

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

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

OPPOSITION OF SPRINT NEXTEL CORPORATION

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Summary of Sprint's Opposition

The Commission should deny the Petition for Declaratory Ruling seeking to subject wireless rates to state-by-state regulation.

First, under settled FCC precedent that has been affirmed on appeal, the Commission has determined that the Section 332(c)(3) “rates charged” clause “prohibits states from prescribing, setting or fixing of rates” of wireless services. But that is precisely how Petitioners want to use state law. Specifically, Petitioners concede that late fees are not unlawful *per se*. Rather, their claim is that the particular rates carriers impose are too high – that is, the rate level “far exceed[s] the cost caused by customers who pay late.” In other words, Petitioners want courts (or juries) across the country to use state law to “prescribe, set or fix” the late fees that the defendant wireless carriers may impose – *the very state activity that Section 332(c)(3) explicitly prohibits*.

But the Commission is required to preempt even if it determines that late fees are an “other term and condition” rather than a “rate charged” within the scope of Section 332(c)(3). This is because Congress has directed this Commission – and not courts or juries – to “establish a *Federal regulatory framework* to govern the offering of *all* commercial mobile services.” Congress explicitly found that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market.”

The state law-based litigation that Petitioners are pursuing would conflict with this Congressional mandate in several ways. One, a federal regulatory framework cannot be achieved if each state determines what late fee practices are, or are not, lawful. Second, the FCC has already ruled that the very late fees Petitioners are challenging under state law are reasonable and lawful. Finally, Petitioners want courts to find that state law requires wireless carriers to use cost-based rates, when the Commission has determined that for the wireless industry, prices should be based on the market rather than regulatory cost studies. Accordingly, Petitioners’ state law-based litigation “stands as an obstacle to the accomplishment and execution of the full objectives of Congress” and must be preempted under the conflicts preemption doctrine.

Sprint finally responds briefly to four Petitioner assertions that lack merit:

1. Petitioners’ suggestion that consumers have no remedy other than State-law based litigation is incorrect.
2. Petitioners’ reliance on certain language in a 1993 House Report is misplaced because Congress did not enact the particular House Bill proposal on which the language is based.
3. The presumption against preemption does not apply here because Congress had a “clear and manifest purpose” to preempt state law as applied to wireless services.
4. Petitioners’ reliance on the Section 414 savings clause is misplaced, and the Supreme Court has already rejected Petitioners’ argument.

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Sprint Nextel Corporation, on behalf of its various operating subsidiaries providing wireless services (“Sprint”), submits this opposition to the Petition for Declaratory Ruling filed by five California consumers seeking a Commission ruling that late payment fees are not “rates” under Section 332(c)(3) of the Act and that, as a result, their State law litigation claims are not preempted (hereinafter, “Petition”).¹

Under settled law, Petitioners’ state law claims are preempted. Indeed, preemption is warranted under two different preemption doctrines. One, Petitioners in their litigation seek to use state law to “prescribe, set or fix” the size of the late fees that certain wireless carriers impose. Under long-standing Commission precedent (affirmed on appeal), this activity falls within the express preemption provision in Section 332(c)(3) of the Act. Two, the Commission would be required to preempt Petitioners’ state law claims even if it determined that late fees involved an “other term and condition.” This is because the Commission has already determined the very late fees that Petitioners are challenging in their class action lawsuits are reasonable and lawful.

¹ See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Regarding Interpretation of Section 332(c)(3)(A) of the Communications Act of 1934, as Amended, as Applied to Fees Charged for Late Payments*, WTB Docket No. 10-42, DA 10-264 (Feb. 19, 2010).

Permitting courts (or juries) across the country to make their own determination of what rate levels are lawful would undermine the Commission's ability to discharge its Congressional mandate to establish a "federal regulatory framework" for all wireless services.

