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

In the Matter of	)	
	)	
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	)	WT Docket No. 10-42
	)	
	)	

To: The Commission

COMMENTS OF VERIZON WIRELESS

John T. Scott, III
Vice President & Deputy General Counsel

William D. Wallace
Senior Counsel

Verizon Wireless
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
(202) 589-3760

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SUMMARY

Petitioners are class action plaintiffs seeking to invoke state laws to invalidate two types of fees charged by Verizon Wireless and other wireless carriers: a late payment fee that applies when a customer fails to pay the bill when due, and a reconnection fee that applies when a customer whose service has been impaired due to nonpayment seeks to reestablish service. Their litigation claims are based exclusively on the theory that these fees are unreasonably high, rather than that the fees are inadequately disclosed. The plain language of the text of Section 332(c)(3)(A) of the Communications Act of 1934, as amended in 1993, as well as the regulatory history that the statute was intended to change, preclude these claims, and demonstrate that both late fees and reconnection fees are wireless carrier "rates," which states are precluded from regulating.

The Commission and the courts have defined a "rate" as the amount of a charge or payment, or as the charge for a good or service. The fees at issue in the Petition fit squarely within both those and any other sensible interpretation of the statutory words "rates charged by" a wireless carrier. The late fee is a charge for the service of extending credit to the customer beyond the due date. It is also a charge for the wireless services provided to customers because the timing of payment is an integral part of its price. The reconnect fee is a charge for the service of re-establishing wireless service to the customer after it has been impaired due to nonpayment and therefore is a charge for wireless service, no less than activation fees incurred at the initiation of service.

As detailed in the attached Declaration of Robert G. Harris, an economist with expertise in regulated industries and state ratemaking practices, state regulation of wireline and wireless rates prior to the enactment of Section 332 treated late fees and reconnect fees as "rates" and as

part of a carrier's rate structure. The preemptive language of Section 332(c)(3)(A) was adopted to fit squarely into this regime and eliminate state regulation of *all* rates charged by wireless carriers to promote competition and to benefit consumers. The suggestion by Petitioners that Section 332 preemption only applies to per unit charges that are directly tied to specific wireless services such as airtime finds no support in the statute's text, structure, purpose or history. In any event, the contested fees would qualify as "rates" even under Petitioners' truncated and untenable definition. Late fees are a common practice among many industries, and reflect the economic reality that the timing of payment for a product is an integral part of its price. They are thus part of a seller's rate structure, which Section 332 also preempts from state regulation. Petitioners' effort to fit late fees and reconnect fees within the "other terms and conditions" provision of Section 332 fails, because these fees are "rates" under the ordinary meaning of that term and in light of the regulatory background against which Congress enacted Section 332.

The disclosure of Verizon Wireless late and reconnection fees is not at issue in the underlying lawsuits, and Petitioners do not seek to enforce state law requirements concerning customer billing information or practices. Rather, the lawsuits against Verizon Wireless squarely request the courts to assess the reasonableness of the fees in light the costs they seek to recover. Under settled Commission and judicial precedents, that is the definition of prohibited state rate regulation. A declaration to that effect in this proceeding would have no effect on state laws governing disclosure.

Petitioners' policy arguments fare no better than their legal arguments and statutory interpretation. The issues presented by the Petition are controlled by Congress' intent as expressed in Section 332. The Petitioners' arguments concerning the feasibility of carriers' complying with varying state regulations and President Obama's directive on preemption are irrelevant to the preemptive scope of Section 332 as expressly set forth by Congress. Congress made clear that competition is the best way to ensure that wireless rates are reasonable, and that if there were a need for regulation, it may be carried out only by the Commission, not the states. Ultimately, granting the Petitioners' requested declaration would harm consumers by encouraging carriers to collect the costs incurred for late paying customers from the entire subscriber base rather than those for whom the costs are incurred.

Accordingly, the Commission should deny the Petition and declare that wireless late fees and reconnection fees are "rates" within the meaning of Section 332(c)(3)(A).

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COMMENTS OF VERIZON WIRELESS

I. INTRODUCTION

In 1993, Congress amended the Communications Act to provide that "no State or local government shall have *any* authority to regulate the entry of or the *rates charged by*" a wireless carrier.[1] This preemption provision was at the heart of Congress' program to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[2]

Petitioners ask the Commission to declare that Section 332 applies to some rates, but not others. Petitioners are class action plaintiffs seeking to invoke state laws to invalidate two types of fees charged by Verizon Wireless and other wireless carriers: a late payment fee that applies when a customer fails to pay the bill when due, and a

[1] 42 USC § 332(c)(3)(A) (emphasis added).

[2] H.R. Rep. No. 103-111, at 260 (1993).

reconnection fee that applies when a customer whose service has been impaired due to nonpayment seeks to reestablish service. In the underlying lawsuit against Verizon Wireless, Petitioners do not allege that Verizon Wireless' fees are inadequately disclosed. Instead, their claims are based exclusively on the theory that the fees are unreasonably high. Although Petitioners admit that access fees and usage fees are rates that states are preempted from regulating, they claim that late fees and reconnect fees are not. The plain language of the text of Section 332, as well as the history of state regulation that the statute was intended to change, preclude these claims.

The Commission and the courts have defined a "rate" as the amount of a charge or payment. Some courts have suggested that the charge must also be in exchange for a good or service. The fees at issue fit squarely within those and any other sensible interpretation of the words "rates charged by" a wireless carrier. The late fee is a charge for the service of extending credit to the customer beyond the due date. It is also a charge for the wireless services provided to customers, for it is an economic reality that the timing of payment for a product is an integral part of its price, as numerous merchants who tout their wares by offering no payment until a certain date understand. The reconnect fee is a charge for the service of re-establishing wireless service to the customer after it has been impaired due to nonpayment and therefore is a charge for wireless service, no less than activation fees are.

In addition, state regulation of wireless rates prior to the enactment of Section 332, which Congress ousted through that statute, treated late fees and reconnect fees as rates and as part of a carrier's rate structure. Petitioners seek to exclude the challenged fees from the plain terms of the statute by asserting, in effect, that only per unit charges directly tied to specific wireless services meet the definition of a "rate." This proposal, however, finds no support in the statute's text, structure, purpose or history. In any event, the contested fees would qualify as "rates" even under Petitioners' truncated and untenable definition.

The Petition before the Commission does not implicate the states' ability to regulate disclosure or billing information. The claims in the underlying lawsuits are not based on disclosure and do not seek to enforce state law requirements concerning customer billing information or practices. Rather, the lawsuits squarely request the courts to assess the reasonableness of the fees in light of the costs they seek to recover. Under settled Commission and judicial precedents, that is the definition of prohibited rate regulation. Thus, contrary to Petitioners' suggestion, a holding that the contested fees are rates charged would neither expand Section 332 beyond its proper scope nor raise any issue as to the state's ability to regulate "other terms and conditions" of service -- that is, terms and conditions of service other than rates. In particular, it would have no effect on state laws governing disclosure.

