at issue] were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 2250 (1996) (applying the presumption against preemption “to support a narrow interpretation of such an express [preemption] command”).

<sup>5</sup> *See Cellular Telecomms. Indus. Ass’n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (“Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what compromises other terms and conditions of wireless service.”).

<sup>6</sup> *See, e.g., Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1252 (11th Cir. 2006) (“*NASUCA*”) (applying the presumption against preemption in rejecting Section 332 preemption of state regulation of line items contained in wireless telephone bills); *Farina v. Nokia*, 578 F.Supp.2d 740, 755 (E.D. Pa. 2008) (applying the presumption against preemption in rejecting Section 332 preemption of certain state-law tort claims).

consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”<sup>7</sup> This recent directive serves to reaffirm a prior executive order (Executive Order 13132) mandating that executive departments and agencies should preempt state law “only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute,” and even then “[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.”<sup>8</sup> Adjudicative bodies have previously relied on both these presidential mandates in refusing to find certain state actions preempted under Section 332.<sup>9</sup> These authorities further counsel that the Commission should reject any CMRS-industry claims that the term “rates” should be broadly applied to prohibit state regulation of late-payment penalties.

### **III. Congress Did Not Intend to Preempt State Regulation of CMRS Provider’s Billing Practices, Such as Levying Late-Payment Penalties on Wireless Customers.**

With the presumption against preemption in mind, the “touchstone” of any “analysis of the scope of [a] statute’s pre-emption is guided by the purpose of Congress.”<sup>10</sup> It is clear that Congress did not intend the term “rates” to be construed broadly in Section 332 so as to sweep up every wireless-related fee in its path. As one court astutely noted, Congress did not preempt “all state laws that *related* to rates, . . . only those *regulating* rates.”<sup>11</sup> The legislative history pertaining to the 1993 amendments to the Act indicates that Congress specifically desired that many CMRS business practices remain subject to regulation by applicable state law, including billing practices such as the imposition of late-payment penalties:

Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on . . . commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. . . . 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.”<sup>12</sup>

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<sup>7</sup> Memorandum: Preemption, 74 Fed. Reg. 24693 (May 20, 2009).

<sup>8</sup> Exec. Order No. 13132: Federalism, 64 Fed. Reg. 43255 (Aug. 4, 1999).

<sup>9</sup> See *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F.Supp.2d 831, 839 (W.D.La. 2009).

<sup>10</sup> *Lohr*, 518 U.S. at 485, 116 S.Ct. at 2250.

<sup>11</sup> See *Iberia Credit Bureau*, 668 F.Supp.2d at 839.

<sup>12</sup> Omnibus Reconciliation Act of 1993, House Report No. 103-111, 103rd Congress, 1st. Sess. (1993) (emphasis added); *reprinted in* 1993 U.S.C.C.A.N. 378 at \*588; *available at* 1993 WL 181528 at \*261.

The late-payment penalties at issue here are nothing more than a “billing practice” as contemplated by Congress, meant to incentivize customers to pay their bill on time. Such fees’ imposition goes only to the *manner* in which CMRS providers seek to have their customers pay the “rates charged” for the provision of wireless service, and are *not* part of the underlying “rates” themselves.<sup>13</sup> Put differently, whether a late-payment fee is levied on a particular customer in a particular billing cycle has *nothing* to do with the actual provision of any type of wireless service to the customer, and has *everything* to do with the (lack of) timeliness of the customer paying for the services that were in fact provided.

The Commission has already recognized that “[i]f Congress had desired to foreclose state . . . regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied.”<sup>14</sup> The above legislative history makes it plain that Congress did not desire to preempt states from regulating “customer billing information and practices . . . and other consumer protection matters.” When viewed in light of the presumption against preemption, this Congressional intent belies any claim that the billing practice of levying a late-payment penalty on a tardy wireless customer falls within the meaning of “rates” under Section 332.

#### **IV. The Commission has Previously Taken a Narrowly-Tailored View of “rates” Under Section 332, Rejecting Arguments for a Broad Reading of the Provision.**

In prior matters regarding preemption pursuant to Section 332, the Commission—in accordance with the presumption against preemption and Congressional intent—has appropriately taken a narrowly-tailored view of what charges and fees fall within the meaning of “rates” under the provision.<sup>15</sup> The Commission has recognized that “the very structure of Section 332 limits the scope of its preemption by distinguishing . . . rates from terms and conditions[,] which are subject to state jurisdiction.”<sup>16</sup> In contrast, the Commission has taken a broader view of “other terms and conditions,” characterizing the term as “sufficiently flexible” in scope to encompass various types of state regulation of CMRS providers.<sup>17</sup>

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<sup>13</sup> Cf. *NASUCA*, 457 F.3d at 1254 (“State regulation of line items [on wireless telephone bills] regulate the billing practices of cellular wireless providers, not the charges that are imposed on the consumer.”).

