

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

In re )  
 )  
Petition for Declaratory Ruling Regarding )  
Interpretation of Section 332(c)(3)(A) of the ) WT Docket No. 10-42  
Communications Act of 1934, as Amended, as )  
Applied to Fees Charged for Late Payments )  
\_\_\_\_\_ )

**COMMENTS OF AT&T INC.**

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## TABLE OF CONTENTS

|   | <b>Page</b> |
|---|-------------|
| I. Introduction and Executive Summary .....   | 1           |
| II. Background.....   | 5           |
| III. Section 332 Preempts State Regulation of Late Fees. ....   | 9           |
| A. Section 332 Expressly Preempts State Regulation of the “Rates Charged<br>by” Wireless Carriers.....              | 9           |
| B. State Regulation of Late Fees Is Expressly Preempted Under Section<br>332(c)(3)(A).....                          | 12          |
| 1. Late Fees are Themselves “Rates Charged By” Wireless Carriers<br>for Services Rendered to Consumers.....         | 12          |
| 2. Late Fees Are Part of the “Rate Structure” of the Wireless<br>Customer Agreement .....                           | 18          |
| C. State Regulation of Late Fees is Not Superintendence of “Other Terms and<br>Conditions” of Wireless Service..... | 21          |
| IV. Conclusion .....  | 26          |

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AT&T hereby submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment on the Petition for Declaratory Ruling<sup>1</sup> (the “Petition”) regarding whether late fees imposed by commercial mobile radio service (“CMRS”) providers are “rates . . . charged by” wireless carriers under Section 332(c)(3)(A) of the Communications Act (“Act”).<sup>2</sup> For the reasons set forth below, the Commission should deny the Petition.

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

The Petition asks the Commission to declare that “penalty fees for late payment” charged to subscribers are not “rates charged by” wireless carriers under Section 332(c)(3)(A). According to the Petition, late fees are instead “other terms and conditions” of wireless service and, therefore, beyond the preemptive sweep of the statute. In particular, Petitioners seek this declaratory ruling in order to continue their state law litigation against wireless carriers for

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<sup>1</sup> *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 (filed Jan. 14, 2010) (“Petition”), placed on Public Notice on February 19, 2010, DA 10-264.

<sup>2</sup> 47 U.S.C. § 332(c)(3)(A).

allegedly violating “clear and longstanding [state] consumer protection law by charging late fees that far exceed the actual damages by consumers who pay late.”<sup>3</sup> The Commission should adhere to its longstanding construction of Section 332, which requires the preemption of state law challenges to the reasonableness of late fees under Section 332, and is designed to protect wireless carriers from the very sort of state regulation that Petitioners wish to pursue. Accordingly, the FCC should deny the declaratory relief sought by the Petition.

In Section 332, Congress explicitly removed from states “*any* authority to regulate . . . the rates charged by” wireless carriers.<sup>4</sup> The FCC has made clear that the phrase “rates charged by” encompasses both rate elements and rate structures. As the Commission has explained, “states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.”<sup>5</sup> Section 332 thus expressly preempts state regulation—including state law claims under generally applicable consumer protection laws—that would preclude a wireless carrier from “charg[ing] whatever prices it wishes,” would superintend “the reasonableness of a prior rate,” or would “set[] a prospective charge for services.”<sup>6</sup> The FCC has explained that this interpretation of Section 332 “ensure[s] that similar

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<sup>3</sup> Petition at 1.

<sup>4</sup> 47 U.S.C. § 332(c)(3)(A) (emphasis added).

<sup>5</sup> *Sw. Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907 (¶ 20) (1999).

<sup>6</sup> *Wireless Consumers Alliance*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17035, 17041 (¶¶ 27, 39) (2000).

services are accorded similar regulatory treatment” and that wireless service is not saddled with “undue regulatory burdens, consistent with the public interest.”<sup>7</sup>

There can be no question that AT&T’s late fees qualify as a “rate[] charged” for wireless service under Section 332(c)(3)(A)’s plain meaning and the FCC’s governing construction of the statute. *First*, AT&T provides a variety of telecommunications, billing, and related services to customers who fail to pay their bills on time and incurs additional costs and risk in doing so. In continuing to provide telecommunications services to such customers, AT&T incurs a heightened risk of nonpayment for the services these customers use. And AT&T incurs further costs by providing additional services to notify such customers that their accounts are past due, to warn them of the potential consequences, and to make sure that they are aware of the various options available to them for paying their bills. AT&T also suffers a loss of the time value of money as a result of late payments. Late fees thus merely charge customers for these additional services, risks, and costs. As such, late fees are “rates charged” under any reasonable definition of that statutory phrase.

*Second*, late fees constitute an important part of wireless rate structures; they enable carriers to obtain compensation for the costs and risks associated with late payments solely from those customers who create those costs and risks, and no one else. Late fees are thus rational, economically efficient, and contribute to lower monthly access fees overall. Indeed, if wireless carriers were forbidden from charging late fees to late-paying customers in those states that decide to prohibit or arbitrarily reduce late fees, carriers would be forced to spread the costs for the burdens that late payment imposes on them over *all* customers. Allowing state courts

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<sup>7</sup> *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1504 (¶ 250) (1994) (“*Second Report and Order*”).

effectively to force wireless carriers to restructure their rates in this inefficient and unfair way would not only run afoul of Section 332 but undermine Congress' goal of a "national regulatory policy for CMRS, not a policy that is balkanized state-by-state."<sup>8</sup>

Because late fees are "rates charged" for wireless services, they cannot simultaneously be "other terms and conditions," as Petitioners claim. To the contrary, the use of the word "other" means that such "terms and conditions" are *not* rates. As Congress has made clear, the statute's "other terms and conditions" provision generally refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters[.]"<sup>9</sup> State law claims that seek to regulate, limit, or proscribe late fees because they allegedly are excessive, unfair, or fail to correspond precisely to costs, do not seek simply to superintend billing practices but go to the substance of the fees themselves. There can be no dispute that AT&T fully discloses these fees; nor does the Petition raise any other objection to the manner in which AT&T attempts to collect these charges. Rather, the Petition—notwithstanding the fact that it disclaims any interest in having courts "assess[] the value or sufficiency of any wireless service"<sup>10</sup>—directly challenges the reasonableness of the late fee charges by arguing that late fees "far exceed the actual damages caused by late payment"<sup>11</sup> and constitute "illegal profits"<sup>12</sup> derived from "revenue that exceeds costs."<sup>13</sup> The Petition is a paradigmatic attack on the "rates charged by wireless carriers"—not a challenge to the "other terms and conditions" of wireless

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<sup>8</sup> *In re Petition of the Connecticut DPUC*, Report and Order, 10 FCC Rcd 7025, 7034 (¶ 14) (1995).