The issues presented by the Petition are controlled by Congress' intent as expressed in Section 332. Petitioners' policy arguments are therefore misplaced (and incorrect on their own terms). Neither the feasibility of carrier's compliance with varying state regulations nor President Obama's directive on preemption can alter the preemptive scope of Section 332 as expressly set forth by Congress. Moreover, Congress made clear that competition is the best way to ensure that rates are reasonable, and that if there were a need for regulation, it may be carried out only by this Commission, not the states. In the end, because carriers may avoid state regulation simply by recovering the costs of delinquencies through other components of their rate structures, the result Petitioners seek is without economic substance and would not benefit anyone but the class action attorneys.

For these reasons, the Commission should act decisively to give effect to the express Congressional mandate in Section 332 and hold that Petitioners' claims are preempted.

II. BACKGROUND REGARDING LATE FEES AND LITIGATION

Late or non-payment of bills imposes significant costs on Verizon Wireless, as it does on any other business. Customers who do not pay their bills when due require Verizon Wireless to maintain a collections organization and associated infrastructure; to extend credit, in effect, to those customers beyond the due date; to employ outside collection agencies; and to devote a portion of its general and administrative expenses to those activities, all at a significant cost to Verizon Wireless. Some of the customers who do not pay on time will not pay at all, resulting in significant bad debt expenses. To reduce these costs and encourage timely payment, Verizon Wireless makes available to its customers various ways to pay their bills. In addition to writing a check, a customer may pay at Verizon Wireless's stores or payment kiosks, or set up an on-line account with Verizon Wireless and receive email reminders when a bill is about to be due. Verizon Wireless also charges a late payment fee of $5 or 1.5% of the overdue balance when a customer's account becomes delinquent, in order to defray the costs of collection, to avoid or reduce bad debt, and to encourage timely payment.

An account is considered delinquent if the balance remains unpaid as of the next "bill cycle" date, the date on which Verizon Wireless generates the customer's bill for the next billing period. Because the bill cycle date falls several days after the due date stated on the customer's bill, the customer effectively receives a grace period past the stated due date. Shortly after the bill becomes overdue, the customer receives a text message, a letter and/or a call reminding them of the overdue bill. If the customer still does not pay the bill despite these reminders, Verizon Wireless "hotlines" the account, so that when the customer attempts to make an outbound call, the call is routed to Verizon Wireless's collections department.[3]

Most customers whose accounts become delinquent either pay the outstanding balance or make a payment arrangement at this point. If the customer still does not pay the outstanding balance after receiving a further text message, a call and/or reminder letter, Verizon Wireless suspends the customer's account, so that the customer can no longer make or receive calls or text messages.[4] If a customer's account is hotlined or suspended, and the customer thereafter pays the overdue bill and reconnects their wireless service, Verizon Wireless charges a reconnect fee of $15 per line. If the customer chooses not to pay the overdue balance, the account is eventually disconnected and written off, and then could be referred for collection. Verizon Wireless informs the customer, before hotlining or suspending a customer's service, that if the customer does not pay promptly and the account is hotlined or suspended, the $15 reconnect fee would apply in order to reconnect the line.

In 2007, a Verizon Wireless customer residing in California filed a putative class action challenging Verizon Wireless's $5 minimum late fee and asserting various state

[3] At the "hotline" stage, the customer may still receive inbound calls and make 911 calls.

[4] At the suspension stage, the customer may still make a 911 call. The account is no longer billed any monthly charges during the period of suspension.

law claims.[5] In December 2008, the plaintiffs in *Gellis* amended the complaint to add a claim that Verizon Wireless's reconnect fee also violated California law. The plaintiffs' principal claim - that the fees allegedly violate Section 1671 of the California Civil Code - would require the court to determine whether the fees are reasonable in light of the actual damages that Verizon Wireless sustains due to the customer's delinquency.[6] In their briefing, the plaintiffs did not dispute that their claims require the court to evaluate the reasonableness and any cost or other justifications for the challenged fees. Nor did they contend that their claims are in any way based on alleged failure to adequately disclose the fees to customers. As Petitioners acknowledge, the amount and application of the late fee is clearly stated in Verizon Wireless's customer service agreement.[7]

In its orders, the district court defined the term "rate" as "an amount charged for a good or service."[8] Nonetheless, the court held that the late fee was not a "rate" because it is, in the court's view, not a charge for providing wireless service,[9] and that the reconnect fee was not a "rate" because it is charged for reactivating "normal mobile services" and

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[5] *Gellis v. Verizon Communications, Inc., et al.*, Case No. C 07-3679 (N.D.Cal.) Petitioners Joseph Ruwe and Elizabeth Orlando substituted in as putative class representatives in late 2008.

[6] *See, e.g., Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc.*, 135 Cal. App. 4th 1023, 1038 (Cal. App. 2006) ("*UCAN*") (validity of liquidated damages provision turns on "the relationship between the amount of liquidated damages and a fair estimate of the actual damages from a breach of the contract.")

[7] Petitioners' Opening Comments at 5.

[8] Appendix of Materials Submitted in Support of Petition for an Expedited Declaratory Ruling that Section 332 of the FCA Does Not Preempt State Law Protecting Consumers Against Unlawful Penalties ("Pet. App.") Exhibit 15 at 3; Exhibit 16 at 4.

[9] Pet. App., Ex. 15 at 5-6.

thus "is essentially charged for the same service" as the monthly access fee.[10] In both rulings, the court stated that "the term 'rate' should be construed narrowly."[11]

III. SECTION 332 PREEMPTS PETITIONERS' STATE LAW CHALLENGES TO THE LATE AND RECONNECT FEES.

"[T]he purpose of Congress is the ultimate touchstone in every preemption case."[12] Where, as here, Congress has provided express language stating its preemptive intent, the "pre-emptive scope of the statute is governed entirely by [its] express language."[13] The text of Section 332(c)(3)(A) unquestionably expresses Congress's intent to preempt "*any*" State "regulat[ion]" of "rates charged by" wireless carriers. The question before the Commission therefore is two-fold. First, do Petitioners' claims challenging wireless carriers' late and reconnect fees constitute "regulat[ion]"? Second, are late fees and reconnect fees "rates charged by" wireless carriers? As shown below, the answer to each question is affirmative.

A. <u>Petitioners' Claims Constitute State Regulation Of The Fees.</u>

There can be no serious dispute that the pending lawsuits seek to "regulate" the late and reconnect fees. State law claims constitute regulation within the meaning of Section 332 if, in order to resolve the claims, "the court must determine whether the price charged for a service is unreasonable, or . . . set a prospective price for a service."[14] As the Commission has noted, while state courts may interpret or enforce wireless contracts

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[10] Pet. App., Ex. 16 at 4.