I. PETITIONERS' STATE LAW CLAIMS ARE PREEMPTED UNDER THE EXPRESS PREEMPTION PROVISION IN SECTION 332(C)(3)

Petitioners have filed three different class action lawsuits against Sprint, T-Mobile and Verizon Wireless. The claims in each lawsuit are basically the same: Petitioners allege that the carriers' late fees imposed on delinquent customers are "illegal" under state law because the fees are alleged to be set at levels that "far exceed costs."²

All three courts stayed the litigation under the doctrine of primary jurisdiction so the plaintiffs (here, the Petitioners) could obtain the Commission's guidance regarding the challenged fees.³ As the first referral court stated, the "FCC's determination as to whether defendant's late payment charge is a 'rate' and if it is, whether the rate is reasonable, will necessarily guide similar suits against other telecommunication providers":

It will likewise guide any decision by this Court regarding plaintiff's state law claims. Thus, use of the primary jurisdiction doctrine and referral to the FCC will avoid disparate or conflicting requirements for telecommunication providers, and promote uniformity.⁴

Petitioners then filed their Petition to address "a narrow question":

² See Petition at 1 and 2. Petitioners also complain about the size of carriers' reactivation fees. Because the legal analysis for the two fees is the same, Sprint discusses in the text only late fees.

³ See *Barahona v. T-Mobile*, 628 F. Supp. 2d 1268, 1272 (W.D. Wa., May 15, 2009); *Thomas v. Sprint Solutions, Inc.*, No. C08-5119-TEH, Order Granting in Part and Denying in Part Motion to Stay Case (N.D. Cal., Sept. 2, 2009); *Ruwe v. Verizon Wireless*, No. C07-03679-JSW, Order Granting Defendant's Motion for Stay (N.D. Cal., July 10, 2009).

⁴ *Barahona, supra*, 628 F. Supp. 2d at 1272.

[W]hether contractual late payment penalties are “terms and conditions” of service subject to state consumer protection law or preempted “rates charged” pursuant to Section 332.⁵

Petitioners’ assertion that their state law litigation claims do not fall within the scope of the Section 332(c)(3) preemption statute is not credible. The Commission has ruled that the “rates charged” clause in this statute “prohibit[s] states from prescribing, setting or fixing rates of CMRS providers.”⁶ But that is precisely how Petitioners want to use state law. Specifically, Petitioners concede that late fees are not unlawful *per se*.⁷ Rather, their claim is that the particular rates defendant carriers impose are too high – that is, the rate level “far exceed[s] the cost caused by customers who pay late.”⁸ In other words, Petitioners want courts (or juries) across the country to use state law to “prescribe, set or fix” the late fees that the defendant wireless carriers may impose – the very state activity that Section 332(c)(3) prohibits.

⁵ Petition at 3. Oddly, although the referral court explicitly directed Petitioners to ask the FCC “whether [late fees] are reasonable under applicable law” (*ibid*), they state they are “not asking the [FCC] to make any determination as to a permissible amount of a fee that a wireless carrier may charge due to a customer paying late.” Petition at 3. In fact, given that Petitioners concede some late fees are reasonable and appropriate (*id.*), the only way the FCC can possibly address their Petition and provide the guidance the federal courts seek is to review the specific late fees they are challenging. See *Kiefer v. Paging Network*, 16 FCC Rcd 19129, 19131 ¶ 5 (2001)(FCC approves the particular late fee challenged, but not all late fees, regardless of size). See also *Thomas v. Sprint Solutions, Inc.*, No. C08-5119-TEH, Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss (N.D. Cal., March 30, 2010) (holding that Sprint’s failure to disclose the exact amount of its late fee and reconnect fee was not a violation of the California Consumer’s Remedy Act, as the alleged fees were not unconscionable on their face).

⁶ *Pittencrieff Communications*, 13 FCC Rcd 1735, 1745 ¶ 20 (1997), *aff’d* *CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). See also *Connecticut CMRS Preemption Order*, 10 FCC Rcd 7025, 7060 ¶ 81 (1995)(PUCs “may not prescribe, set, or fix rates” but may address “carrier practices, separate and apart from their rates.”), *aff’d* *Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

Because the statutory phrase, “rates charged,” is not defined in the Act, the FCC has authority to define the phrase, courts will defer to the FCC’s definition under the *Chevron* doctrine – and, in fact, courts have already affirmed the FCC’s interpretation of the “rates charged” clause. See *CTIA, supra*, 168 F.3d at 1336-37.

⁷ See Petition at 3 (“Petitioners are not claiming CMS providers may not recoup legally cognizable damages caused by customers who pay late.”).