<sup>9</sup> H.R. Rep. No. 103-111, at 261 (1993).

<sup>10</sup> Petition at 21.

<sup>11</sup> *Id.* at 22.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 2.

service.<sup>14</sup> As demonstrated in greater detail below, there can be no question that late fees are “rates charged” by AT&T for services provided to its customers.

## II. BACKGROUND

In 1993, Congress amended the Communications Act to “dramatically revise the regulation of the wireless telecommunications industry” in two important ways.<sup>15</sup> *First*, Congress amended Section 2(b) of the Act to exempt wireless services from the system of dual state and federal regulation that governs wireline telephone services.<sup>16</sup> *Second*, Congress expressly provided that “no State or local government shall have any authority to regulate the entry of or the rates charged by” wireless carriers.<sup>17</sup> The avowed purpose behind this federal ban on state regulation of the “rates charged by” and market entry of CMRS was “[t]o 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.”<sup>18</sup> In passing these

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<sup>14</sup> See, e.g., *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999); *Gilmore v. Sw. Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 922 (N.D. Ill. 2001).

<sup>15</sup> *Conn. Dep’t of Pub. Util. Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996).

<sup>16</sup> Before 1993, Section 2(b) had reserved to the states, and denied to the FCC, authority to regulate intrastate common carrier service. In practice, this meant that wireless services were subject to the same system of dual state and federal regulation, including tariff filing and plenary rate regulation, that had long applied to traditional wireline telephone services. Under that regime, a number of states required carriers to establish intrastate wireless rates in tariffs filed with their public utility commissions, see, e.g., *In re Petition on Behalf of the State of Hawaii*, Report and Order, 10 FCC Rcd 7872, 7879-80 (¶¶ 30-38) (1995) (discussing state tariffing of wireless services), which maintained oversight of carriers’ rate structures, see *Conn. Dep’t of Pub. Util. Control*, 78 F.3d at 847 (discussing state commission reviews of the question whether wireless carriers’ “rate structures were unreasonable or discriminatory”). Interstate wireless services, by contrast, were regulated under Title II of the Communications Act, which imposes a number of obligations on common carriers, including the filing of tariffs with the FCC to establish the rates, terms, and conditions of interstate service. In 1993, consistent with Section 332(c)(3)(A), Congress amended Section 2(b) to exclude intrastate CMRS rate and market entry regulation from exclusive state jurisdiction. See 47 U.S.C. § 152(b); see also *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev’d on other grounds sub nom.*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>17</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>18</sup> H.R. Rep. No. 103-111, at 260 (1993).

significant amendments to the Act, Congress intended to establish a uniform “national regulatory policy for CMRS, not a policy that is balkanized state-by-state.”<sup>19</sup> The wireless regulatory model adopted by Congress in 1993, and implemented by the FCC over the course of the last fifteen years, is premised on the sound conclusion that replacing the patchwork of state-by-state rate regulation with a uniform, competition-based federal regulatory model is the most effective way to foster the development of a seamless national wireless network. The Commission has found that preemption of state wireless regulation “help[s] promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.”<sup>20</sup> In sum, as the FCC has recognized, “Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers.”<sup>21</sup>

Remaining faithful to this regulatory model, the Commission has repeatedly rejected attempts by states to secure authority to regulate the rates charged by wireless carriers.<sup>22</sup> And, importantly, it has upheld wireless late fees against an attack on their reasonableness under governing federal standards.<sup>23</sup> The FCC concluded that “late fees have been routinely used by

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<sup>19</sup> *In re Petition of the Connecticut DPUC*, 10 FCC Rcd at 7034 (¶ 14).

<sup>20</sup> *Second Report and Order*, 9 FCC Rcd at 1421 (¶ 23).

<sup>21</sup> *Id.* at 1417 (¶ 12).

<sup>22</sup> *See, e.g., In re Petition on Behalf of the State of Hawaii*, 10 FCC Rcd at 7879-80 (¶¶ 30-38); *In re Petition of the Connecticut DPUC*, 10 FCC Rcd at 7046 (¶ 43); *In re Petition of the People of the State of California*, Report and Order, 10 FCC Rcd 7486 (1995).

<sup>23</sup> *Kiefer v. Paging Network, Inc., d/b/a PageNet*, Memorandum Opinion and Order, 16 FCC Rcd 19129 (2001).

other industries regulated by the Commission” and “the facts do not warrant that we find that the \$5.00 late fee violates section 201(b).”<sup>24</sup>

The grant of exclusive federal oversight over CMRS rates, and the FCC’s light-handed approach to rate regulation have proven hugely successful. When wireless service first emerged, it was not widely available and was not affordable for most people; the heavily-regulated “cellular duopoly” was inefficient, expensive, and of limited utility to consumers.<sup>25</sup> By 1995, wireless service had only a “ten percent penetration rate.”<sup>26</sup> Today, however, wireless service is ubiquitous, affordable for millions of customers throughout the nation,<sup>27</sup> and provides those customers with a transformative array of innovative products such as prepaid and postpaid offerings. “U.S. consumers continue to reap significant benefits—including low prices, new technologies, improved service quality, and choice among providers” in the wireless marketplace.<sup>28</sup> As the Commission has explained, “[r]elatively low prices on mobile voice and

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<sup>24</sup> *Id.* at 19132 (¶ 7). In analyzing late fees, the FCC explained that “the Commission has regulated CMRS, such as those offered by PageNet, through competitive market forces. In doing so, the Commission has not imposed specific cost-based rate regulations on CMRS providers.” *Id.* at 19131 (¶ 5).

<sup>25</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8846 (¶ 7) (1995). *See generally id.* at 8845 (¶ 2) (“Traditionally, CMRS was composed of discrete services that did not compete with each other to any significant degree, were used by relatively few customers, and were regulated in a traditional public utility manner by this Commission and most states.”).

<sup>26</sup> *Id.* at 8844 (¶ 3)

<sup>27</sup> *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 24 FCC Rcd 6185, 6279-6280 (¶ 196) (2009) (“*Thirteenth Competition Report*”) (explaining that the wireless penetration rate in 2008 was 86 percent nationally and that the “addition of 21.2 million subscribers represented an 8.8 percent subscriber growth during 2007. Together with the largest absolute yearly increase of 28.8 million subscribers in 2006, the total mobile telephone subscriber base has increased 23 percent in the last two years”).