[11] *Id.*

[12] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

[13] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (plurality op.).

[14] *Fedor v. Cingular Wireless*, 355 F.3d 1069, 1973 (7th Cir. 2004); *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003).

and provide remedies for misrepresentation or nondisclosure, "a court will overstep its authority under Section 332 if . . . [it] purports to determine the reasonableness of a prior rate or it sets a prospective charge for services."[15]

Plaintiffs in the *Gellis* matter do not assert claims based on nondisclosure of the contested fees, nor do they seek to enforce the wireless service contract. Rather, the plaintiffs claim that the fees should not be enforced because they are unreasonable, unconscionable or unjustified under California law. For example, the plaintiffs would have to prove that the late and reconnect fees do not reasonably approximate the actual damages imposed on Verizon Wireless by delinquent customers in order to establish a violation of their principal claim under Section 1671 of the California Civil Code.[16] Similarly, to establish their claim that the fees are "unconscionable," the plaintiffs must prove that the fees are so substantively unfair and unreasonable as to "shock the conscience."[17] To adjudicate these claims, the court would necessarily have to engage in a reasonableness inquiry before it could determine liability, assess actual damages and modify the fees accordingly. These lawsuits thus seek a judicial determination that the fees are unreasonable in relation to the carriers' costs under standards set by state law. That is precisely the inquiry that the Commission and the courts have held constitutes "regulat[ion]."[18]

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[15] *Wireless Consumers Alliance*, 15 FCC Rcd 17021, 17041, ¶39; *see id.* at 17027, ¶ 12.

[16] *See e.g.*, *UCAN*, 135 Cal. App. 4th at 1034 ("the reasonableness or unreasonableness of stipulation is *decisive*" in determining whether a liquidated damages provision is valid) (emphasis added) (quoting Williston, Contracts (1936), § 779, p. 2192).

[17] *See e.g., 24 Hour Fitness, Inc. v. Super. Ct.*, 66 Cal. App. 4th 1199, 1213 (1998).

[18] *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1082 (8th Cir. 2005) ("[w]e agree with the FCC that fixing rates of providers is rate regulation") (internal quotation marks and citation omitted).

Petitioners' assertion that Section 332 does not preempt all state regulation that could *influence* rates by imposing additional costs on carriers[19] is correct but irrelevant. A legal claim does not amount to rate regulation merely because the claim, if successful, would impose monetary liability on a carrier that could theoretically lead the carrier to increase its rates. But any claim that directly challenges the reasonableness of a fee amounts to state regulation of the fee.[20] Petitioners' lawsuits involve precisely such a claim and hence would require the court to engage in a form of regulation.

B. The Contested Fees Are "Rates Charged By" Wireless Carriers.

The late fee and reconnect fee are "rates charged by" wireless carriers under Section 332 based on "the text of the statute and . . . traditional canons of statutory construction."[21]

1. The Fees Are Rates Under The Plain Language Of The Statute.

As Petitioners concede, Section 332 must be read "using the normal meaning of its words."[22] Courts and the Commission have stated the meaning of the term "rate" as:

- The "amount of a charge or payment"[23];

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[19] *See* Petitioners' Opening Comments at 17-20.

[20] *Wireless Consumers Alliance*, 15 FCC Rcd at 17041, ¶ 39; *see id.* at 17027, ¶ 12; *Gilmore v. Sw. Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 922-24 (N.D. Ill. 2001) (distinguishing fraud claim that "would not require proof that the Fee was unreasonably high or unjustified in light of any new services provided in return" from contract claim that the fee "is unjust and/or unreasonable" and stating that "the key focus . . . [is] whether the validity of the fee had to be determined in order to resolve the claim"); *Ball v. GTE Mobilnet*, 81 Cal. App. 4th 529, 537-38 (2000) (allowing claims that defendant failed to disclose practice of rounding up to the next full minute of use for billing purposes while finding that claims that "attack the reasonableness of the method" and therefore "direct[ly] challenge the rates charged" are preempted).

[21] *National Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252 (11th Cir. 2006) ("*NASUCA*").

[22] Petitioners' Opening Comments at 13-14 (citing *NASUCA*).

- The "amount paid or charged for a good or service"[24];
- "A charge to a customer to receive service"[25];
- A "means by which the carrier recovers its costs of service from its customers"[26];
- The "amount of payment or charge based on some other amount"[27];
- The "amount of a charge or payment . . . having relation to some other amount or basis of calculation"[28]; and
- A "charge per unit of a public-service commodity."[29]

Both fees qualify as rates under *any* of these definitions.

The fees are, self-evidently, "amount[s] of charge or payment." This is, as the Eleventh Circuit noted, "the common definition of . . . a 'rate' as defined in the dictionary and previous decisions by" the Commission.[30] Petitioners reject this first level definition and contend that a "rate" must be tied to an element of service for which it applies, reflecting the approach taken by the district court in *Gellis*.[31] But there is no

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[23] *NASUCA*, 457 F.3d at 1258 (quoting Oxford English Dictionary (2d ed. 1989)).

[24] *Id.* at 1254 (quoting Black's Law Dictionary 1268 (7th ed. 1999)); *Gellis* Order (Pet. App. Exs. 15, 16).

[25] *MCI Telecomms. Corp. v. F.C.C.*, 822 F.2d 80, 86 (D.C. Cir. 1987).

[26] *Id.*

[27] *Sw. Bell Mobile Sys. Inc.*, 14 FCC Rcd 19898, 19901, ¶ 19 (1999).

[28] *NASUCA*, 457 F.3d at 1254.

[29] *Id.*

[30] *Id.* at 1258.

[31] Petitioners' Opening Comments at 14; Pet. App. Ex. 15 at 5-6.

indication that Congress intended to modify and limit the "common definition" of the term in any way. While Petitioners point to the Supreme Court's observation in *AT&T v. Central Office Telephone, Inc.* that rates must be understood in the context of a service for which it is provided,[32] this argument misapprehends the import of that statement and, in fact, would turn it on its head. In *Central Office Telephone*, the Court held that a plaintiff may not avoid the filed rate doctrine by recasting a challenge to a filed rate as a claim of inadequate service, because adequacy of service is merely the flip side of a claim that the rate is unreasonable in light of the service provided.[33] The Court's holding therefore supports a broad definition of the term "rate" and protected "rates" from challenges couched in the language of "service and billing."[34] *Central Office Telephone* therefore provides no support for Petitioner's attempt to *narrow* the meaning of "rate" and characterize the fees as involving merely billing practices or disputes.

In any event, the additional qualification that the charge be "for a good or service" would not change the result. A late fee is a charge for the service of extending credit to the customer beyond the due date for a bill. The reconnect fee is also charged for a service – that of restoring normal operations of a wireless device that had been impaired due to nonpayment. Under this definition, therefore, the fees are amounts charged by wireless carriers for "a good or service" and not subject to scrutiny under state laws for reasonableness in light of the value of the service provided. As Dr. Robert G. Harris, an economist with expertise on economic pricing principles and rate design, explains in his

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[32] 524 U.S. 214, 223 (1998).