<sup>14</sup> *In the Matter of Petition of New York State Public Service Comm’n to Extend Rate Regulation*, 10 F.C.C.R. 8181, 8190 (1995).

<sup>15</sup> For example, in a prior proceeding before the Commission CMRS providers argued that the filed-rate doctrine—which generally governs the rates charged by traditional, landline telephone providers—should be applied pursuant to Section 332 to preempt any state-law-based action seeking damages against CMRS providers. The Commission, however, “reject[ed] the sweeping extension of this broad analysis to CMRS cases,” holding that the filed-rate doctrine had no place in the CMRS industry. *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17032 (2000).

<sup>16</sup> *Id.*

<sup>17</sup> *In re New York State Public Service Comm’n*, 10 F.C.C.R. at 8203.

The Commission's carefully tailored view of scope of "rates" under Section 332, in juxtaposition with the flexibility found in the scope of "other terms and conditions," has rightly led it to find in a prior proceeding addressing the preemptive force of Section 332 that

state contract or consumer fraud laws relating to . . . rate practices have [not] generally been preempted with respect to CMRS. Such preemption by Section 332(c)(3)(A) is not supported by its language or legislative history. . . . [T]he legislative history of Section 332 clarifies that billing information, practices and disputes—all of which might be regulated by state contract or consumer fraud laws—fall with "other terms and conditions" which states are allowed to regulate.<sup>18</sup>

Accordingly, the Commission has held that Section 332 should not be used "to circumscribe a state's traditional authority to monitor commercial activities within its borders[;] . . . [a state] retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state."<sup>19</sup> Adherence to this precedent and the Congressional intent discussed above leads to the conclusion that the state-retained authority to regulate CMRS providers encompasses conduct such as the billing practice of levying late-payment fees on wireless customers who are tardy in remitting their monthly payment.

Moreover, the potential for petitioner-plaintiffs in the court actions underlying this Petition for Declaratory Ruling to secure damage awards should they ultimately prevail does not, according to the Commission, alter the above analysis: "[t]he indirect and uncertain effects of monetary damage awards based on tort and contract law do not correspond to the mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities."<sup>20</sup> Therefore, in addition to (and presumably because of) Congress's clear purpose to preserve states' ability to regulate aspects of the CMRS industry aside from rate making, the Commission's prior precedent supports a continued, narrow reading of the term "rates" as used in Section 332 so as to exclude the billing practice of levying late-payment penalties on wireless customers.

**V. Courts Have Uniformly Held that Late-Payment Penalties Are Not "rates," but "other terms and conditions" of the Wireless Service, Under Section 332.**

Every court that has considered the question of how to characterize late-payment penalties in regards to Section 332 has held that such fees are part of the "other terms and conditions" of the wireless service, not "rates," under the provision. The issue first arose a decade ago in *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421 (D. Md. 2000). There, plaintiffs sought to "recover allegedly unlawful late fee charges," and defendant CMRS

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<sup>18</sup> *In re Sw. Bell Mobile Systems*, 14 F.C.C.R. at 19908.

<sup>19</sup> *Id.*

<sup>20</sup> *In re Wireless Consumers Alliance*, 15 F.C.C.R. at 17034.

provider argued that Section 332 “completely preempts their claims.”<sup>21</sup> The court deemed the plaintiff’s position the correct one, and held that late-payment fees were not “rates” under Section 332:

The court finds that late fees are not included in “rates” of service, but rather are part of the “other terms and conditions” of service. While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment. Defendants argue that late fee charges are completely preempted because a reduction in late fee charges will result in an increase in rates. However, any legal claim that results in an increased obligation for Defendants could theoretically increase rates. For example, a claim of false advertising could lead to an increased obligation to notify customers of charges, which could in turn lead to an increase in rates. Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of rates themselves.<sup>22</sup>

Since *Brown*, the only other federal court to consider the issue (at least to the best of this Office’s knowledge) reached the same result,<sup>23</sup> also finding that late-payment penalties were properly characterized as “other terms and conditions” of the wireless service, and thus subject to state regulation:

The Court . . . finds that the term “rate” must be construed narrowly. . . . If the Court adopted Verizon Wireless’s reasoning, any charge imposed by a wireless carrier to recover costs and make a profit would qualify as a “rate,” regardless of whether it was imposed in exchange for providing service or not. Although Section 332 could have preempted the regulation of any “charge,” it only preempts the regulation of “rates.” Therefore, the Court finds that [Plaintiff’s] state law claims challenging Verizon Wireless’s late fee do not challenge the company’s “rates,” and thus are not preempted by Section 332.<sup>24</sup>

Accordingly, in lock-step parallelism with the presumption against preemption, the presidential directives to avoid preemption of state law whenever possible, and past Commission precedent,

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<sup>21</sup> *Id.* at 422-23.

