

**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)
_____)

REPLY COMMENTS OF AT&T INC.

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AT&T hereby submits these reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment on the Petition for Declaratory Ruling¹ (the “Petition”) concerning wireless late fees.

I. INTRODUCTION

As AT&T demonstrated in its opening comments, late fees are “rates charged” for wireless services under Section 332(c)(3)(A) of the Communications Act (the “Act”).² Late fees qualify as “rates charged” under any reasonable definition of the statutory phrase because they compensate AT&T for the additional services, risks, and costs it incurs by continuing to offer wireless service to late-paying customers and because late fees are an integral part of AT&T’s rate structure. State superintendence of the amount, reasonableness, or cost basis of late fees thus is expressly preempted. Allowing state regulation of late fees also is anti-consumer: it

¹ 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.

² 47 U.S.C. § 332(c)(3)(A).

threatens to raise monthly access charges and force customers who make timely payment to subsidize those customers who do not.

At bottom, permitting states, whether through legislation, regulation, or litigation, to regulate late fees runs afoul of Section 332 and undermines Congress' goal of a "national regulatory policy for CMRS, not a policy that is balkanized state-by-state."³ As explained below, the comments submitted in support of the Petition offer no legal or factual argument that would alter this conclusion. Indeed, these comments—which are littered with legal and factual errors—only serve to highlight the wisdom of federal preemption in this area. The Commission should deny the Petition.

II. AT&T'S LATE FEES ARE "RATES CHARGED" WITHIN THE MEANING OF SECTION 332 OF THE COMMUNICATIONS ACT

As AT&T explained in its opening comments, late fees are "rates charged" for wireless service under Section 332(c)(3)(A). Late fees are "rates charged" because of the additional services, risks, and costs incurred by AT&T in continuing to offer wireless service to customers who fail to pay their bills on time.⁴ Late fees also are "rates charged" because they constitute an important part of wireless "rate structure" as they enable carriers to obtain compensation for the costs and risks associated with late payments only from those customers who create those costs and risks.⁵ By definition, therefore, late fees are not "*other* terms and conditions" of wireless service; the statute's use of the word "other" indicates that rates charged, which are themselves a term and condition of service, are not included in the category of *different* types of terms and

³ *In re Petition for the Conn. DPUC*, 10 FCC Rcd 7025, 7034 (¶ 14) (1995).

⁴ *See* AT&T Comments at 12-18.

⁵ *See id.* at 18-20.

conditions that may be subjected to state regulation.⁶ For all of these reasons, AT&T has asked the Commission to declare that because late fees are “rates charged” for wireless service, state law challenges to their reasonableness fall within the preemptive sweep of Section 332(c)(3)(A).⁷ As explained below, none of the comments submitted in support of the Petition undermine this request. Indeed, in many ways the comments provide additional support for AT&T’s construction of the statute.

First, Minnesota premises its entire argument on the incorrect assertion that “customers receive no type of service in return for payment” of late fees.⁸ According to the Minnesota Attorney General, “the late-fee payment at issue is incurred not because any type of service is extended by CMRS providers, but as a result of the mere passage of time (specifically, passage beyond the billing due date).”⁹ As previously explained, however, AT&T provides multiple services to late-paying customers in exchange for the late fee.¹⁰ In particular, AT&T continues to provide telecommunications services to late-paying customers after a missed payment and, in so doing, incurs an increased risk of nonpayment for the continued provision of these services.¹¹ AT&T also provides additional services to these customers by notifying them that their accounts are past due, warning them of the consequences of late and non-payment, and providing them

⁶ *See id.* at 21-26.

⁷ *See id.* at 26-27.

⁸ Minnesota Attorney General Comments at 8.

⁹ *Id.* at 8-9; *see also id.* at 9 (arguing that late fees are a charge “for which no service of any kind is provided”) (emphasis added).

¹⁰ AT&T Comments at 12-15.