⁸ *Ibid.*

Petitioners claim that late fees are not “rates” but are rather “other terms and conditions” of wireless service. This is because, they assert, such fees are “not part of the services CMS providers offer:”

Reference sources define the word “rate” to mean “[a]n amount paid or charged for a good or service.” * * * Penalty Fees are not tied to or charged in exchange for usage of minutes, text messages, or any other unit of any mobile phone service. Rather, the Penalty Fees . . . are intended to penalize customers who . . . breach the terms and conditions of service – namely, the promise to timely pay.⁹

This argument is meritless. First, late fees are imposed for service. These fees are paid so the delinquent customer can continue to receive service despite past defaults. More fundamentally, however, Petitioners concede that the fees paid for service (*e.g.*, activation fees, monthly fees) fall within the scope of the Section 332(c)(3) preemption clause.¹⁰ Thus, Petitioners concede they would have no state claims at all if a wireless carrier chose to recover its collection costs from all customers in the form of a higher monthly rate for service. Yet, Petitioners want the Commission to rule that once a carrier decides to recover its collection costs only from those persons who impose the cost – thereby lowering the prices for customers who pay their bills on time – states acquire suddenly the authority to “prescribe, set or fix” the late fees.

Petitioners neglect to advise the Commission that the D.C. Court of Appeals, in affirming a Commission order, has rejected already the very argument Petitioners now make. In *MCI v. FCC*, 822 F.2d 80 (D.C. Cir. 1987),¹¹ MCI argued that AT&T’s cancellation fees were not

⁹ Petition at 2, 14 and 16.

¹⁰ See Petition at 16 (“These are the ‘rates’ – the provision of minutes of airtime, number of text messages, or bytes of data in exchange for an advertised price – that states may not regulate under Section 332.”).

¹¹ The court affirmed the FCC’s decision in *AT&T Revisions to Tariff F.C.C. Nos. 260 and 266*, FCC 55-350 (July 16, 1985), which, in turn, affirmed the Common Carrier Bureau’s decision in *AT&T Revisions to Tariff F.C.C. Nos. 260 and 266*, Mimeo No. 1613 (Jan. 13, 1985).

“rates” within the parties’ contract (but were rather non-rate “regulations”) and that therefore AT&T did not have the authority to impose these fees. Like the Petitioners here, MCI did not challenge the fact that the defendant (AT&T) incurred costs in engaging in the activity at issue, or that at one time AT&T had recovered these cancellation costs in “its general rates for private-line service, thereby spreading the costs among all ratepayers” (*id.* at 86). The court rejected MCI’s argument that the recovery of these costs could no longer be considered “rates” simply because AT&T decided to “unbundle these discrete costs and impose them directly on the customers who caused AT&T to incur the costs:”

This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service. We therefore conclude that the Commission reasonably found that the [cancellation] charges are “rates” within the meaning of the Agreement (*id.* at 86).

Petitioners’ argument – state regulatory authority over late fees depends on whether a carrier bundles or disaggregates its collection costs – fails for the same reason.

In summary, the clear objective of Petitioners’ lawsuits is to use state law to “prescribe, set or fix” the late fees wireless carriers impose. Under the Commission’s settled precedent, affirmed on appeal, this is the very activity that Section 332(c)(3) preempts.

II. PREEMPTION IS NECESSARY EVEN IF THE COMMISSION DETERMINES THAT LATE FEES CONSTITUTE AN “OTHER TERM AND CONDITION”

Petitioners incorrectly assume the Commission’s task is complete once it determines whether late fees are a “rate charged” or an “other term and condition” within the scope of Section 332(c)(3). Even if the Commission were to determine that late fees are an “other term and condition,” it still must preempt Petitioners’ state law litigation claims under the conflict preemption doctrine. This is because: (a) the FCC has already ruled that late fees of the sort that Peti-

tioners are challenging are both reasonable and lawful; (b) this FCC ruling applies to all wireless services, including intrastate mobile services.

A. THE COMMISSION HAS ALREADY DETERMINED THAT LATE FEES OF THE SORT PETITIONERS ARE CHALLENGING ARE REASONABLE AND LAWFUL

Petitioners in their class action lawsuits challenge the late fees charged by T-Mobile and Verizon Wireless.¹² Both carriers use the same late fee structure: “1.5% or \$5.00 per month (or portion of a month) whichever is greater.”¹³ The Commission has already ruled that this very late fee structure is a reasonable practice and thus lawful under the Communications Act.

In *Kiefer v. Paging Network*, 16 FCC Rcd 19129, 19130 ¶ 2 (2001), the paging carrier imposed a late fee of “\$5 or 1.5% of the past due balance.” The complainant, a PageNet customer, alleged this late fee was unreasonable under Section 201(b) of the Act and thus unlawful:

Mr. Kiefer argues that PageNet's assessment of a late fee violates section 201(b) of the Act because the fee is not cost-based, does not reflect actual losses resulting from late payments, and does not represent a reasonable estimate of such losses (*id.* at 19131 ¶ 4).