<sup>22</sup> *Id.* at 423.

<sup>23</sup> As the Commission is already aware, two other courts have stayed consideration of similar questions pending the outcome of the present Petition for Declaratory Ruling. See *Thomas v. Sprint Solutions, Inc.*, Case No. C08-5119THE, Order Granting in Part and Denying in Part Motion to Stay Case (N.D. Cal., Sept. 9, 2009); *Barahona v. T-Mobile USA, Inc.*, Case No. C08-1631RSM, Order on Motion to Dismiss or Stay This Action (W.D. Wash., May 15, 2009).

<sup>24</sup> *Gellis v. Verizon Commc’ns, Inc.*, 2007 WL 7044762, \*4 (N.D. Cal., Nov. 5, 2007). Subsequent to addressing the issue on the merits, the *Gellis* court stayed further proceedings to permit the Commission to weigh in on the matter. See *Gellis v. Verizon Commc’ns, Inc.*, Case No. C07-3679JSW, Order Granting Defendant’s Motion for Stay (N.D. Cal., July 10, 2009).

the relevant judicial authority also supports the conclusion that late-payment fees are not preempted “rate” regulation.

In at least two of the actions underlying the current Petition for Declaratory Ruling, CMRS providers have cited a number of inapposite judicial precedents in arguing that late-payment penalties should be considered “rates” under Section 332. Paramount among these is *Kiefer v. Paging Network, Inc.*, 50 F.Supp.2d 681 (E.D. Mich. 1999). However, *Kiefer* involved the court interpreting the broader term “charge”—not “rate”—in the context of construing a different statute, 47 U.S.C. § 201(b)—not 47 U.S.C. § 332(c)(3)(A).<sup>25</sup> *Kiefer*’s interpretation of a different term in a different statute has no bearing on the present issue.<sup>26</sup>

Despite being equally distinguishable, CMRS providers have also relied on *Gilmore v. Sw. Bell Mobile Sys., Inc.*, 156 F.Supp.2d 916 (N.D. Ill. 2001), to support their claim that late-payment penalties should be considered “rates.” In *Gilmore*, plaintiffs challenged the levying of a Corporate Account Administrative Fee by CMRS-provider defendants.<sup>27</sup> Several of plaintiff’s challenges “explicitly raise[d] the issue of whether [plaintiff] received sufficient services in return for the Fee” and “whether the Fee was unjust.”<sup>28</sup> *Gilmore* recognized that such challenges were rate issues, and thus preempted.<sup>29</sup> Here, by contrast, the nature of the claim in regard to the late-payment fee is very different. Unlike *Gilmore*, petitioners here appear to simply claim that the fee is an impermissible penalty for late payment of a wireless bill. Should petitioners ultimately prevail, it does not appear as if they expect or seek to secure “more” or higher quality services on behalf of wireless customers, like the *Gilmore* plaintiffs. This renders the current proceeding distinguishable from *Gilmore*.<sup>30</sup>

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<sup>25</sup> *Kiefer*, 50 F.Supp.2d. at 682-83 (challenging the propriety of a late-payment fee as an unreasonably high and unjust “charge” under Section 201(b), and not once citing Section 332 throughout the opinion).

<sup>26</sup> Echoing the inappropriateness of their reliance on *Keifer*, CMRS providers have also argued that how a particular state legislatures defined the term “rate” in certain state statutes (which, necessarily, could not regulate CMRS rates) has bearing on the meaning of the term in Section 332. However, legislative bodies are not fungible, and the numerous problems of relying on the intent of particular legislature in passing a particular law to interpret a different law passed by a different legislature is obvious.

<sup>27</sup> *Gilmore*, 156 F.Supp.2d at 919.

<sup>28</sup> *Id.* at 924-95.

<sup>29</sup> *Id.*

<sup>30</sup> In the same briefing in the cases underlying the current matter, CMRS providers have argued that even if state regulation of late-payment fees is not regulation of “rates” per se, it is an impermissible regulation of their “rate structure.” However, this argument is nothing more than a costume change for act two of the same play. Regulation of rate structures and rate levels does not alter the simple fact that “rate levels and rate structures are still components of ‘rates.’ The inclusion of the specific components ‘rate levels’ or ‘rate structures’ within the general term ‘rates’ does not magically expand the [preemptive] authority of . . . [Section 332] beyond what the statutory language allows.” *NASUCA*, 457 F.3d at 1255-56.