<sup>28</sup> *Id.* at 6189 (¶ 1).

data services appear to have been a key factor stimulating subscriber growth and usage.”<sup>29</sup> Thus, “the pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefit for consumers.”<sup>30</sup>

One of the keys to the successful transformation of the wireless industry from a niche product to a ubiquitous nationwide service is the advent of national or regional standard service plans under which customers agree to pay for wireless service on a monthly basis for a fixed period of time.<sup>31</sup> The FCC has recognized that these postpaid term contracts have reduced the up-front costs of wireless service, led to increased wireless subscribership, and driven higher wireless penetration rates.<sup>32</sup> Late fees are an important part of these basic nationwide service plans, for two related reasons. *First*, late fees enable wireless carriers to keep monthly access fees low by imposing the costs and burdens of late payments only on those customers who pay late rather than incorporating the costs and risks associated with late payment into higher basic monthly access fees for all customers. Thus, late fees are an essential part of wireless rate

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<sup>29</sup> See *id.* at 6310 (¶ 274). Competition also has driven down prices. See *id.* Quality also is on the rise. *Id.* (“Survey evidence also indicates that U.S. mobile subscribers have experienced an improvement in call quality in the past year.”).

<sup>30</sup> Brief for the Federal Communications Commission as Amicus Curiae at 9-10, *Cellco P’ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2005) (No. 04-3198).

<sup>31</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Rcd 14783, 14830 (¶ 98) (2003) (“*Eighth Competition Report*”) (“In the United States, most mobile telephony subscribers pay their phone bills after they have incurred charges (known as postpaid service). Prepaid service, in contrast, requires customers to pay for a fixed amount of minutes prior to making calls.”).

<sup>32</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd 17660, 17669 (2000) (“*Fifth Competition Report*”) (describing the benefits of nationwide footprints which “permit companies to introduce and expand innovative pricing plans such as digital-one-rate type (“DOR”) plans, reducing prices to consumers”).

structures that facilitate equitable pricing rather than driving up the costs of service for all customers. *Second*, late fees facilitate the use of national service and pricing plans because they enable carriers to rely on a few basic methods of calculation for such plans, thereby eliminating the need to personalize late charges on a customer-by-customer or state-by-state basis. Indeed, if state regulators, legislators, and courts around the country can selectively and inconsistently evaluate, invalidate, and prescribe late fee methodologies and charges—as the Petitioners seek to have the Commission unleash these entities to do—they will sacrifice the simplicity and general uniformity of the very national rate plans that the FCC has lauded as benefiting consumers and spurring wireless penetration.

### **III. SECTION 332 PREEMPTS STATE REGULATION OF LATE FEES.**

#### **A. Section 332 Expressly Preempts State Regulation of the “Rates Charged by” Wireless Carriers.**

Section 332(c)(3)(A) provides that “no State or local government shall have any authority to regulate the entry of or the *rates charged by* any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.”<sup>33</sup> “In the absence of an indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning.’”<sup>34</sup> A “rate” is

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<sup>33</sup> 47 U.S.C. § 332(c)(3)(A) (emphasis added).

<sup>34</sup> *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207, (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)). Because the meaning of Section 332 is clear, the agency’s interpretation of this statute is not altered by any “presumption against preemption” as urged by the Petition. See Petition at 11. The FCC is bound to interpret Section 332 in accordance with the “clear and manifest” intent of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In any event, the presumption against preemption “is not triggered” where, as here, “there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000). For nearly a century, beginning with the Radio Acts of 1912 and 1927, radio communication has been subject to continuous and pervasive federal regulation. See *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). And, from the inception of the cellular telecommunications industry, the FCC has asserted “federal primacy” over its regulation. *Use of the Bands 825-845 MHz and 870-890 MHz*, 86 F.C.C.2d 469, 504-05 (¶ 82) (1981); *Use of the Bands 825-845 MHz and 870-890 MHz*, 89 F.C.C.2d 58, 95 (¶ 81) (1982). Nor can the Commission

*Footnote continues on next page . . .*

commonly defined as “[t]he amount of a charge or payment . . . having relation to some other amount or basis of calculation,”<sup>35</sup> “a fixed charge or payment applicable to each individual case or instance,”<sup>36</sup> “a charge, valuation, payment or price fixed according to ratio, scale or standard,”<sup>37</sup> the “amount or level of payment,”<sup>38</sup> and “[a]n amount paid or charged for a good or service.”<sup>39</sup> Under any of these reasonable definitions, “state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service.”<sup>40</sup>

The FCC has endorsed this plain-meaning construction of the statute by concluding that Section 332 preempts state regulation that would stop a wireless carrier from “charg[ing] whatever prices it wishes,” would superintend “the reasonableness of a prior rate,” or would “set a prospective charge for services.”<sup>41</sup> In so concluding, the Commission has held that the “rates

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“narrowly interpret” the preemptive scope of Section 332 in response to President Obama’s Memorandum regarding preemption. *See* Petition at 25. The Memorandum by its terms applies only to “Executive Departments and Agencies,” not independent agencies such as the FCC. *See* Presidential Memorandum, 74 Fed. Reg. 24693 (May 20, 2009). But even if the Memorandum constituted a directive to the Commission, which it does not, it would still not govern this proceeding because the issue presented by the Petition is the scope of Congress’s express preemption of state rate regulation under Section 332, not any “announce[ment]” by the FCC “that [its] regulations preempt State law;” it thus involves the “explicit preemption by the Congress” that the Memorandum recognizes as outside its scope. *Id.*

<sup>35</sup> *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1258 (11th Cir. 2006) (quoting Oxford English Dictionary (2d ed. 1989)).

<sup>36</sup> Oxford English Dictionary (2d ed. 1989).

<sup>37</sup> Black’s Law Dictionary (6th ed. 1990); *accord* Webster’s Ninth New Collegiate Dictionary (1991).

<sup>38</sup> Cambridge International Dictionary of English, Cambridge University Press (1995 ed.).

<sup>39</sup> Black’s Law Dictionary 1268 (7th ed. 1999).

<sup>40</sup> *Fedor v. Cingular Wireless*, 355 F.3d 1069, 1073 (7th Cir. 2004); *see also AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003) (explaining that “state courts may not determine the reasonableness of a prior rate or set a prospective charge for service”).