In other words, this complainant made the very same allegations that the Petitioners make in their Petition (and in their class action lawsuits).¹⁴

The Commission denied this complaint with prejudice, determining that “the facts do not warrant that we find that the \$5.00 late fee violates section 201(b)” (*id.* at 19132 ¶ 7). The Commission found among other things:

- The FCC has “regulated CMRS . . . through competitive market forces” and the wireless market is competitive (*id.* at 19131 ¶ 5);

¹² See note 2 *supra*.

¹³ See Petition at 5 (Verizon Wireless) and 6 (T-Mobile).

¹⁴ See, e.g., Petition at 1 (the challenged late fees “far exceed the actual damages caused by consumers who pay late”); 4 (the wireless defendants are charging fees “far exceeding the cost caused by customers who pay late”); 22 (same).

- The FCC has “not imposed specific cost-based rate regulations on CMRS carriers” (*id.*);
- The complainant had not “cite[d] any authority or present[ed] any evidence requiring PageNet’s late fee to be based on an estimate of its actual losses” (*id.*); and
- “[L]ate fees have been routinely used by other industries regulated by the Commission” (*id.* at ¶ 7).

If, as the Commission has determined, PageNet’s “\$5 or 1.5%” late fee structure was a reasonable practice under the Act, then T-Mobile’s and Verizon Wireless’ use of the identical late fee structure necessarily is a reasonable practice as well.¹⁵

Petitioners also have filed a lawsuit against Sprint alleging that its “late fee of 5% of the total amount due” is unlawful under California law.¹⁶ While the Commission has not, to date, addressed the lawfulness of this particular late fee structure, there can be no doubt that Sprint’s late fees are also reasonable under *Kiefer* – given that for the average Sprint subscriber, *such fees are only half that charged by Sprint’s competitors*.

According to CTIA’s most recent data, the average monthly local bill for wireless service in December 2009 was \$48.16.¹⁷ A T-Mobile or Verizon Wireless customer would pay a late fee of \$5 if he or she did not pay timely a \$50 bill (because \$5 is higher than the alternative: 1.5%, or

¹⁵ Although the level of the \$5 or 1.5% late fee is the same, the impact on customers is different. *Kiefer*’s monthly paging bill was \$19.95, so a \$5 late fee constituted 25% of the monthly bill. *See Kiefer v. PageNet*, 50 F. Supp. 2d 681, 682 (E.D. Mich. 1999). Conversely, the average wireless bill today is about \$50, so a \$5 late fee is about 10% of the monthly bill.

¹⁶ *See* Petition at 5 and 10. While the federal court has stayed under the primary jurisdiction doctrine Petitioners’ claims against Sprint as applied to its late fees (*see* note 2 *supra*), it did not stay two additional State law claims: the allegations that Sprint failed to adequately disclose the late fees and that the size of these fees is unconscionable. The federal court recently dismissed these two non-stayed claims, but provided Petitioners with leave to amend one of the claims. *See Thomas v. Sprint Solutions, Inc.*, No. C08-5119-TEH, Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss (N.D. Cal., March 30, 2010).

¹⁷ *See* CTIA Semi-Annual Wireless Industry Survey, at 2 and 4 (Dec. 2009), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf.

75 cents). In contrast, a Sprint customer with the same \$50 unpaid bill would instead pay a late fee of only \$2.50 (or 5% of the total amount due).

In summary, the Commission has ruled squarely that the late fee structure (\$5 or 1.5%) used by T-Mobile and Verizon Wireless is reasonable and lawful, and given that Sprint's late fees are even lower on average, Sprint's fees necessary are encompassed within the *Kiefer Order* as well.

B. THE COMMISSION'S *KIEFER ORDER* ALSO APPLIES TO INTRASTATE WIRELESS SERVICES

Historically, the Commission possessed exclusive jurisdiction over interstate communications services, while states held exclusive jurisdiction over intrastate communications services.¹⁸ The only exception to this "dual jurisdictional" regulatory regime was in those circumstances where the Commission could invoke the conflicts preemption doctrine.¹⁹

All of this changed for wireless services when Congress enacted the Omnibus Budget Reconciliation Act of 1993 and amended Sections 2(b) and 332(c).²⁰ Congress did two things in this Act of importance to the issues in this proceeding. First, it *expanded* the Commission's regulatory authority over wireless services to include intrastate services.²¹ Congress further explained why it eliminated the "dual jurisdictional" regime as applied to wireless services:

¹⁸ Compare 47 U.S.C. § 152(a) with *id.* at § 152(b) (1992).