[33] *Id.*

[34] *Id.* (rejecting the Ninth Circuit's reasoning that plaintiff's claim did "not involve rates or ratesetting, but rather involve[d] provisioning of services and billing").

attached Declaration, under wireless postpaid service plans, "the carrier is providing credit to finance the use of the service until the end of the billing period. The cost of providing credit within the limits of the billing and allowed payment period is incorporated within and is therefore part of the price of the service plan, both as a matter of economics and the law."[35]

In order to avoid that conclusion, Petitioners seek to impose two additional limitations on the statutory language, suggesting that only *per unit* charges for *wireless* service (which, in their view, includes airtime, text messages or "bytes of data") qualify as a "rate."[36] The contention that a rate must be a "per unit" charge is easily dismissed. Under that definition, a flat monthly fee for unlimited voice, text and data usage would fall outside the scope of Section 332 because the charge would not vary with the amount of usage. Nor could such a rate be specifically tied to an identifiable service because the customer pays a flat price for the bundle containing multiple services. Yet, to say that such pricing plans are not "rates" would be an obviously absurd result that Congress could not have intended: whether to design a rate plan to charge per minute rates or a flat rate for specified or unlimited usage of a single or multiple services is precisely the type of differentiated strategies that a firm pursues in a competitive market, which Section 332 was intended to foster.[37] Thus, while a "rate" encompasses a per unit charge for service, flat charges without variation based on amount of usage must also be considered

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[35] *See* Declaration of Robert G. Harris, ¶¶ 37-38, 51-52 (attached).

[36] Petitioners' Opening Comments at 14-16.

[37] *See* Harris Decl., ¶¶ 6-7.

"rates."[38] In any event, the late fee and reconnect fee would satisfy the proposed "per unit" limitation: the late fee is charged as a percentage *per* overdue balance or as a flat fee *per* each month the balance remains outstanding. The reconnect fee is charged *per* each line that is reconnected.

Nor is there any sound textual or economic basis for limiting the term "rate" to charges for *wireless* service, i.e., the rates that directly apply to airtime, text messaging or data transmission, and excluding other types of services that a wireless carrier may provide to a customer. Most significantly, the plain text of the statute precludes such an interpretation. Section 332 preempts state regulation of "rates charged *by* any commercial mobile service," without limitation. Under this language, what matters is that the charge is assessed *by* a commercial mobile service, rather than the type of service *for* which the charge is imposed.[39] If Congress intended to preserve state regulation of ancillary service rates, it could have written Section 332 to do so, by stating that states shall not have authority to regulate "rates charged *for*" enumerated services. It did not do so.[40]

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[38] *See Cellco P'ship*, 431 F.3d at 1081 (Section 332 prohibits state regulation of carrier's decision "whether to charge for calls in . . . increments").

[39] *See Gilmore*, 156 F. Supp. 2d at 919 (finding a wireless carrier's "Corporate Account Administration Fee" to be a rate and holding that claims challenging the reasonableness of fee to be preempted). Petitioners seek to distinguish *Gilmore* by arguing that their claims do not involve "assessing the value or sufficiency of any *wireless* service." Petitioners' Opening Comments at 21 (emphasis added). But this argument assumes, incorrectly, that a rate must be a charge for wireless service, not other types of service (such as extending credit or maintaining a corporate account). Petitioners' claims indeed challenge whether they received sufficient credit service or reconnection service for the amount of the fee charged.

[40] Congress' decision not to limit preemption of rate regulation to specified services is consistent with sound economic policy. In a dynamic and innovative industry with evolving technologies, it would have been unnecessarily limiting and likely fruitless to define the services that would be covered by Section 332. For example, Congress can hardly be expected to have foreseen in 1993 that carriers would be offering a wide array of applications for Droid smart phones, as well as

Moreover, even if, contrary to the text of the statute, Section 332 were limited to charges in exchange for *wireless* service, the fees at issue would still fall squarely within that definition. The reconnect fee is a charge for the service of (re)initiating wireless service to a device that has been impaired or suspended. It is no different than an activation fee for initiating service at the outset, which no one could seriously contend is not a "rate."[41]

The late fee is also a charge for wireless service because the timing of payment for a service is part of the price of that service under basic economic principles. In a postpay service plan, Verizon Wireless and most carriers bill the monthly access charges for the next billing period in advance and do not provide that part of wireless service on credit. When a customer pays late, the carrier is forced to provide service on credit. There is an economic difference in these arrangements and a difference in price. As the Supreme Court has stated, "credit terms must be characterized as an inseparable part of the price."[42] In considering whether an agreement among competitors not to extend credit constituted "price fixing" condemned *per se* by the antitrust laws, the Court found it "*virtually self-evident* that extending . . . credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time."[43] Imposing a late fee of $5 is no different in economic terms than quoting a price

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music, video on demand and a host of other services enabled by advances in technology. Limiting the scope of Section 332 to charges for particular wireless services as the services existed then would have been contrary to Congress' overall purpose of fostering competition and innovation.

[41] *See* Harris Decl., ¶¶ 51-52.

[42] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980).

[43] *Id.* (emphasis added).

of a monthly service plan as $39.99 if paid within 30 days but $44.99 if paid between 30 and 60 days, or stating the price as $44.99 with a $5 discount if paid within 30 days. Such credit arrangements abound in the real economy and are commonly understood as reflecting different prices. As the Supreme Court put it:

> Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase.[44]

Every merchant who has negotiated a credit term on a contract or has sought to grab the attention of a customer by advertising an offer of no payment until a specified time knows that the timing of payment is part of the price. Likewise, the timing of payment is part of the monthly access fee for wireless service. A late fee is a "rate" no less than the monthly access charge is a "rate" because the two are part and parcel of a single price. As Dr. Harris explains, how long customers have to pay their bills, and whether there are discounts for early payments, or fees for later payments, are integral and interrelated aspects of price competition, and integral to prices themselves. "When sellers do offer payment or credit terms to buyers, the 'lender' typically includes some provision for an additional charge for late payment. There is a very straightforward reason for putting a 'price' on late payment: if there is no consequence for paying late, there would be no incentive for customers to pay on time."[45] Dr. Harris discusses late

[44] *Id.* at 645 (*quoting Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097, 1103 (9th Cir. 1979) (dissenting opinion), *rev'd and remanded*, 466 U.S. 643 (1980)).