## **VI. Treating Late-Payment Penalties as “rates” Does Not Serve the Policy Goals of Congress When it Preempted State Regulation of CMRS Rate Making.**

The Commission has acknowledged that, in preempting state regulation of CMRS rates, it was Congress’s “general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.”<sup>31</sup> However, preempting state regulation of late-payment penalties would not advance this interest here, and may actually harm competition within the CMRS industry. By imposing a late-payment penalty, CMRS providers are frequently able to conceal the effective or “true” cost of their wireless service. Such late-payment fees are often disclosed to consumers, if at all, buried within an long list of fine-print contract terms. Based on this Office’s extensive experience litigating alleged non-disclosure of CMRS contract terms with Sprint Nextel,<sup>32</sup> this Office believes that it is likely that many wireless consumers are unaware of the potential that they will be subject to late-payment penalties before signing their wireless contract. This “hidden” cost in turn stifles price competition in the CMRS industry because it makes it difficult for consumers to accurately evaluate the actual cost of the many wireless service plans offered by any number of CMRS providers. Accordingly, rather than fostering price competition among different CMRS providers as Congress intended, late-payment penalties tend to impede such competition, undermining any rationale to exclude such penalties from state regulation for competitive reasons.

## **VII. Late Payment Penalties are Not “rates” Because No Services are Provided in Return for Their Payment.**

Finally, buttressing the already overwhelming *legal* authority indicating that late-payment penalties are not “rates” within the meaning of Section 332 is the simple *fact* that customers receive no type of service in return for payment of the penalty. The Commission has recognized that “a ‘rate’ has no significance without the element of service for which it applies.”<sup>33</sup>

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<sup>31</sup> *In re Sw. Bell Mobile Systems*, 14 F.C.C.R. at 19902 (quotation omitted). At the same time, the Commission acknowledged that this preference for competition to govern CMRS providers should not be viewed in “absolute terms,” or as implying “a general exemption . . . from neutral application of state contractual or consumer fraud laws.” *Id.*

<sup>32</sup> This Office filed suit against Sprint Nextel in September 2007 regarding (among other things) its failure to disclose various terms and conditions of its wireless service, including those that would trigger renewal of a wireless contracts thereby “locking in” the consumer as a Sprint Nextel customer for an additional period of time. See *State, by its Attorney General, Lori Swanson v. Sprint Nextel Corporation, d/b/a Sprint Nextel, Nextel or Sprint and f/k/a Sprint Corporation; Sprint Spectrum, L.P. a/k/a Sprint PCS; Northern PCS Services, LLC; Sprint Solutions, Inc.; Sprint/United Management Company; Nextel Retail Stores, LLC; Nextel Operations Inc.; Nextel Partners Operating Corp.; Nextel West Corp.; and Nextel West Services, LLC*, Court File No. 27-CV-0720108 (Minn. Dist. Ct., 4th Judicial Dist.). After extensive litigation, this action was settled in October 2009.

<sup>33</sup> *In re Sw. Bell Mobile Systems*, 14 F.C.C.R. at 19906. Moreover, even CMRS providers acknowledge a “rate” is not a “rate” absent a connection to some other amount. *Id.*

Similarly, the Supreme Court has stated that an essential aspect of determining what is and is not a “rate” is ascertaining what, if anything, is received in return for charge: “Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.”<sup>34</sup>

Here, the late-payment fee at issue is incurred not because any type of service is extended by CMRS providers, but as a result of the mere passage of time (specifically, passage beyond the billing due date). Thus, as indicated throughout, the fee functions as a penalty presumably intended to prompt tardy customers to remit timely payment in the future. The *Gellis* court has found as much, stating that even “[a]ssuming that [CMRS providers] do[] incur costs when customers fail to pay their bills on time, the[y] . . . chose to recover such costs through imposing a late fee *unrelated to the provision of any services*, as opposed to raising its rates generally.”<sup>35</sup> CMRS providers are, of course, free to change the current practice at any time and roll the costs of late payment into their overall rates. What they are not free to do, however, is impermissibly twist the meaning of “rates charged” in Section 332 to encompass penalty fees for which no service of any kind is provided.

#### VIII. Conclusion.

This Office asks that the Commission consider these comments in connection with its February 19, 2010 Public Notice, and further declare that the imposition of late-payment penalties by providers of commercial mobile radio service are not “rates,” but “other terms and conditions,” under 47 U.S.C. § 332(c)(3)(A). Please feel free to contact this Office if there is any additional information that would be helpful to the Commission in considering the above comments.

Respectfully submitted,

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<sup>34</sup> *Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 223, 118 S.Ct. 1956, 1963 (1998).

<sup>35</sup> *Gellis*, 2007 WL 7044762 at \*4 (emphasis added).