¹¹ *See id.* at 13.

options to pay their bills.¹² In addition, AT&T suffers a loss of the time value of money as a result of late payments.¹³ Late fees merely (and appropriately) charge customers for these additional services, risks, and costs. The Minnesota Attorney General’s assertion that late fees “are nothing more than a ‘billing practice’ . . . meant to incentivize customers to pay their bill on time” thus is factually unsustainable.¹⁴ Because AT&T provides additional services in exchange for the late fee, there can be no question that it is a “rate charged” even under the Minnesota Attorney General’s narrow construction of the statute.

Indeed, the Minnesota Attorney General basically concedes that late fees are “rates charged” by advocating for a legal regime under which customers’ late payment costs are not separately assessed or disclosed but instead are “roll[ed] . . . into their overall rates” for wireless service.¹⁵ In other words, the Minnesota Attorney General would prefer that *all* customers bear the cost of *some* customers’ late payments in the form of higher monthly access charges, so that late payers can better “evaluate the actual cost” of their wireless service plans.¹⁶ Not only would this be a harmful policy for consumers and unfair to the vast majority of customers who make their payments on time,¹⁷ but the argument effectively concedes that state regulation of late fees interferes with the manner in which wireless carriers structure their rates. As the Commission has explained, “[t]he pricing mechanisms employed to determine rates and charges as well as

¹² See *id.* at 12-14.

¹³ See *id.* at 14-15.

¹⁴ Minnesota Attorney General Comments at 4

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 8.

¹⁷ See AT&T Comments at 8-9, 19-20; see also *infra* at 16-17.

any interrelationships which exist among rate elements are part of rate structures.”¹⁸ By attempting to control the manner in which wireless carriers recover their costs, and by seeking to impose its preference that wireless carriers “roll” the costs of late payments into higher “overall rates,” the Minnesota Attorney General freely acknowledges the direct relationship between late fees and monthly access fees. In so doing, the Minnesota Attorney General necessarily admits that late fees are an integral part of the wireless “rate structures” that the Commission has made clear are shielded by Section 332 from state regulation.¹⁹

Second, the Arizona Consumers Council (“Council”) incorrectly argues that late fees are not “rates charged” because “many consumers might not ever pay a late fee.”²⁰ In the Council’s view, “late charges, which are paid only under certain circumstances, and only by some customers, are not rates.”²¹ But the contingent nature of a late fee simply does not change its fundamental character. Nothing in the text of Section 332, or any of the reasonable definitions of “rates charged,”²² suggests that the legal status of a wireless fee turns on whether it is paid by all customers. Indeed, such a distinction would be unsustainable. There are myriad other fees that are conditional or are not paid by all customers. For example, fees for international roaming are clearly “rates charged” for service,²³ despite the fact that not every customer will incur them.

¹⁸ *AT&T Private Line Rate Structure and Volume Discount Practices*, 74 F.C.C.2d 226, 235 (1979).

¹⁹ *See Sw. Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907 (¶ 20) (1999).

²⁰ *See Arizona Consumers Council Comments* at 2.

²¹ *Id.* at 2-3.

²² *See AT&T Comments* at 9-10.

²³ *See In re Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15818 (2007) (“[R]oaming is a common carrier service because roaming capability gives end users access to a foreign network in order to
Footnote continues on next page . . .

Similarly, fees for minutes used over the amount in the relevant rate plan also are clearly “rates charged” for wireless service even though not every customer will incur overage charges. On this understanding, the D.C. Circuit rejected an argument raised in a similar context that cancellation charges, which are conditional by nature, “are not part of the charge to the customer to receive interconnection service.”²⁴ The court instead concluded that the FCC “reasonably found that the . . . charges are ‘rates’ within the meaning of the Agreement.”²⁵ Any fee’s conditional nature has no bearing on whether it is a “rate charged” under Section 332. Late fees are no exception.