[45] Harris Decl., ¶ 31.

payment fees imposed by retail merchants, airlines, universities, and other suppliers and demonstrates why these fees are part of suppliers' decisions as to what "rate" to charge.[46]

Finally, Petitioner's citation to the savings clause in 47 U.S.C. § 414 adds nothing to the analysis. Because "there can be no doubt that Congress intended *complete* preemption" of rate regulation in enacting Section 332, the savings clause cannot be read to preserve state regulation of rates or entry.[47] As the Seventh Circuit held, when the two statutes are read together, they create an "*exclusive federal*" "sphere of responsibility" for rates and entry.[48]

2. The Regulatory Background When Section 332 Was Enacted Supports The Conclusion That The Fees Are "Rates".

Because the purpose of the 1993 amendments was to divest states of authority to regulate "rates," the scope of preemption can be discerned by examining the practices of the states that Congress intended to preempt.[49] State regulatory statutes employ a broad definition of the term "rate" that is consistent with the common understanding of the word discussed above, *i.e.*, any and all charge or compensation assessed by a utility for service, a definition that would clearly encompass the fees at issue here.[50]

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[46] Harris Decl., ¶¶ 32-35.

[47] *Bastien v. AT&T Wireless*, 205 F.3d 983, 986-87 (7th Cir. 2000) (emphasis added).

[48] *Id.* at 987 (emphasis added).

[49] *See* Harris Decl., ¶¶ 14-25.

[50] 220 Ill. Comp. Stat. 5/3-116 (defining "rate" under Illinois law as "include[ing] *every . . . charge . . . or other compensation* of any public utility) (emphasis added); Ark. Code Ann. § 23-1-101(10) (providing that "'[r]ate' means and includes *every compensation*, charge, fare, toll, rental, and classification, or any of them, demanded, observed, charged, or *collected by any public utility for any service*, products, or commodity offered by it as a public utility to the public . . .") (emphasis added); MD Code Ann., Pub. Util. Cos., § 1-101; Tex. Util. Code Ann. § 101.003(12); N.M. Stat. § 62-3-3(H) (1978); Minn. Stat. § 216B.02, subd. 5; 66 Pa. Con. Stat.

As of 1993, state public utility commissions had invoked their authority over "rates" to regulate late fees. For example:

- In 1993, immediately prior to the enactment of Section 332, the California Public Utilities Commission ("CPUC") ordered Pacific Bell to refund late fees it had assessed to customers pursuant to its rate setting authority.[51] In so doing, the CPUC expressly rejected the defendant's contention that "late payment charges are not a rate for a product, commodity or service" and held that "late payment charges and reconnection charges are *part and parcel of the rates charged for telephone services.*"[52]
- The Connecticut Department of Public Utility Control ("DPUC") approved a late payment charge of 1 ¼ percent proposed by Southern New England Telephone in its cellular service tariff and "direct[ed] the [c]ompany to include this *rate* within its tariffs."[53] Tariffs filed by wireless carriers also included a "service restoral charge" for reactivation of service which has been temporarily suspended due to nonpayment among their "proposed retail rates" or "table of rates."[54] The DPUC later sought to retain mandatory tariffing for cellular providers by filing a petition to the Commission for authority to maintain rate regulation pursuant to Section 332(c)(3)(B) of the Act.

Ann. § 102; Wyo. Stat. Ann. 1977 § 37-1-102; Ky. Rev. Stat. § 278.010(12); N.C. Gen. Stat. Ann. § 62-3(24).

[51] *Toward Util. Rate Normalization, Inc., vs. Pacific Bell*, 49 CPUC 2d 299, 1993 WL 767152 (Cal.P.U.C. May 19, 1993).

[52] *Id.* § III.E (emphasis added).

[53] *See* Harris Decl., Appendix A, Item 10.

[54] *See* Harris Decl., ¶¶ 16-17 & Appendix A, Items 3, 4 & 12.

However, the Commission denied its petition, finding that the DPUC had failed to meet its burden of justifying continued regulation of the rates of cellular carriers.[55]

- This understanding of the term "rate" continued after Section 332 was adopted. For example, the Vermont Public Service Board invoked its statutory authority to "remedy unjust or unreasonable rates" to order a cable company to refund certain late fees to customers. The Board stated that "the Vermont Legislature has given the Board the authority to regulate all rates for cable television systems" and that there is "no doubt that 'late fees' as fees are among such rates."[56]

The Commission itself has used the term "rates" to describe a late payment charge in 1993. In *Allnet Communication Services, Inc. v. U.S. West, Inc.*, the Commission applied standards governing "what constituted reasonable *rates*" to a wireline carrier's late payment charge and found that the "24% *rate*" in the carrier's tariff was unjust and unreasonable.[57]

Reviewing these and other examples of states having included late fees within their ratemaking functions, Dr. Harris concludes, "All three meanings of the term "rates" – ordinary, economic and regulatory – clearly apply to and include late payment charges and reconnect fees."[58] He explains:

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[55] *Petition of the Connecticut Dep't of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order,* 10 FCC Rcd 7025 (1995).

[56] *In re Mountain Cable Co. d/b/a Adelphia Cable Commc'ns*, Nos. 6117, 6118, 6119, 1999 WL 628268 (Vt. Pub. Serv. Bd. May 3, 1999), Board Discussion subpart 10; *see also* Harris Decl. ¶ 24, & Appendix A, Item 14 (retail pricing plan in Ohio Public Utilities Commission's "new alternative regulation plan" lists in "Summary of Rate Changes" the "late payment charge.").

[57] 8 FCC Rcd 3017, 3027, ¶ 48 (1993) (emphases added).

[58] Harris Decl., ¶ 13.

> Regulators were well aware that while the overall revenue requirement would determine the level of rates for consumers, the rate design would also have a substantial impact on the rates consumers would actually pay. Thus, if the cost of late payment were not paid by customers who paid their bills late, the costs of late payment and collection would be recovered in other rates paid by "general ratepayers." As we will see, one state regulatory decision after another echoes this sentiment in offering the rationale for regulating the rates of late payment charges. Therefore, among the many telephone rates regulated by state commissions were "late payment charges" and "reconnection fees."[59]

These are the types of state rate regulation which Congress meant to oust by enacting Section 332. In construing a Congressional enactment, it is presumed that "Congress is knowledgeable about the existing law pertinent to the legislation it enacts,"[60] and that, in using a term, "Congress intended it to have its established meaning."[61] Congress used the word "rate" deliberately—it was the same word that states had used to regulate all charges and compensation assessed by public utilities, including specifically late fees and reconnection fees. The unmistakable import of the use of that word is to preclude state regulation of all charges that were considered "rates" and regulated as such by the states up to that point.

3. <u>The Fees Are Not "Other Terms And Conditions" Beyond The Preemptive Scope Of Section 332.</u>

Because the fees are "rates" under the ordinary meaning of that term and in light of the regulatory background against which Congress enacted Section 332, the

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[59] Harris Decl., ¶¶ 15-16.

[60] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *see also Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 319-20 (1983). In *Goodyear*, the Supreme Court considered a federal statute that extended state law worker's compensation benefits to employees injured on federally-owned facilities. In determining whether states had the authority to award a particular form of benefit to such employees, the court looked to the benefits available under the state's workers' compensation laws at the time when the federal statute was enacted. *See* 486 U.S. at 184-86.