¹⁹ See *Louisiana PCS v. FCC*, 476 U.S. 355, 370, 376 (1986).

²⁰ See Omnibus Budget Reconciliation Act of 1993, PUB. L. NO. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

²¹ To achieve this end, Congress amended Section 2(b) of the Act that historically had given States exclusive jurisdiction over intrastate communications services. See 47 U.S.C. § 152(b) (1993) ("Except as provided in . . . section 332 of this title, . . . nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to" intrastate services.). See also *Unified Inter-carrier Compensation NPRM*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

The intent of this provision, as modified, is to establish a *Federal regulatory framework* to govern the offering of *all* commercial mobile services.²²

Second, Congress *reduced* the scope of state regulatory authority over wireless services. Specifically, it divested states of “any authority to regulate the entry of or the rates charged by any commercial mobile service,” relegating states to regulating the intrastate portion of “other terms and conditions.”²³

In short, with this 1993 Act, Congress gave the Commission regulatory authority over *all* commercial mobile radio services while reducing the states’ role over intrastate wireless services to the “other terms and conditions” that apply to such intrastate services. Consequently, although the Commission’s *Kiefer Order* applied federal law to wireless late fee practice, under the 1993 amendments to the Act, that ruling has the effect of applying to all wireless services, including *intrastate* wireless services.

C. THE COMMISSION MUST PREEMPT PETITIONERS’ LAWSUITS BECAUSE THIS LITIGATION CONFLICTS WITH ITS LAWFUL ORDERS AND JEOPARDIZES ITS ABILITY TO DISCHARGE THE CONGRESSIONAL MANDATE FOR THE WIRELESS INDUSTRY

Given that the Commission has spoken directly to the very late fees that Petitioners challenge, it makes no difference whether such fees constitute an “other term and condition” under Section 332(c)(3) of the Act. Even if late fees constitute an “other term and condition” (as opposed to a “rate,” which is expressly preempted), the fact remains that, given the Congressional mandate to establish a “Federal regulatory regime” for wireless services, the Commission has

²² H.R. CONF. REP., 103d Cong., 1st Sess., No. 103-213, at 490 (Aug. 4, 1993)(italics added).

²³ 47 U.S.C. § 332(c)(3)(A).

both the authority and obligation to preempt state regulation that “thwarts or impedes [this] valid federal policy.”²⁴

The Supreme Court has held the Commission may preempt state law under the conflicts preemption doctrine where “the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.”²⁵ As noted above, Congress made clear that the reason it expanded FCC authority over all wireless services was so the FCC could “establish a *Federal regulatory framework* to govern the offering of *all* commercial mobile services.”²⁶ Congress’ objective was not simply to ensure that the wireless industry would be subject to a uniform set of regulations throughout the country, but also to “ensure that an appropriate level of regulation be established and administered for CMRS providers”:

Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications market. * * * [W]e establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers.²⁷

As the Commission stated more recently, “[i]n place of traditional public utility regulation, the 1993 Budget Act sought to establish a *competitive nationwide market* for [CMRS] with *limited regulation*.”²⁸

The Commission’s reliance on market forces for the wireless industry has been spectacularly successful. As the Commission found in its most recent annual report, “U.S. consumers

²⁴ *Second CMRS Order*, 9 FCC Rcd 1411, 1506 nn. 515, 517 (1994).

²⁵ *See Louisiana PCS v. FCC*, 476 U.S. 355, 369-70 (1986). *See also New York v. FCC*, 486 U.S. 57, 64 (1988).

²⁶ H.R. CONF. REP., 103d Cong., 1st Sess., No. 103-213, at 490 (Aug. 4, 1993)(italics added).

²⁷ *Second CMRS Order*, 9 FCC Rcd 1411, 1418 ¶¶ 14-15 (1994).

²⁸ *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001)(italics added).

continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace.”²⁹ A large part of this success is due to the use of national one-rate plans, where American consumers, whether they reside or travel in the largest cities or the country’s most remote areas, pay the same price for wireless service.