<sup>41</sup> *Wireless Consumers Alliance*, 15 FCC Rcd at 17035, 17041 (¶¶ 27, 39).

charged by” wireless carriers encompass “both rate levels and rate structure.”<sup>42</sup> Rate elements are the various parts of the total combined rate for service charged to customers—or, the “building blocks” of rates.<sup>43</sup> The Commission has made clear, therefore, that “states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.”<sup>44</sup>

The Commission has further concluded that this prohibition on state rate regulation extends to state court enforcement of otherwise generally applicable contract or consumer protection laws because “it is the substance, not merely the form” that determines whether state law is preempted by Section 332.<sup>45</sup> Thus, “[i]f a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332. Likewise, if a state court were to set a prospective price for CMRS service, this action would also be preempted by Section 332.”<sup>46</sup> By contrast, where a case turns on whether a service has been provided “in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier’s advertising,” such a claim “could present breach of contract or false advertising claims

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<sup>42</sup> *Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19907 (¶ 20); *see also Wireless Consumers Alliance*, 15 FCC Rcd at 17028 (¶ 13).

<sup>43</sup> *AT&T Private Line Rate Structure and Volume Discount Practices*, Notice of Inquiry and Proposed Rulemaking, 74 F.C.C.2d 226, 235 (1979).

<sup>44</sup> *Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19907 (¶ 20).

<sup>45</sup> *Wireless Consumers Alliance*, 15 FCC Rcd at 17307 (¶ 28).

<sup>46</sup> *Id.* at 17035 (¶ 25).

appropriately reviewable by a state court.”<sup>47</sup> Under this reasoning, the evaluation of state law claims is straightforward: state law claims that require a determination of the reasonableness of a charge—for example, allegations that a charge is excessive in relation to a carrier’s costs—are preempted, while claims asserting that the price was not properly disclosed or was assessed in contravention of the contracts’ terms are not preempted. We apply these principles below.

**B. State Regulation of Late Fees Is Expressly Preempted Under Section 332(c)(3)(A).**

1. Late Fees are Themselves “Rates Charged By” Wireless Carriers for Services Rendered to Consumers.

Late fees are “rates charged by” AT&T for services provided to late-paying customers. As clearly explained in AT&T’s Terms of Service, late fees are amounts that the customer agrees “AT&T may charge, as a part of its rates and charges” “for amounts not paid by the due date.”<sup>48</sup> Once a subscriber has missed a payment due date, AT&T expends resources in making sure that the customer is aware of the situation and in attempting to secure payment. For example, AT&T undertakes a number of measures to contact and inform customers that payment is overdue, and explain their options for submitting payment, as well as the consequences of continued failure to submit payment, including warning them that their account may be placed in “suspend” status unless payment is made. Information about the penalties for non-payment is included in “dunning” notices that are sent to customers who have missed a payment due date, as well as in emails, which are sent if AT&T has the customer’s email address on file. Late payment information is also added to and reflected on customer bills, which continue to be sent during the

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<sup>47</sup> *Id.* (¶ 26). In those circumstances, “the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance.” *Id.*

<sup>48</sup> AT&T Service Agreement, available at [http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q\\_termsKey=postpaidServiceAgreement&q\\_termsName=Service +Agreement](http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service +Agreement).

past-due period. During this period, AT&T will also usually place several courtesy calls to customers in order to advise them of their delinquency, to inform them about ways to make payment on their account, and to advise them of the possible suspension of service.<sup>49</sup>

Moreover, while it attempts to make the customer aware of the situation and to secure payment, instead of immediately terminating service for breach of contract as it could have chosen to do, AT&T continues to provide telecommunications service to these late-paying customers. AT&T continues to provide service to these customers despite its knowledge that with each passing day, the likelihood of receiving any payment at all decreases. By continuing to offer communication services after non-payment, AT&T thus assumes the additional financial risks that it will have to engage in further collection activities to receive expected payments for those services, and that it will not receive payment at all.

If the aforementioned collection efforts are unsuccessful, AT&T undertakes additional lawful measures to attempt to obtain payment and to limit its exposure to additional damages and costs. If no payment is received during this time, typically 2-5 weeks after the payment due date, AT&T can suspend an account for nonpayment, in yet a further attempt to obtain payment from the customer. After an account is suspended, AT&T places several outbound calls to the customer and mails the customer a letter advising that if the account is not paid, it will be cancelled and sent to a collection agency. And even after AT&T suspends service, the

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<sup>49</sup> The Commission has recently proposed a rule change that would significantly increase the cost to carriers of providing late fee notices and instructions to delinquent customers. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket 02-278 (Jan. 2010). Specifically, the Commission proposes to prohibit carriers from making automated calls to wireless telephone numbers without written customer consent, even in those situations where the customer has designated that wireless telephone number as her/her contact number. *Id.* at (¶ 20). AT&T is at a loss to understand the purpose of this proposed rule, and it intends to oppose the proposal on the ground that it will significantly increase costs without offering any public benefit. If this rule is nonetheless adopted, that would be but one more reason why it is untenable to view late fee charges as anything other than fees for services rendered.

subscriber retains the ability to use their wireless phone to call “611” to access AT&T’s customer service assistance and to dial “911” and access emergency services.<sup>50</sup> Approximately 30 days after a suspension, a delinquent account may be disconnected, and 30 days thereafter, AT&T typically sends such an account to an outside collection agency. If a customer’s service is disconnected and the customer is still under a contract, AT&T will assess any applicable termination fees. All in all, this process can last as many as 100 days from the date the customer misses their contractually-agreed payment due date to the time the account is sent to a collection agency. AT&T is entitled to charge its customers for the above-described additional services rendered and risks borne during this period.<sup>51</sup>

In addition to compensating AT&T for these costs and reflecting the risks in continuing to serve customers who are already late and demonstrably more likely eventually to default, the late fee compensates AT&T for another cost: the expense and cost associated with the deprivation of the payment itself. A customer’s late payment results in a transfer of the time value of money from AT&T to the customer, who retains the balance due to AT&T in his or her possession while depriving AT&T of the valuable use of these funds and its cash flow. This fact is not lost on Petitioners, who argue that a carrier should not charge a late fee when it “can simply calculate the time value of money based on the number of days after the due date that it

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<sup>50</sup> Cf. 47 C.F.R. § 20.18 (describing carriers’ 911 service obligations).