[61] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

reservation of state authority over "other terms and conditions" is inapplicable, and Petitioners' reliance on that text and its legislative history is misplaced.[62] Indeed, the Commission need not define the phrase "other terms and conditions" in order to resolve this Petition. Because Section 332 divides terms and conditions into two mutually exclusive categories, if the fees are rates within the meaning of the first clause of the statute, they cannot, as a matter of statutory construction, be "*other*" terms and conditions.[63] Nonetheless, Petitioners' arguments on this point are without merit.

First, relying on the *Gellis* order and *Brown v. Washington/Baltimore Cellular,*[64] Petitioners assert that, to the extent that the fees are liquidated damages provisions or "penalties," they must fall on the side of "other terms and conditions," rather than rates. This argument assumes that liquidated damage provisions are *ipso facto* not "rates." But that result has no basis in the text of the statute or in sound reasoning: a fee can be both a "rate" and a liquidated damages for default. Indeed, the D.C. Circuit has held that a provision for an additional charge upon default of a contractual obligation is part of the "rate" for the contracted-for service.[65] *MCI* involved cancellation and discontinuance charges for private line service, whereby the charge on the customer's remaining service commitments increased if the customer canceled a part of the service or a pending order

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[62] This distinction is consistent with the practices of state regulatory commissions prior to enactment of Section 332. States regulated the "terms and conditions" of service which included both rates and other terms and conditions. Thus, while "rates" were included in terms and conditions generally, they were not "other" terms and conditions. *See* Harris Decl., ¶ 14.

[63] *See Bastien*, 205 F.3d at 988 ("study of the phrase 'other terms and conditions'" is unnecessary where "meaning of 'entry or rates charged by any commercial mobile service' adequately resolves the issue.")

[64] 109 F.Supp.2d 421 (D. Md. 2000).

[65] *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987).

for additional service. The court held that such charges were "rates" as that term was used in an interconnection agreement. The court reasoned that "rates are a means by which the carrier recovers its costs of service from its customers."[66] Because cancellations and discontinuances impose costs on the carrier, and because the charge at issue sought to recover those costs directly from the customers who cause them, the court found, the charge was a "rate" no less than the generally-applicable rate for private line service that applied to all customers.[67]

Similarly, Verizon Wireless incurs costs when a customer fails to pay the bill when due, and it seeks to recover those costs through a discrete fee "impose[d] . . . directly on the customers who cause[]" Verizon Wireless "to incur the costs."[68] The fees are therefore "rates" (and not "other terms and conditions") no less than if Verizon Wireless raised its monthly access fees to recover those costs.[69]

Second, Petitioners cite a number of cases holding that state actions that increase a carrier's costs and therefore may lead to an increase in its prices are not prohibited rate regulation.[70] This argument is a red herring Verizon Wireless does not contend that Petitioners' state law claims are preempted simply because they would increase its costs of doing business and therefore would lead to an increase in its rates. Petitioners'

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[66] *Id.* at 86.

[67] *Id.*

[68] *Id.*

[69] *See* Harris Decl., ¶¶ 41-50.

[70] Petitioners' Opening Comments at 18-19.

lawsuits are preempted because they directly challenge the reasonableness of the fees that are *themselves* "rates."

Petitioners' argument conflates the terms "regulate" and "rates charged" as used in Section 332. The authorities Petitioners cite stand for the proposition that state requirements that increase a carrier's business expenses do not amount to "regulat[ion]" simply by virtue of influencing the carrier's "rates." For example, a disclosure requirement as to the contents, format and font-size of the customer bill may increase the carrier's billing costs, but it does not regulate how the carrier may recover those costs or the reasonableness of any particular rate the carrier may adopt in light of its cost structure and competitive forces.[71] On the other hand, a state law that regulates the amount of a charge that the carrier may impose to recover its existing billing costs would be an impermissible regulation. In other words, a state that prohibits a carrier from charging a particular amount on the grounds that such a rate is unreasonable engages in impermissible rate regulation. Petitioners' claims squarely fall into the latter category.

Third, Petitioners' reliance on the House Report accompanying Section 332[72] is misplaced. Neither the phrase "other terms and conditions" or the reference in the House Report to "other consumer protection matters" may be read to contradict the unambiguous prohibition on rate regulation. A state may not seek to pursue its consumer protection goals by dictating a "reasonable" level of monthly access fees. Indeed, as the

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[71] *Cf. NASUCA*, 457 F.3d at 1255 (state regulation of line item billing is not preempted because it "do[es] not require a carrier to recover nor prohibit a carrier from recovering a particular cost" but "pertain[s] only to the presentation of that cost on customer's bills.").

[72] Petitioners' Opening Comments at 13.

Eighth Circuit stated in finding that Section 332 preempted Minnesota's requirement of a 60-day "opt-in" period before a rate change can take effect:

> Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by §332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "[other] terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures . . . that directly impact the rates charged by providers.[73]

Here, Petitioners' lawsuits go well beyond directly "impacting" the rates charged by providers: they directly challenge them and seek to invalidate them on reasonableness grounds. No fair reading of the "other terms and conditions" exception could permit such a result. The House Report's reference to "billing information and practices" and "billing disputes" similarly does not support Petitioner's position. As the Eleventh Circuit held in *NASUCA*, state regulation of "billing practices" are regulations that "affect the presentation of the charge on the user's bill but . . . *not affect[ing]* the amount that a user is charged."[74] In contrast, plaintiffs claims challenge only the amount charged and do not challenge the manner in which the fees are disclosed or presented on the customer bill.

C. State Regulation Is Preempted Because The Fees Are Part Of Carriers' Rate Structures.

The Commission has found that "the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures," and that "states are precluded from

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[73] *Cellco P'Ship*, 431 F.3d at 1082-83 (emphasis added). The United States reiterated this point in its brief in opposition to the petition for certiorari in that case, noting that "Congress clearly did not intend the States to be able to accomplish under the 'consumer protection label' what it prohibited them from accomplishing by 'rate regulation.'" Brief for the United States as Amicus Curiae, *Hatch v. Cellco P'Ship*, No. 05-1159, 2006 WL 2668196, *13 (Sept. 15, 2006).

[74] *NASUCA*, 457 F.3d at 1254 (emphasis added); *see also id.* at 1257.

regulating either of these."[75] This means that a state is prohibited not only from declaring a particular element of a wireless carrier's rates unreasonable but also from attempting to dictate how a wireless carrier may structure its rates - i.e., through what combination of fees a wireless carrier may seek to recover its costs of providing service.