Third, the Council also argues that physical placement of late fee information in the “terms of service” portion of the bill means that late fees are not rates.²⁶ The Council argues, for example, that “carriers’ practice of describing their late fees separately from their rates . . . leads one to the conclusion that late fees are not rates.”²⁷ As a threshold matter, however, the Council misrepresents AT&T’s disclosures when it claims that AT&T “doesn’t tell the customer how much it will be or how it might be calculated.”²⁸ This contention is factually incorrect. On AT&T’s website, as part of its post-paid Service Agreement, AT&T clearly explains: “You agree that for amounts not paid by the due date, AT&T may charge, *as a part of its rates and charges*, and you agree to pay, a late payment fee of \$5 in CT, D.C., DE, IL, KS, MA, MD, ME, MI, MO,

communicate messages of their own choosing.”); *see also id.* at 15832-33 (“conclud[ing] that regulation of roaming rates is not warranted on economic grounds”) (emphasis added)).

²⁴ *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987).

²⁵ *Id.*

²⁶ Arizona Consumer Council Comments at 2.

²⁷ *Id.*

²⁸ *Id.*

NH, NJ, NY, OH, OK, PA, RI, VA, VT, WI, WV; the late payment charge is 1.5% of the balance carried forward to the next bill in all other states.”²⁹

In any event, placement of a fee’s description on a website or in a customer agreement under the heading “Terms of Service” cannot be dispositive of a fee’s status as a “rate charged” for wireless service. Section 332 does not distinguish between “rates” and “terms and conditions”—it distinguishes between “rates” and “*other* terms and conditions.” After all, a rate—like any other aspect of the customer agreement—is itself a term and condition of service. Thus, rates charged are a *subset* of terms and conditions, not a mutually exclusive category. A rate is not transformed into an “other” term or condition simply because it is described under a header “terms of service” or separate from the monthly access or any other fee. As AT&T previously explained, Section 332’s preservation of state authority over “other terms and conditions” refers to such *non-rate* issues as disclosure of charges, the methods of billing, and collection practices.³⁰ State regulation of the reasonableness of late fees’ amount moves well beyond billing practices—it is quintessential rate regulation. As the Commission has made clear, “states may [not] regulate rates in the guise of regulating billing practices.”³¹

Like its other arguments, the Council’s reliance on a charge’s placement as evidence of its legal status also proves far too much. For example, AT&T’s terms of service explain the terms of international roaming and associated charges, AT&T’s obligations with respect to coverage gaps, and its practices with respect to rounding up and billing in full-minute

²⁹ http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service%20+Agreement) (emphasis added). Indeed, the Petition itself recognizes and quotes this language, albeit for another purpose. See Petition at 7 and App. , Ex. 13. at 1.

³⁰ See AT&T Comments at 21-23.

³¹ 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).

increments.³² Indeed, monthly recurring charges and rate plans are also discussed in AT&T's terms of service.³³ All of these "terms of services" are indisputably part and parcel of "rates charged" for wireless service and all would be protected from state regulation for reasonableness or to impose a cost-basis for the charge.³⁴ The Council's argument that late fees must be categorized as "other terms and conditions" simply by virtue of their placement in "terms of service" or otherwise listed separately from monthly access fees is untenable. The issue before the Commission is whether state regulation of late fees for reasonableness is preempted by federal law—the physical location of a charge on a customer agreement does not provide the answer to this legal question.³⁵

Fourth, and last, the Minnesota Attorney General argues that two judicial decisions, *Gellis v. Verizon Communications, Inc.*³⁶ and *Brown v. Washington/Baltimore Cellular, Inc.*,³⁷ which hold that late fees are not "rates charged" for wireless service, should be given significant weight.³⁸ This argument is flawed for several reasons. Foremost, these federal district court decisions are not controlling on the Commission. The Commission should follow lower court

³² See http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?qtermsKey=postpaidServiceAgreement&q_termsName=Service%20+Agreement

³³ See *id.*

³⁴ See, e.g., *Cellco P'Ship v. Hatch*, 431 F.3d 1077, 1081 (8th Cir. 2005) (recognizing that "regulation of rates includes regulation of 'rate levels and rate structures,' such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls"); *Sw. Bell Mobile Sys.*, 14 FCC Rcd at 19907 (¶ 23) (rejecting state efforts to control carrier practices of "rounding up" charges to the nearest whole minute).

³⁵ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (explaining that "the purpose of Congress is the ultimate touchstone in every pre-emption case").

