

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Public Notice Seeking 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

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE  
PEOPLE OF THE STATE OF CALIFORNIA**

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The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the Federal Communications Commission’s (FCC or Commission) Public Notice Seeking Comment on Petition for Declaratory Ruling Regarding Status of Wireless Contract Late Payment Fees as “Rates” or “Terms and Conditions (Section 332(c)(3)(A) of the Communications Act of 1934, As Amended, As Applied to Fees Charged for Late Payments.)

The FCC in its Notice requests comment on the following dispute:

Petitioners argue that the late payment fees charged by AT&T Mobility, LLC, Cellco Partnership, d/b/a Verizon Wireless (Verizon Wireless), Sprint Solutions, and T-Mobile USA (T-Mobile) are “other terms and conditions” of service, and therefore may be regulated under state consumer protection laws. In their pleadings in the pending cases, Verizon Wireless and T-Mobile have argued that these fees are rates under Section 332(c)(3)(A) and therefore cannot be regulated by the states.<sup>1</sup>

In 1993, Congress amended the 1934 Communications Act with the addition of section 332.<sup>2</sup>

The relevant provision of Section 332, i.e., 332(c)(3)(A), reads as follows:

“(3) State Preemption. (A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that *this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service s.*” [emphasis added]

In the years since enactment of Section 332 (c)(3)(A), there has been extensive litigation about where the line between “rates charged” and “terms and conditions of service” should be

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<sup>1</sup> Notice, pp. 1-2.

<sup>2</sup> 47 U.S.C. 332.

drawn. In particular, wireless carriers have asserted that late payment fees involve the imposition of rates. The CPUC has rejected this position in D.04-10-013<sup>3</sup> and D.04-12-058.<sup>4</sup>

In these Decisions, the CPUC has consistently rejected the arguments made by wireless carriers that the CPUC exceeded its jurisdiction by intruding upon carrier decisions regarding the imposition of rates and by improperly restricting carriers' flexibility to establish rate structures and to choose when to impose fees on customers. As to the arguments of the carriers, the CPUC stated specifically in D.04-12-058, quoting D.04-10-013:

[S]ection 332 is not so broadly construed . . . . States retain jurisdiction to regulate `other terms and conditions' of wireless service. 47 U.S.C. § 332(c)(3)(A). This phrase has been broadly defined to include consumer protection matters and customer billing information." (*Id.*) We further noted that "[s]everal courts have limited section 332's reach to regulations that *directly and explicitly* control rates or prevent market entry." (*Id.* (emphasis in original), citing *Communications Telesystems Intern. v. CPUC* (9<sup>th</sup> Cir. 1999) 196 F.3d 1011, 1017; *Spielholz v. Superior Court* (2001) 86 Cal. App. 4<sup>th</sup> 1366.) We also found that "the Federal Communications Commission ("FCC") has also rejected carrier arguments that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for service, and the FCC rejected carrier claims that regulations that require an increase in operating costs had an impact on the rates charged, and thus were preempted. (See, e.g., D.04-10-013, p. 5; *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021 (Aug. 14, 2000) ¶ 27 ("a carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service"); *In re Pittencrieff Communications, Inc.* 13 F.C.C.R. 1735 (Oct. 2, 1997), ¶¶ 15-18, 20, 22.)" (*Id.*)

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<sup>3</sup> D.04-10-013, p. 4.

<sup>4</sup> D.04-12-058 pp. 3-4. *See also*: D.02-10-061, D.04-09-062, D. 04-050-057

This conclusion was upheld by the California Court of Appeals in *Pacific Bell Wireless v. CPUC*, 140 Cal.App.4<sup>th</sup> 718 (2006).<sup>5</sup>

### CONCLUSION

Based on the CPUC's prior Decisions regarding this issue, the CPUC agrees with Petitioners that late payment fees are not "rates," but are "terms and conditions of service" subject to state jurisdiction, and, in particular, to state consumer protection statutes.

Respectfully submitted,

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<sup>5</sup> California Supreme Court review denied by *Pacific Bell Wireless v. P.U.C. (Utility Consumers' Action Network)*, 2006 Cal. LEXIS 12459 (Cal., Oct. 11, 2006); *cert. den.sub nom. AT&T Mobility LLC v. Cal. PUC*, 127 S. Ct. 1931; 167 L. Ed. 2d 582; 2007 U.S. LEXIS 3923 (U.S., Apr. 10, 2007).