The late and reconnect fees are part of the carrier's rate structure. As Dr. Harris notes, this is illustrated by contrasting postpay plans, which typically have such fees, and prepaid plans, which do not. In a prepaid plan, all charges are paid in advance and the service automatically terminates when the purchased minutes are exhausted, subject to replenishment. The carrier does not bear any credit risk or incur the cost of attempting to collect overdue bills. Consequently, the late fee and reconnect fee are not part of the rate elements for prepaid service. Postpay plans have a different rate structure that includes late fees and reconnect fees as rate elements because of the risk of late or nonpayment and the costs that delinquencies impose on the carrier.[76]

Prepaid and postpay plans present alternative rate structures for wireless service, and such alternative structures are one basis on which carriers compete with one another. Carriers may also adopt different rate structures within a postpay plan. As Dr. Harris explains, carriers make pricing decisions based on multiple factors, including competing as effectively as possible in the market, winning new customers and retaining existing customers, and recovering costs of providing service. Delays in payments impose costs on carriers in multiple ways. In addition to the direct cost of delayed receipt of revenues, "Carriers incur very substantial costs in developing, upgrading and implementing late

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[75] *Sw. Bell Mobile Sys*, 14 FCC Rcd at 19901, ¶ 20.

[76] Harris Decl., ¶¶ 36-40.

payment monitoring, notification, communication and collection systems."[77] The carrier may seek to recover the costs of delinquencies from all of its customers by increasing the monthly service fee element of the rate structure. Alternatively, the carrier may choose to include a discrete charge as an element of its rate structure by charging late fees and reconnect fees only to those customers who do not pay their bills on time. The Commission's interpretation of Section 332 to prohibit state regulation of rate structures correctly recognizes that there is no sound basis for subjecting one structure to a different regulatory regime than the other.

The court in *Kiefer v. Paging Network, Inc.* made precisely this observation in rejecting the claim that a late payment charge for paging services is "merely a 'term and condition' of the parties' service contract" rather than a part of the "overall rate structure for paging services."[78]

> Plaintiff's argument ignores the fact that a service provider's overall rate structure can take several forms; i.e., it can spread the costs of untimely payments among its customers by charging everyone an increased rate, or it can include in its overall rate structure a separate charge for untimely payments that are to be imposed solely on those customers who fail to timely pay their bills. Defendant chose the latter of these two options to be included in its overall rate structure.[79]

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[77] Harris Decl., ¶¶ 43-45.

[78] 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999).

[79] *Id.* The D.C. Circuit applied the same reasoning in *MCI Telecomms.*, 822 F.2d at 86, when it held that AT&T's decision to recover the cost of cancellations of private line service through a discrete charge rather than through a generally-applicable charge did not alter the fee's status as a "rate."

While the *Keifer* court did not directly consider the application of Section 332[80], as Petitioners note, the court's articulation of the economic rationale for treating late fees as part of the carrier's rate structure is beyond reproach, and Petitioners offer no response.

There is nothing to be gained -- from the perspective of fostering competition, promoting economic efficiency, fairness, or consumer protection -- by subjecting one choice of rate structure that includes a separate late fee to regulation by each state, while permitting only uniform national regulation of another choice of rate structure, where all costs are to be recovered from the monthly access charge. Indeed, to the extent that the prospect of balkanized state regulation induces carriers to recover the cost of untimely payments solely through monthly access fees, Petitioners' proposal would distort competition and unfairly penalize customers who pay their bills on time. Congress surely did not rest the scope of Section 332 on such an artificial and insubstantial distinction, and the Commission was correct in holding that rate structures are beyond the states' power to regulate.

Finally, a review of state regulation that Section 332 displaced confirms that late and reconnect fees are part of the rate structure. Not only have state regulatory agencies referred to the fees as "rates" and regulated them pursuant to their rate regulation authority, as discussed above, the fees were explicitly considered in general rate cases as a source of contribution towards carriers' overall revenue requirement.[81] This meant that,

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[80] Petitioners seek to distinguish *Keifer*, as the *Gellis* court did, by pointing out that *Keifer* involved a claim under Section 201, which uses the word "charges," rather than the term "rates." However, there is no sound basis for distinguishing "charges" from "rates" as an economic matter. In fact, state regulation that preceded Section 332 treated the two terms as equivalent and interchangeable, regardless of whether certain rates were commonly referred to as "charges." *See* Harris Decl., ¶¶ 17-19.

[81] *See* Harris Decl., ¶¶ 15-16.

to the extent that a carrier's rate design included discrete elements for late fees or reconnect fees, other elements of the rate design would be correspondingly lower so as to achieve the target rate of return overall for the carrier. Conversely, to the extent that cost recovery for delinquencies was embedded in generally-applicable rates, there would be no separate late fee in the rate design.[82] Dr. Harris identifies examples "of how state regulators understood the relationship between the rates or charges set for late payment and/or reconnection on the one hand, and the rates charged for other services on the other hand. In other words, the rates for late payment and reconnection were an important part of the regulated *rate structures* and were consistent with regulatory pricing principles underlying rate regulation."[83]

This history confirms that the fees are part of a wireless carrier's overall rate structure. Again, the prior scheme of wireless rate regulation was the background against which Congress enacted Section 332 and confirms that Congress meant to divest the states of authority to regulate the fees at issue.

D. Consumer Protection Goals Are Not Advanced By Allowing Plaintiffs to Pursue Their Claims.

Petitioners erroneously claim that the Commission should declare that late fees and reconnect fees are not rates in order to protect consumers. Initially, Petitioners' policy arguments are out of place, as the only relevant question is the meaning of Section

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[82] *See Mark Bernsley v. Gen. Tel. Co. of Cal.*, No. 83-01-07, 1983 Cal. PUC LEXIS 327, at *3 (July 20, 1983) ("[t]imely performance is an important *ratemaking concern* since late payments increase the utility's revenue requirement by adversely impacting the working cash component of the rate base") (emphasis added); *see* Harris Decl. ¶ 15.

[83] Harris Decl., ¶ 20 (emphasis in original).

332. As the Eleventh Circuit held in *NASUCA*, the Commission's interpretive authority does not extend "beyond what the statutory language allows."[84]

Moreover, Petitioners' policy arguments are unavailing on the merits. The premise of Section 332 is that competition, rather than state regulation, will drive rates to reasonable levels. As Petitioners acknowledge, "[t]he legislative history of Section 332 makes clear that Congress intended to allow the growth of a national network of wireless service through competitive market conditions, including rate competition....Congress's purpose in preempting the regulation of 'rates' was to allow market competition to drive efficiencies and dictate the rates for mobile phone services set by wireless providers in order to benefit consumer welfare."[85] These strong competitive forces will discipline all rates, including separate rate elements such as late fees and reconnect fees.