³⁶ No. 07-03679, 2007 WL 7044762 (N.D. Cal. Nov. 5, 2007).

³⁷ 109 F. Supp. 2d 421 (D. Md. 2000).

³⁸ See Minnesota Attorney General Comments at 5-7.

decisions to the extent they are persuasive—but such decisions are not binding authority. Indeed, the federal court’s referral of this matter to the Commission for resolution candidly acknowledges the Commission’s key role in interpreting Section 332: “Regulation of wireless telephone services, particularly the rates charged, is a matter that Congress has placed within the special competence of the FCC. It follows that determination as to whether the late fee is a ‘rate charged’ is also within the special competence of the FCC.”³⁹

Moreover, the *Gellis* court’s construction of Section 332, on which the Petition and its supporters principally rely, was infected by a “presumption against preemption” that does not apply in this setting.⁴⁰ As AT&T has explained, the presumption against preemption “is not triggered” here because “there has been a history of significant federal presence”⁴¹ in this field since 1912.⁴² “No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.”⁴³ And the Commission has asserted “federal primacy” over cellular telecommunications industry since its advent.⁴⁴ In the

³⁹ *Barahona v. T-Mobile US, Inc.*, 628 F. Supp. 2d 1268, 1271 (W.D. Wash. 2009).

⁴⁰ *Gellis*, 2007 WL 7044762, at *4 (“[T]he term ‘rate’ must be construed narrowly.”); *see also* Minnesota Attorney General Comments at 2-3 (arguing that the presumption against preemption should govern the Commission’s construction of Section 332(c)(3)(A)).

⁴¹ *United States v. Locke*, 529 U.S. 89, 108 (2000); *cf. Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (“[W]e do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.”).

⁴² *See also* CTIA Comments at 14-15.

⁴³ *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933).

⁴⁴ *Use of the Bands 825-845 MHz and 870-890 MHz*, 86 F.C.C.2d 469, 504-05 (¶ 82) (1981) (“[W]e are asserting federal primacy over the areas of technical standards and competitive market structure for cellular service.”); *Use of the Bands 825-845 MHz and 870-890 MHz*, 89 F.C.C.2d 58, 95 (¶ 81) (1982) (affirming broad federal preemption because it “is imperative that no additional requirements be imposed by the states which could conflict with our [technical] standards and frustrate the federal scheme for the provision of nationwide cellular service.”).

Omnibus Budget Reconciliation Act of 1993 (“OBRA”), Congress ratified this approach by codifying a uniform, nationwide regulatory regime for CMRS service. As the Commission has explained, OBRA was enacted in order to “establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state.”⁴⁵ Accordingly, the Commission should reject this request to use “artificial presumption aids” to narrow the preemptive scope of Section 332(c)(3)(A).⁴⁶

In any event, *Brown* and *Gellis* are simply wrongly decided.⁴⁷ The *Brown* court’s conclusory holding that “late fees are not included in ‘rates’ of service, but rather are part of the ‘other terms and conditions’ of service” was supported by a single citation to a Maryland Court of Appeals’ decision characterizing “late fees [as] a form of liquidated damages” as a matter of state law.⁴⁸ That case—which involved the application of state common-law liquidated damages

⁴⁵ *In re Petition on Behalf of the People of the State of Cal. and the Pub. Utils. Comm’n of the State of Cal. to Retain Regulatory Authority over Intrastate Cellular Serv. Rates*, 10 FCC Rcd 7486, 7499 (¶ 24) (1995).

⁴⁶ *Locke*, 529 U.S. at 108. In any event, a debate over the applicability of the “presumption” is largely academic. Because Section 332 expresses Congress’ “clear and manifest,” *Medtronic, Inc.*, 518 U.S. at 485, intent to preempt state regulation of late fees, the presumption against preemption is inapplicable here. See AT&T Comments at 9-10 n. 34. The Minnesota Attorney General, like the Petitioners, also attempts to draw support from President Obama’s Memorandum regarding preemption. See Minnesota Attorney General Comments at 3. As AT&T has explained, however, the Memorandum was not directed at independent agencies like the Commission and, in any event, it does not reach an agency’s construction of an express statutory preemption provision. See AT&T Comments at 9-10 n. 34.