<sup>51</sup> The only “service impairment” fee charged by AT&T is a \$36 fee to restore or reconnect service, of which it advises customers in the dunning letter mailed to customers prior to suspension of service. Additional information about this fee is available at AT&T’s website’s Answer Center, which explains, among other things, that “the standard reconnect fee is \$36. When your service has been suspended or disconnected for nonpayment this is charged to reinstate your service.” See *AT&T Answer Center, Answer to Question*: “How much does it cost to have my service restored?” AT&T’s Answer Center is available at [http://www.wireless.att.com/answer-center/main.jsp?t=browseTab&ft=browseTab&opentopic=800293&topicName=Fees+and+Taxes&topicTreeId=solutionPropertyTree&showcontent=true&lstLanguageResults=&locale=en\\_US&\\_dyncharset=UTF-8](http://www.wireless.att.com/answer-center/main.jsp?t=browseTab&ft=browseTab&opentopic=800293&topicName=Fees+and+Taxes&topicTreeId=solutionPropertyTree&showcontent=true&lstLanguageResults=&locale=en_US&_dyncharset=UTF-8)

received payment.”<sup>52</sup> Putting aside the Petitioners’ gross oversimplification of the complexities and transaction costs associated with calculating and charging each individual customer for the time value of money associated with their particular circumstances, such a mandate would dramatically under-compensate AT&T for the costs and risks imposed by late payments.

It should be beyond dispute that, if AT&T knew in advance of entering into a contractual relationship with a customer that the customer would not make timely payments, AT&T would charge that customer higher rates to reflect the increased burdens and risks anticipated. Late fees represent, in part, a modest subsequent increase in the total amount AT&T charges a late-paying customer once AT&T learns that the customer has not made timely payments.

At bottom, AT&T’s late fee is a “rate[] charged” under any reasonable construction of Section 332(c)(3)(A). Indeed, even the Petition defines a “rate” as “[a]n amount paid or charged for a good or service.”<sup>53</sup> Here, as explained in detail above, AT&T provides significant additional services—both telecommunications and otherwise<sup>54</sup>—to its late-paying customers,

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<sup>52</sup> Petition at 9.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> The fact that the costs associated with late payment and the attendant carrier activities are not derived *exclusively* from the provision of telecommunications service does not alter the legal conclusion that late fees are rates charged. For example, administrative fees also are not associated with costs derived directly from the provision of the telecommunication service itself. But administrative and other fees are nonetheless rates charged by wireless carriers for the provision of service to its customers, and challenges to their reasonableness are thus preempted. *See Gilmore*, 156 F. Supp. 2d at 924 (“Plaintiff’s contract allegations explicitly raise the issue of whether it received sufficient services in return for the [Administrative] Fee. That is a rate issue.”). So too have regulatory cost recovery fees and E911 fees been deemed “rates charged.” *See Franczyk v. Cingular Wireless, LLC*, No. 03 C 6473, 2004 WL 178395, at \*3 (N.D. Ill. 2004) (“Looking past the form and language of the Complaint, the significant issue involved is the validity and legitimacy of the [Regulatory Cost Recovery Fee]. Such issue is a rate challenge.”); *Alport v. Sprint Corp.*, No. 03 C 6246, 2003 WL 22872134 (N.D. Ill. 2003) (same analysis applicable to challenge to federal E911 fee). Thus, as the Commission and many courts have observed, the inquiry demanded by Section 332 turns on whether the charge is attributable to a good or service provided to the customer by a wireless carrier, and not on whether the charge somehow can be linked to the technological or engineering demands of providing wireless service.

and late fees certainly have a basis of calculation—\$5 or 1.5% of the balance carried forward.<sup>55</sup> As a result, there should be no question that AT&T’s late fee fits comfortably within the definition of “rate[] charged.”

Presumably recognizing the shortcomings of their own position, Petitioners make a last ditch attempt to narrow the definition of “rates charged” by arguing that a “rate” must correspond to a charge for “a unit” of service. But there is no justification for defining “rates charged” in such a cramped fashion. Although a “rate” certainly can be related to a unit of time or service in certain circumstances, nothing in the text or structure of Section 332, or the purposes animating it, supports such a limitation.<sup>56</sup> Indeed, the Petitioners’ repeated reference to a “certain allotment or usage of minutes” or the “allotment or usage of ‘bytes’ of data,”<sup>57</sup> is inconsistent with even basic wireless pricing plans, which have evolved to include unlimited

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<sup>55</sup> Of course, a rate need not correspond to a particular set of costs in order to fall within the preemptive ambit of Section 332(c)(3)(A). The FCC has made a conscious decision not to impose any cost-based regulation on the wireless industry, *see Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd 8987, 8998 (2002) (“[T]he Commission has regulated CMRS through competitive market forces, declining to impose specific cost-based regulations on CMRS providers”), including in the particular context of late fees, where it has specifically rejected the claim that a late fee must be cost-based. In *Kiefer*, the Commission specifically “rejected the complainant’s assertion that the late fee must be cost-based, noting, among other things, that the Commission has regulated CMRS ‘through competitive market forces,’ and that the existence of a competitive market in that case ‘did not warrant a finding that the late fee violate[d] section 201(b).’” *Id.* at 8996 (¶ 18) (quoting *Kiefer*, 16 FCC Rcd 19131-32 (¶¶ 5, 7)).

<sup>56</sup> The Petition argues that its cramped definition is “consistent” with the Supreme Court’s “view that a ‘rate’ must be in exchange for providing some unit of service.” Petition at 14 n.42 (citing *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998)). The Petition misunderstands *Central Office*. There, in reaffirming that the filed rate doctrine preempts state law claims challenging rate and non-rate aspects of tariffed services, the Court rejected the Ninth Circuit’s reasoning that the filed rate doctrine did not apply “[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing.” *Id.* at 223 (citation omitted). In so doing, the Court made its now-familiar observation that “[r]ates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.” *Id.* Nothing in the Court’s reasoning mandates that the term “rate” be limited to charges for “units” of service. Rather, the Court’s analysis confirms the flawed nature of Petitioners’ attempt to unravel wireless service agreements by disaggregating rates into individual charges and deeming “other terms and conditions” any charge not related to a unit of service.

<sup>57</sup> Petition at 14.

calling plans that are not predicated on any “unit” of service at all,<sup>58</sup> and ignores carriers’ provision of various other products, functions, and services related to CMRS that are not simply minutes of talk time but for which carriers may impose charges, such as activation fees, reconnect fees, and enhanced voicemail, among others. In light of the statute’s text, structure, and purpose, as well as the FCC’s longstanding regulatory construction of Section 332(c)(3)(A), it would be unreasonable for the FCC to limit Section 332(c)(3)(A)’s preemptive reach to only those charges that can be tied to a unit of time or service.