There are two problems with Petitioners’ late fee lawsuits. First, they are asking the courts (or juries) to determine that wireless carrier late fees are unlawful under State law – even though the Commission has already ruled that these very late fees are both reasonable and lawful. Second, Petitioners are asking the courts (or juries) to determine that under State law, wireless carrier late fees must be based on costs (and can be no higher than costs) – even though the Commission determined long ago that cost-based pricing is not appropriate for the competitive wireless industry.³⁰

It bears emphasis that Congress directed this Commission – and not courts or juries applying State law – to “establish a Federal regulatory framework to govern the offering of all commercial mobile services.”³¹ What is more, Congress further explained that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market.”³²

²⁹ Thirteenth Annual CMRS Competition Report, 24 FCC Rcd 6185, 6189 ¶ 1(2009).

³⁰ *See, e.g.*, Petition at 3 (“Petitioners allege the CMRS providers are similarly charging penalty fees far exceeding the cost caused by customers who pay late.”). In drawing this important distinction, Sprint does not mean to suggest that its late fee would not pass a cost-based pricing test.

³¹ H.R. CONF. REP., 103d Cong., 1st Sess., No. 103-213, at 490 (Aug. 4, 1993).

³² *See id.* at 481, *incorporating by reference* Senate Bill 1134, 103d Cong., 1st Sess., § 402(13), at 100-01 (June 22, 2993).

A “uniform national policy” is not possible if courts (or juries) in different states are permitted to apply disparate State laws to the wireless industry. And, a “uniform national policy” is not possible if State law can be used to require cost-based pricing after the Commission has ruled that such pricing is not appropriate for a competitive wireless industry. In this case, application of State law would “stand[] as an obstacle to the accomplishment and execution of the full objectives of Congress.”³³ Accordingly, the Commission has both the authority and the obligation to preempt the pending State law-based litigation so the “uniform national policy” that Congress has determined is both “necessary and in the public interest” can be maintained.

III. SEVERAL PETITIONER ARGUMENTS LACK MERIT AND REQUIRE A BRIEF RESPONSE

Sprint below provides a brief response to several of Petitioners’ assertions and arguments that lack merit.

A. PETITIONERS’ SUGGESTION THAT CONSUMERS HAVE NO REMEDY OTHER THAN STATE LAW-BASED LITIGATION IS WRONG

Petitioners suggest that wireless customers would have no remedy against unreasonable late fees unless they can file lawsuits that raise state law claims:

Unless checked by state law, CMS providers will continue to insert unlawful penalty fees provisions with impunity into boilerplate terms and conditions in consumer contracts.³⁴

This suggestion lacks merit.³⁵

³³ See *Louisiana PCS v. FCC*, 476 U.S. 355, 369-70 (1986). See also *New York v. FCC*, 486 U.S. 57, 64 (1988).

³⁴ Petition at 1.

³⁵ While Section 332(c)(3)(A) preempts state claims related to the rate charged for the late fee, other matters related to the late fee, such as how the rate is disclosed, how it is presented and other general contracting and disclosure practices, have long been topics that fall within the confines of state law. Indeed, in this case, the plaintiffs have a “disclosure” claim related to late fees that was not stayed.

Federal preemption does *not* deprive any wireless customer of a legal remedy if he or she believes a particular late fee imposed by a particular carrier is unreasonable. Wireless carriers are common carriers,³⁶ and Section 201(b) of the Act prohibits a common carrier from engaging in any “unjust or unreasonable practice.”³⁷ Thus, the *only* effect of federal preemption on customers is that complaints must be filed under federal law (rather than State law) and that relief must be sought in a federal forum – whether the Commission or a federal court.³⁸ This federal approach to remedies is entirely consistent with the Congressional directive that the Commission “establish a Federal regulatory framework to govern the offering of all commercial mobile services.”³⁹

Petitioners do not allege, much less demonstrate, that use of federal law or a federal forum is inadequate. The “unjust and unreasonable” standard in Section 201(b) is sweepingly broad in scope and encompasses any type of complaint a consumer might possibly have over late fees. And, as confirmed by the facts of this proceeding where Petitioners have filed lawsuits in three different federal courts, use of a federal forum is also not problematic. Customers also have the option of filing a formal complaint, as was done in the *Kiefer* late fee case, or using the more informal complaint procedures.⁴⁰

B. PETITIONERS’ RELIANCE ON CERTAIN LEGISLATIVE HISTORY IS MISPLACED

Petitioners quote from several sentences of the 1993 House Report that accompanied House Bill 2264, from which they conclude that Congress, in amending Section 332(c), did “not

³⁶ See 47 U.S.C. § 332(c)(1)(A).