Petitioners' only response is to suggest that competition exists for monthly access fees, but not for late fees and reconnect fees. This argument contradicts basic economic principles. Unless a part of the price of a service is undisclosed, competition occurs based on all components of the price. The presence or absence of a late fee is one basis on which postpay plans and prepaid plans compete with each other. Regardless of whether all consumers would consider the amount of a carrier's late fee in choosing among competing carriers, it is sufficient that some buyers make a choice based on a given price element for that element to make a difference in competitive outcomes. Thus Dr. Harris concludes that late fees play a significant role in wireless competition. "To the extent that Verizon Wireless does not recover the costs of late payments from customers

[84] *NASUCA*, 457 F.3d at 1256.

[85] Petitioners' Opening Comments at 22.

who pay late, it would need to recover those costs from other customers through other prices – which would most decidedly affect its competitive position."[86]

Petitioners' further suggestion that competition does not protect consumers from excessive late fees and reconnect fees because such fees are "buried in contractual prolix"[87] is also misplaced. To the extent disclosure is the claimed problem, it is something that can be and is addressed separately. Petitioners' argument is especially inapposite because they have not asserted any nondisclosure claim against Verizon Wireless. The Commission therefore must evaluate whether state regulation of the reasonableness of late fees and reconnect fees is preempted, *assuming* that such fees are properly disclosed.

Although Congress believed that competition was the best way to protect consumers from excessive rates, Congress did recognize the possibility that competition would not be successful. In that event, Congress gave this Commission the authority to review rates under the "unjust or unreasonable" standard set forth in 47 U.S.C. § 201(b), and the nondiscrimination requirements contained in 47 U.S.C. § 202(a). Although competition among wireless carriers is clearly robust and consumers adequately protected, if there were a need for further regulation, this Commission, and not the states, would be the only appropriate regulatory authority.

Petitioners also ignore the policy considerations that counsel against state regulation. As noted above, subjecting a rate structure that includes a separate late fee to state regulation, while preserving national regulation of other rate structures, distorts,

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[86] Harris Decl., ¶¶ 49-50.

[87] Petitioners' Opening Comments at 24.

rather than promotes, competition. Competition is enhanced when firms are free to pursue alternative pricing structures and strategies, without having those choices constrained by an artificial distinction in applicable regulation. [88]

President Obama's policy statement on preemption likewise provides no support for Petitioners' position. By its terms, the statement applies to "preemption of State law by executive departments and agencies."[89] The issue in this proceeding is express *statutory* preemption, not *regulatory* preemption. Regulatory preemption focuses on the authority of the agency to preempt state laws that conflict with its regulations or frustrate their purpose, and differs from explicit statutory preemption that focuses on Congress's intent to preempt state law.[90] Indeed, President Obama's policy statement is specifically addressed to the position taken by various federal agencies that "their regulations preempt State law . . . *without explicit preemption by the Congress*."[91] Here, however, Congress has unambiguously stated its intent to preempt state regulation of rates charged by wireless carriers.[92] The Commission need not go beyond the express mandate of Congress in order to find Petitioners' claims to be preempted. Moreover, the

[88] Petitioners cite to a Verizon Wireless employee's testimony that Verizon Wireless has no interest in increasing the number of delinquencies so as to "grow" late fee revenues, as a basis for their claim that late fees are not a part of services wireless carriers provide. *See* Petitioners' Opening Comments at 2. This is a non sequitur. Given the significant costs late and non-payments impose on Verizon Wireless, it is entirely expected and unremarkable that the company has no interest in increasing late fees. In any event, that fact has nothing to do with whether late fees are "rates charged" by Verizon Wireless based on the text, purpose and history of Section 332.

[89] Pet. App., Ex. 28.

[90] *See e.g., City of New York v. FCC,* 486 U.S. 57, 64 (1988).

[91] Pet. App., Ex. 28 (emphasis added).

[92] *See* Brief for the United States as Amicus Curiae, *Hatch v. Cellco P'Ship*, No. 05-1159, 2006 WL 2668196, *13 (Sept. 15, 2006).

memorandum is directed to "executive departments and agencies,"[93] and not to independent agencies such as this Commission.

Petitioners' assertion as to a presumption against preemption of state wireless rate regulation (Petitioners' Opening Comments at 11-12) is also incorrect. It is settled that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108 (2000). Wireless service can be provided only through the use of radio frequencies licensed by the FCC. *See* 47 U.S.C. §§ 301, 303. Thus, there has been a significant federal role in the regulation of such service since its inception, and Congress extended that presence by enacting Section 332. The United States reiterated this point in its brief in opposition to Minnesota's petition for certiorari in *Hatch.* It advised the Supreme Court that "Petitioner is likewise mistaken in arguing that the court of appeals 'failed to follow this Court's established preemption standards' by 'completely ignoring the ... presumption against preemption.'" The United States noted, "There has long been a 'significant federal presence' in the regulation of wireless communications services. ... Accordingly, the 'assumption of nonpre-emption' has no application here."[94]

Whether carriers have state-specific late fee policies in some instances[95] does not alter the Commission's analysis. Congressional mandate expressed in the text of Section 332, rather than the purported feasibility of complying with different state laws, controls the scope of preemption. In any event, the fact that some carriers have chosen different

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[93] Pet. App. Ex. 28.

[94] Brief for the United States as Amicus Curiae, *Hatch v. Cellco P'Ship*, No. 05-1159, 2006 WL 2668196, *13 (Sept. 15, 2006.)

[95] Petitioners' Opening Comments at 25-26.

late fees for some states says nothing about whether it would be feasible to comply with what numerous courts determine, through vagaries of litigation, what a reasonable level of late fee should be.[96]

There is simply no reason to believe that state regulation of late fees would enhance consumer welfare. Even assuming, without basis, that state regulation would be more protective of consumer welfare than oversight by this Commission, the fact remains that carriers wishing to avoid state regulation of the fees simply can do so by embedding cost recovery for delinquent accounts in their monthly access fees or other rate elements that are unquestionably within the scope of Section 332. Any purported advantage of state regulation over federal regulation would evaporate at that point. Petitioners' proposal to exclude these rate elements from the scope of Section 332, in short, lacks substance.

[96] Petitioners' analogy to litigation concerning early termination fees ("ETFs") is also inaccurate and misleading. The outcome of those lawsuits in no sense proves that it would have been feasible to comply with 50 states' disparate regulation of early termination fees: no carrier has had to implement state specific ETF policies as a result of any litigation. Contrary to Petitioners' suggestion, Verizon Wireless adopted a pro-rated ETF not as part of any settlement but voluntarily as a competitive strategy and did so more than a year before any settlement was reached.

IV. CONCLUSION

For the foregoing reasons, the Commission should declare that: (1) late and reconnect fees are rates and rate structures within the meaning of Section 332(c)(3)(A); (2) the state law claims, whether common law or statutory, currently being raised against the fees seek to regulate rates under the statute; and (3) the state law claims are therefore expressly preempted by Section 332.

Respectfully submitted,

VERIZON WIRELESS

By: John T. Scott III

John T. Scott, III
Vice President & Deputy General Counsel

William D. Wallace
Senior Counsel

Verizon Wireless
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
(202) 589-3760

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