In the end, the Petition does not contest the fact that late fees are “rates charged” insofar as they are a monetary charge expressly contemplated by the customer service agreement. Rather, its central claim is that late fees are not charged in exchange for—or in some sense exceed the costs of—a good or service provided to the customer. As demonstrated above, however, AT&T’s late fees are charged in exchange for significant services, including telecommunications services themselves, provided to customers who miss their payment due dates. And the state law claims the Petitioners seek to pursue in litigation, for which they are seeking the FCC’s approval, represent quintessential rate regulation. As explained above, “state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service.”<sup>59</sup> The Petition could not be more direct about its ultimate purpose of asking courts to use state law to set a “reasonable” amount for late fees, alleging that wireless providers “violate clear and longstanding consumer protection law by charging late fees that far exceed the actual damages

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<sup>58</sup> *Thirteenth Competition Report*, 24 FCC Rcd at 6244 (¶ 112) (“The major development since the release of the Twelfth Report is the introduction of unlimited national flat-rate calling plans across the four nationwide operators in the first quarter of 2008.”).

<sup>59</sup> *Fedor*, 355 F.3d at 1073; *see also Gilmore*, 156 F. Supp. 2d at 924 (“Plaintiff’s contract allegations explicitly raise the issue of whether it received sufficient services in return for the Fee. That is a rate issue.”).

by consumers who pay late.”<sup>60</sup> The Commission should conclude, therefore, that any state law challenge to the reasonableness of late fees is expressly preempted as regulation of “rates charged” under Section 332(c)(3)(A).

2. Late Fees Are Part of the “Rate Structure” of the Wireless Customer Agreement.

In addition to constituting a direct challenge to the “rates charged” by wireless carriers, the Petition also represents an impermissible attack on the manner in which wireless carriers structure their rates.<sup>61</sup> As explained above, wireless carriers could have chosen an alternative rate structure in which they divided the costs associated with late payments evenly among all customers as part of the basic national service plans and monthly access fees. Had AT&T adopted such a business model, there could be no question that the costs associated with late payments would constitute an element of the rates charged by wireless carrier for the provision of wireless service. Wireless carriers have simply—and equitably—chosen to structure their rates in a way that allows them to charge late fees only to those customers who create those costs. On this point, the District Court’s analysis in *Kiefer* is particularly instructive:

The late payment charge at issue here is part of the overall rate structure for paging services; not merely a ‘term and condition’ of the parties’ service contract. 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.<sup>62</sup>

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<sup>60</sup> Petition at 1.

<sup>61</sup> See *Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19907; *Wireless Consumers Alliance*, 15 FCC Rcd at 17028 (¶ 13).

<sup>62</sup> *Kiefer*, 50 F. Supp. 2d at 685. In its resolution of the primary jurisdiction referral in *Kiefer*, the FCC cast no doubt on this analysis of the economic impact of late fees on wireless rate structure, even though *Footnote continues on next page . . .*

Similarly, there should be no doubt that a wireless carrier could structure its rates so as to provide variable prices to customers who pay early, on time, or late. For example, a carrier could develop pricing plans with different lengths of time for payment and price the corresponding monthly access fees differently, offering lower monthly access fees to customers who agree to pay in a shorter time (say, \$69.99 for unlimited calling and a 30-day payment term), and offering higher monthly access fees for those who elect a longer payment term (say, \$89.99 for unlimited calling and a 90-day payment term). If a plaintiff challenged the amount of the resultant monthly access fees under state law—on the theory that the carrier was recovering in its \$89.99 monthly access fees revenues in excess of costs or the “time value of money” for the additional payment term because the \$20 difference was excessive in relation to the costs of the longer payment term—such a challenge clearly would be preempted by Section 332(c)(3)(A) even under the Petitioners’ cramped interpretation of the statute. Wireless carriers simply have elected to treat the costs and risks associated with late payment as an *ex post*, contingent element of their rates, rather than building them into prices *ex ante* by offering a variety of rate plans with different payment terms depending on the payment interval. This is exactly the type of rate structuring decision that is preempted under Section 332(c)(3)(A).

The rate structure adopted by the wireless industry—which uses national pricing plans and imposes contingent late fees on the customers who impose the costs and risks of late payment—prevents inefficient subsidization. As explained above, customers who pay on time

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petitioner’s “complaint” filed with the FCC “vigorously” urged the FCC to declare that state law claims concerning late fees were not preempted, *Kiefer v. Paging Network, Inc. d/b/a Pagenet*, File No. EB-00-TC-F-002, FCC 01-309, Complaint at 17 (¶ 34) (filed April 3, 2000), and extensively discussed whether late fees are “rates charged” or “among those ‘terms and conditions’ of commercial mobile radio services subject to state law,” *Id.* at 26 (¶ 43); *see generally id.* at 17-26 (¶¶ 35-43) (generally discussing the status of late fees under Section 332).

presently do not pay higher monthly access fees in order to subsidize the late payments and delinquencies of other customers. Yet under the Petitioners' narrow definition of rates, wireless carriers would not be able to structure their rates to ensure that customers internalize the costs of their late payments, nor would carriers be able to maintain the type of national rate pricing that today dominates the industry to the benefit of customers. Such an approach would obscure the elements of wireless rate plans, contrary to the FCC's stated goals of empowering consumers with full information, and would needlessly raise the costs of wireless service at a time when the Commission is particularly concerned about increasing access to wireless services.

For all the reasons identified above, late fees are both an important part of wireless carriers' rate structure and actual "rates charged" by wireless carriers. Accordingly, state law claims challenging their reasonableness, such as the claims described in the Petition, are preempted under Section 332(c)(3)(A).<sup>63</sup>

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<sup>63</sup> The Petition takes rhetorical aim at other fees it terms "impairment" or "reconnect" fees, which are described in the Petition as ranging from \$15 to \$36 and assessed by carriers to resume service after a suspension or termination. Because the Petition and the Public Notice focus on "fees for late payment," Public Notice at 1, the FCC need not address reconnect fees here. Indeed, the FCC has made clear that whether Section 332(c)(3)(A) preempts a particular state law claim "will depend on the specific details" of the allegations and "the facts and circumstances of a particular case." *Wireless Consumers Alliance*, 15 FCC Rcd at 17022 (¶ 2). Accordingly, the FCC should not reach reconnect fees in this proceeding. In any event, reconnect fees plainly constitute a charge or payment for service because the payment is in exchange for the activation of suspended or terminated service, just as an "activation fee" is a fee to turn on or commence service. See generally *In re Petition of the People of the State of California*, 10 FCC Rcd at 7540 (¶ 122) (noting that carrier practice of "waiving activation fees . . . clearly reduce[s] the price available to consumers"). Moreover, reconnect fees have long been part of wireless pricing plans and the charges are within the range of fees historically included in state tariffs. See, e.g., Attachments to Petition of the Connecticut Department of Public Utility Control, PR Docket No. 94-106 (filed Aug. 8, 1994) (Springwich Cellular Limited Partnership tariffs reflecting fees for "restoral of service due to disconnection, suspension" of \$30; MetroMobile CTS Wholesale Tariff for Cellular Mobile Telephone Service in the State of Connecticut, requiring fees of \$5-\$40 to "restore service"). Accordingly, there is no basis for state regulation of the reasonableness of reconnect fees, which are clearly rates charged under Section 332(c)(3)(A).