³⁷ See *id.* at § 201(b).

³⁸ See *id.* at § 207.

³⁹ H.R. CONF. REP., 103d Cong., 1st Sess., No. 103-213, at 490 (Aug. 4, 1993).

⁴⁰ See 47 C.F.R. § 1.716 *et seq.*

intend to preempt generally applicable consumer protection laws and contract law governing billing practices”:

Congress’s intent for the states to retain broad consumer protection authority is supported by the fact that “terms and conditions” was [*sic*] intended to be interpreted expansively, as evidenced by the House Report on the Omnibus Budget Reconciliation Act of 1993.⁴¹

Petitioners’ reliance on this House Report language is misplaced, because Congress fundamentally changed the House Bill in adopting the law that was ultimately enacted. As demonstrated below, the full Congress rather explicitly found that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market.”

Section 5205(a) of House Bill 2264 included language that is similar to the language ultimately adopted as the first sentence of Section 332(c)(3)(A):

Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to impose any rate or entry regulation upon any commercial mobile service or any private land mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.⁴²

This House Bill did not, however, propose to amend Section 2(b) of the Act. Accordingly, while the House Bill would have given the FCC exclusive authority over wireless service rates and entry (including intrastate), this Bill also would have reserved to states exclusive authority over the “other terms and conditions” relative to intrastate wireless services. It was within this context that the House Report stated that the House intended for the “other terms and conditions” clause

⁴¹ Petition at 13 and 22.

⁴² House Bill 2264, 103d Cong., 1st Sess., § 5205(a), at 569-70 (May 25, 1993).

to include such matters as “billing information and practices and billing disputes and other consumer protection matters.”⁴³

The statute amendments that Congress later enacted adopted a very different approach than the one contained in the House Bill. Specifically, unlike the House Bill, Senate Bill 1134 proposed amending Section 2(b) of the Act so as to expand FCC authority over all intrastate wireless services – including the “other terms and conditions” of wireless service.⁴⁴ The Conference Committee adopted the Senate’s proposal:

The Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act to clarify that the Commission has the authority to regulate commercial mobile services. . . . The Conference Agreement adopts the Senate provision.⁴⁵

The Conference Committee also explained why it adopted the Senate proposal over the House proposal:

The intent of this provision, as modified, is to establish *a Federal regulatory framework* to govern the offering of *all* commercial mobile services.⁴⁶

The Conference Committee, in support of this new federal policy for the wireless industry, specifically determined that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market”:

The Congress finds that . . . because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-à-vis telephone exchange services carriers and *State regula-*

⁴³ H.R. REP. NO. 103-111, 103d Cong., 1st Sess., at 261 (May 25, 1993).

⁴⁴ See Senate Bill 1134, 103d Cong., 1st Sess., § 409(b)(2), at 139-40 (June 22, 1993)(“Section 2(b) of the Act (47 U.S.C. 152(b)) is amended by inserting ‘and section 3332’ immediately after ‘inclusive.’”).

⁴⁵ H.R. CONF. REP. NO. 103-213, 103d Cong., 1st Sess., at 497 (Aug 4, 1993).

⁴⁶ H.R. CONF. REP., 103d Cong., 1st Sess., No. 103-213, at 490 (Aug. 4, 1993)(italics added).

*tion can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.*⁴⁷

As the Commission has recognized, this legislative history “makes plain” that Congress through these amendments to Sections 2(b) and 332(c) of the Act sought to “establish a *national* regulatory policy for CMRS, *not a policy that is balkanized state-by-state.*”⁴⁸

Consequently, there is no basis to Petitioners’ assertion that “[w]ireless provider Penalty Fees are exactly the type of billing practice and consumer protection issue that Congress intended to be left to state regulation.”⁴⁹ To the contrary, Congress explicitly found that a “uniform national policy is necessary and in the public interest” and that “State regulation can be a barrier” to this policy.

C. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY HERE

Petitioners cite several cases for the proposition that there is a “strong presumption against preemption under the Supremacy Clause.”⁵⁰ Petitioners acknowledge, however, this presumption does not apply when there exists a “clear and manifest purpose of Congress” to preempt State law.⁵¹

As demonstrated immediately above, Congress’ intent regarding the application of State law to the wireless industry could not be clearer:

⁴⁷ Senate Bill 1134, 103d Cong., 1st Sess., § 402(13), at 100-01 (June 22, 1993)(emphasis added). The Conference Committee explicitly “incorporated herein by reference” this finding. See H.R. CONF. REP. NO. 103-213 at 481.

⁴⁸ *Connecticut CMRS Preemption Order*, 10 FCC Rcd 7025, 7034 ¶ 14 (1995)(italics added), *aff’d Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

⁴⁹ Petition at 23.

⁵⁰ See Petition at 11-12.

⁵¹ *Id.* at 12, quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1995).

- In the 1993 Act, Congress expanded FCC authority to encompass all wireless services (including intrastate services), while it divested States of their authority to regulate wireless intrastate rates and entry;
- Congress stated it took this action to “establish a Federal regulatory framework to govern the offering of all commercial mobile services;” and
- Congress specifically found that a “uniform national policy is necessary and in the public interest” because “State regulation can be a barrier to the development of competition in this [wireless] market.”

Accordingly, any presumption against preemption does not apply to this proceeding.

D. THE SECTION 414 SAVINGS CLAUSE IS NOT RELEVANT TO THIS PROCEEDING

Petitioners assert in passing (in three sentences) that Section 414 of the Act precludes preemption of their State law litigation claims. Section 414, a general savings clause enacted in 1934, provides:

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.⁵²

The simple response to this Petitioner argument is that the U.S. Supreme Court has already rejected it, as has the Commission.

In *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998), a customer filed State law claims against its long distance carrier for not keeping certain promises, in addition to the requirements contained in the carrier’s interstate tariffs. The long distance carrier argued in response that these State claims were preempted by the filed-tariff requirements in Section 203 of the Act, and the customer argued in reply that the Section 414 savings clause of the Act preserved its State law claims. The Supreme Court held that Section 414 did not preclude preemption of the State law claims:

Section 414 . . . *preserves only those rights that are not inconsistent with [federal law]*. A claim for services that constitute unlawful preferences or that di-

⁵² 47 U.S.C. § 414.

rectly conflict with the [federal] tariff – the basis for both the tort and contract claims here – cannot be “saved” under § 414. . . . In other words, the [Communications] act cannot be held to destroy itself (*id.* at 225-28; italics added).

Other federal courts have reached the same result in connection with State law claims implicating wireless carriers and Section 332(c)(3) of the Act: “To read [Section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create.”⁵³

The Commission had earlier reached the same conclusion, holding that while Section 414 “preserve[s] actions based on breach of contracts for matters *not* modified by the Act, . . . Section 414 does *not* give rise to [State] actions based on pre-existing duties *which have been modified by the Act.*”⁵⁴ As the Commission later explained, Section 414 does “not, however, permit all state causes of action to proceed as if federal regulation of communications did not exist”:⁵⁵

Section 414 of the Act, which preserves remedies “existing at common law or by statute,” does not foreclose our preemptive action here. Such “savings clauses” do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.⁵⁶

Accordingly, Petitioners’ reliance on Section 414 is misplaced, because this statute does not preclude preemption of their State law claims.

⁵³ *Bastien v. AT&T Wireless*, 205 F.3d 983, 987 (7th Cir. 2000).

⁵⁴ *Midwestern Relay*, 69 F.C.C.2d 409, 417 n.25 (1978)(italics added).

⁵⁵ *Richmond Brothers v. Sprint*, 10 FCC Rcd 13639, 13642 ¶ 15 (1995).

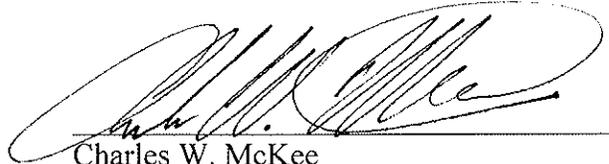
⁵⁶ *Lowest Unit Charge Requirements of Section 315(b)*, 6 FCC Rcd 7511, 7513 ¶ 20 (1991).

IV. CONCLUSION

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission take action consistent with the positions discussed above and deny the Petition for Declaratory ruling seeking to apply state law to wireless carrier late payment fees.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

A handwritten signature in black ink, appearing to read 'Charles W. McKee', is written over a horizontal line.

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