**C. State Regulation of Late Fees is Not Superintendence of “Other Terms and Conditions” of Wireless Service.**

To escape the preemptive sweep of Section 332(c)(3)(A)’s “rates charged” language, the Petitioners urge the Commission to classify late fees as “other terms and conditions” of wireless services, which would subject late fees to plenary state regulation.<sup>64</sup> The Commission should reject the Petition’s counterfactual interpretation of Section 332, which would not only require the FCC to interpret the statutory language in an unreasonable manner but also require the Commission to abandon its longstanding construction of the statute.

As a threshold matter, because late fees are “rates charged by” wireless carriers, there is no need to examine whether they are “other terms and conditions” of service—by definition, they are not. As one court explained, “study of the phrase ‘other terms and conditions’” is unnecessary where the “meaning of ‘entry of or the rates charged by any commercial mobile service’ adequately resolved the issue.”<sup>65</sup> Late fees are either “rates charged” for wireless service or they are “other terms and conditions” of wireless service—they cannot be both. Indeed, the statute’s use of the word “other,” as well as its construction of such terms and conditions as an “except[ion] to the category of “rates charged,” means that “other terms and conditions” can only be those aspects of wireless service that are not rates, regardless of the label affixed to the state law under review. The statute thus makes clear that these categories are mutually exclusive. Consequently, once it is determined that a state law claim constitutes prohibited rate regulation, as should be the case here, that is the end of the matter.

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<sup>64</sup> Petition at 16.

<sup>65</sup> *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 988 (7th Cir. 2000).

In any event, state regulation of the price set by a wireless carrier for its service is not regulation of “other terms and conditions” under any common-sense construction of the statute. Section 332’s “other terms and conditions” language generally refers to “such matters as customer billing information and practices and billing disputes and other consumer protection matters[.]”<sup>66</sup> Properly understood, then, the statute’s preservation of state authority to regulate “other terms and conditions” is aimed at disputes over *non-rate* terms and conditions, such as disclosure of charges, the methods of billing, and collection practices. As the Commission has explained, Section 332’s “legislative history nowhere suggests that states may regulate rates in the guise of regulating billing practices.”<sup>67</sup> Nor is the Petition’s invocation of “consumer protection” as the basis for validating sweeping state regulation sustainable. Defined at that level of generality, any manner of rate regulation arguably would constitute consumer protection, thereby rendering Section 332’s express preemption language a nullity. “To avoid subsuming the regulation of rates within the governance of ‘terms and conditions,’ the meaning of ‘consumer protection’ in this context must exclude regulatory measures . . . that directly impact the rates charged by providers.”<sup>68</sup> Regardless of whether the state regulation sought here is framed as relating to “billing,” involving “consumer protection,” or arising from a “traditional police power,” and irrespective of whether or not the restriction is generally applicable or

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<sup>66</sup> H.R. Rep. No. 103-111, at 261 (1993).

<sup>67</sup> Brief for the Federal Communications Commission as Amicus Curiae at 33, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) (Nos. 05-11682, 05-12601).

<sup>68</sup> *Cellco P’ship v. Hatch*, 431 F.3d 1077, 1083 (8th Cir. 2005).

targeted specifically at wireless services, the “key focus” must be “whether the validity of the [rate] had to be determined to resolve the claim.”<sup>69</sup>

As explained above, state law claims that seek to regulate, limit, or proscribe late fees because they are excessive, unfair, or not limited to costs do not seek merely to superintend billing practices. Indeed, the focus of the Petition is not any alleged failure of wireless carriers to disclose late fee charges; there can be no dispute that AT&T fully discloses these fees. Nor does the Petition raise any other objection to the manner in which wireless carriers attempt to collect these charges. Rather, notwithstanding its attempt to disclaim any interest in having states “assess[] the value or sufficiency of any wireless service,”<sup>70</sup> the Petition directly challenges the reasonableness of late fee charges. The Petition plainly asserts that the late fees “far exceed the actual damages caused by late payment”<sup>71</sup> and constitute “illegal profits”<sup>72</sup> derived from “revenue that exceeds costs.”<sup>73</sup> Put simply, the Petition clearly (and wrongly, as explained above) asserts that customers receive little or nothing of value in exchange for this purportedly punitive fee, and that carriers’ fees are inadequately related to actual costs. As such, the Petition is a paradigmatic attack on the “rates charged by” wireless carriers. Late fees are not properly regulated as “other terms and conditions” of service.<sup>74</sup>

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<sup>69</sup> *Gilmore*, 156 F. Supp. 2d at 922; *accord Wireless Consumers Alliance*, 15 FCC Rcd at 17307; *Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19907.

<sup>70</sup> Petition at 21.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *See, e.g., Kiefer*, 50 F. Supp. 2d at 685; *Gilmore*, 156 F. Supp. 2d at 922.

Similarly, the state law complaints that undergird this Petition also challenge the reasonableness of carriers' late fees insofar as they seek restitution, disgorgement, and payment of the amount of late fees collected in excess of the actual damages incurred by wireless carriers due to late payment.<sup>75</sup> In particular, the complaints allege that late fees are "grossly excessive and disproportionate,"<sup>76</sup> and that, among other things, the fee "drastically exceeds and does not reflect the actual cost"<sup>77</sup> to the carriers of late payment. Evaluation of these state law claims would necessarily involve an examination of the late fee's reasonableness and relation to costs. But the FCC and the D.C. Circuit have indicated that where a court is asked to sit in judgment of the reasonableness of, or value received for, a wireless carrier's charges—as for example in a quantum meruit or other equitable claim—it is likely preempted by Section 332(c)(3)(A).<sup>78</sup>

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<sup>75</sup> The Petition focuses on the claims brought under California Civil Code 1671 but acknowledges that additional claims have been brought based on California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, and the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* Petition at 9 n.19. Some complaints allege that the late fee provision is unconscionable, *see, e.g.*, Third Amended Complaint, *Gellis v. Verizon Communications, Inc.*, No. 3:07-cv-03679 (N.D. Cal. Dec. 10 2008) ("Gellis Complaint"), and also plead unjust enrichment, *see, e.g.*, Complaint for Damages and Injunctive Relief, Fourth Cause of Action, *Barahona v. T-Mobile*, No. 2:08-cv-01631 (W.D. Wash. Nov. 7, 2008); Third Amended Complaint, Fifth Cause of Action, *Ruwe v. Verizon Wireless*, No.07-cv-03679 (N.D. Cal. Dec. 1, 2008).

<sup>76</sup> Complaint at 7, *Thomas v. Sprint Nextel Corp.*, No. 3:08-cv-05119 (N.D. Cal. Nov. 10, 2008).

<sup>77</sup> Gellis Complaint at 4. Gellis also alleges that Verizon Wireless's reconnect fees "drastically exceed the actual cost, if any, Verizon Wireless incurs when its automated systems impair and then resume normal service on a customer's account." *Id.* at 5-6.

<sup>78</sup> *See In re Sprint PCS*, 17 FCC Rcd 13192, 13198 (¶ 13 n.40) (2002) ("Quantum meruit is premised on the notion that a party receiving service would be unjustly enriched if it were not required to pay for that service. Although we defer to the court to address this state law claim, we note that an award of quantum meruit would require the court to establish a value (*i.e.*, set a rate) for the service provided in the past. We note that there is a substantial question whether a court may award quantum meruit or other equitable relief under state law without running afoul of section 332(c)(3)(A)."); *see also AT&T Corp.*, 349 F.3d at 700-01 ("We note that there is a substantial question whether a court may award quantum meruit or other equitable relief under state law without running afoul of section 332(c)(3)(A).") (citing *Sprint PCS*, 17 FCC Rcd. at 13198 n.40).

Nor should the Commission indulge the notion that the invalidation of late fees would have “merely an incidental”<sup>79</sup> or “indirect” effect on rates and rate structures. The invalidation of late fees and monetary relief sought by Petitioners is not the sort of general damage award or regulatory burden that can be dismissed as simply an increase in the “cost of doing business.”<sup>80</sup> As explained above, the theories advanced in the Petition would clearly demand an examination of the fees’ reasonableness by judging them in relation to carriers’ costs. Further, the relief requested would require a court to set a prospective price for service by decreeing that existing late fees cannot be collected or by limiting late fees to actual damages, or, on the Petitioners’ theory, “the time value of money.”<sup>81</sup> And, because late fees also are an integral part of carriers’

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<sup>79</sup> *Wireless Consumers Alliance*, 15 FCC Rcd at 17039-40 (¶¶ 33, 36) (rejecting the argument that *any* monetary damage award is “necessarily equivalent to both retroactive and prospective rate regulation” and is generally preempted by Section 332 by explaining that some monetary damages awards based on tort and contract law might have only an “incidental” effect on rates, and “whether a specific damage award or damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case”).

<sup>80</sup> *In re Petition of Pittencrieff Commc’ns, Inc. for Declaratory Ruling*, 13 FCC Rcd. 1735, 1745 (¶ 20) (1997). Late fees have a far more direct relationship to monthly access fees and other rates than the USF charges at issue in *Pittencrieff*. There the FCC reasoned that although USF obligations could theoretically cause a carrier to raise rates, such an increase would be attributable to an increase in the “costs of doing business,” and the effect on rates would not be sufficiently direct to constitute rate regulation. *See id.* at 1745 (¶ 20) (“We have not found, however, that [Section 332(c)(3)(A)] preempts state authority over matters which may have an impact on the costs of doing business for a CMRS operator. . . . Likewise the Commission has stated that section 332(c)(3) does not preempt other state regulatory activities, such as conducting complaint proceedings concerning disputes over billing practices and requiring informational filings, which impose costs on CMRS providers doing business in that state.”). Further, the conclusion that USF charges were properly imposed as regulation of “other terms and conditions” harmonized the meaning of that phrase with the universal service policies in Section 254(f) of the Act, as well as the provision in Section 332(c)(3)(A) that expressly carved USF requirements out of that section’s preemptive sweep, *see id.* at 1737 (¶ 4) (explaining that “an interpretation of section 332(c)(3) that excludes CMRS providers from making contributions to state universal service mechanisms would contradict the direct language of section 254(f)”), statutory language that is not relevant here.

<sup>81</sup> Petition at 9. Although Petitioners assert that such a regime would not be unduly burdensome or disruptive because AT&T recognizes differential state treatment of billing practices in its service agreement, *id.* at 26, this assertion is premised on a gross oversimplification of the regime that the Petitioners seek to impose on wireless carriers. Petitioners would have the FCC allow states to require carriers to “calculate the time value of money based on the number of days after the due date that it received payment,” *id.* at 9, presumably on a per-customer basis. Not only would such a requirement undervalue the services provided to these customers and prove unworkable in practice, but it is not the necessary or even probable outcome of their  
*Footnote continues on next page . . .*

rate structures, their regulation or invalidation would have a direct effect on the monthly access fees that depend on late fees as a way to avoid imposing the negative externalities of late payment on customers who pay on time.

In sum, because late fees are “rates charged,” they are by operation of statute not “other terms and conditions;” nor are late fees mere non-price “terms and conditions” of wireless service, such as billing practices, under the common-sense meaning of that phrase. Furthermore, because state regulation or invalidation of late fees would regulate the rates and rate structures of wireless carriers in a direct and material way, late fees cannot fall within the ambit of “other terms and conditions.” For all of these reasons, state regulation of late fees is expressly preempted under Section 332(c)(3)(A).

#### **IV. CONCLUSION**

For the reasons stated above, AT&T respectfully requests that the Commission deny the Petition. The Commission should declare that because late fees are “rates charged” for wireless service, state law challenges to their reasonableness are expressly preempted under Section 332(c)(3)(A). Congress’s decision to preempt state law in this area was intended to create a uniform, national model for wireless rate regulation. The Commission should adhere to its longstanding construction of this statute and reject the Petition’s request that wireless regulation return to the patchwork, balkanized system that Congress emphatically rejected in 1993. Granting the Petition’s request would not only violate Congress’ legislative judgment, it would

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state law litigation. As explained above, the complaints in the California litigation make clear that the Petitioners seek to invalidate late fees altogether and replace them with effective rate regulation that considers the cost basis for the fees on an individualized basis. This approach would likely result in state court decisions requiring varying interest rates, state PUC determinations that a fixed dollar figure charge is acceptable, or state law determinations that wireless carriers must fold the costs of late payment into their monthly access fees, and could even result in inconsistent determinations by these state entities within a particular state.

harm wireless customers who pay their bills on time and more generally impede the tremendous progress that the industry has made in making wireless service more affordable and accessible to consumers. At bottom, whether examined through a legal or policy prism, the Petition should be rejected as contrary to the highly successful national framework for wireless regulation that has been in place since 1993.

Respectfully submitted,

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