⁴⁷ California’s representation that it has “consistently” treated late fees as “other terms and conditions” subject to state regulation is both erroneous and irrelevant. See California Comments at 2. In fact, California had previously characterized late fees as “part and parcel” of a carrier’s rate. See *Toward Util. Rate Normalization v. Pac. Bell*, 49 CPUC 2d 299 (Cal. P.U.C. 1993) (“In this particular case, late payment charges and reconnection charges are part and parcel of the rates charged for telephone services.”). Its subsequent about-face on the issue is justly viewed as a self-serving measure designed to wrest control over the reasonableness of late fees from the Commission.

⁴⁸ *Brown*, 109 F. Supp. 2d at 423 n.1 (citing *United Cable Television v. Burch*, 732 A.2d 887, 901 (Md. 1999)).

principles to late fees charged by cable companies—in turn did not even discuss Section 332.⁴⁹ And *Gellis* relied heavily on *Brown* as “[t]he only other federal court [to have] addressed th[e] issue” of whether late fees are “rates” under Section 332 without engaging in the rigorous analysis of the statute’s text, structure, and history demanded here.⁵⁰

*Keifer v. Paging Network, Inc.*⁵¹ and *Gilmore v. Southwestern Bell Mobile Systems, Inc.*⁵² provide a better reasoned and more persuasive construction of Section 332 and thus are the judicial decisions that should inform the Commission’s construction of the statute here. Contrary to the assertions by a least one commenter,⁵³ *Keifer* addressed the question presented here. Notwithstanding the fact that the case arose in the context of Section 201 of the Act, the court in *Keifer* confronted—and rejected—the argument that a late payment charge is a “term and condition” of service subject to state regulation and not “part of the overall rate structure.”⁵⁴ The court reached this sensible conclusion because “[r]egardless of the semantic label Plaintiff uses to dress his . . . claims, he [could not] disguise the fact that they question the reasonableness of Defendant’s uniform late payment charges,” which are “part of the overall rate structure.”⁵⁵ This

⁴⁹ The State Legislature subsequently overruled the court’s decision in *Burch* by statute. See, e.g., *Plein v. Dep’t of Labor*, 800 A.2d 757, 765 n.5 (Md. 2002) (identifying *Burch* as one of many “decisions that the General Assembly specifically enacted . . . laws to overturn”).

⁵⁰ *Gellis*, 2007 WL 7044762, at *2-*4.

⁵¹ 50 F. Supp. 2d 681 (E.D. Mich. 1999).

⁵² 156 F. Supp. 2d 916 (N.D. Ill. 2001).

⁵³ See Minnesota Attorney General Comments at 7.

⁵⁴ *Keifer*, 50 F. Supp. 2d at 685. Mr. Kiefer explained to the FCC that before the federal district court he had “argued that the Communications Act does not preempt state jurisdiction over this issue, as section 332 affords the FCC exclusive jurisdiction to the FCC to regulate rates and charges, but not other terms and conditions of CMRS service, such as a carrier’s late fee penalties.” Complaint at 3 (¶ 6), *Kiefer v. Paging Network Inc. d/b/a Pagenet*, File No. EB-00-TC-F-002, FCC 01-309 (Apr. 3, 2000).

⁵⁵ *Keifer*, 50 F. Supp. 2d at 685.

reasoning applies with equal force to the Petition because the Commission has interpreted the preemptive scope of Section 332 to reach “both rate levels and *rate structures* for CMRS.”⁵⁶ In other words, even if Section 201 is broader than Section 332,⁵⁷ the Petition falls within the area of overlap between the two provisions, rendering *Keifer* highly relevant.

Like *Keifer*, *Gilmore* instructively examined the question presented here in a related context. The court in *Gilmore* held that a plaintiff’s challenge to his provider’s assessment of a “Corporate Account Administrative Fee”⁵⁸ was preempted “rate” regulation. In reaching this conclusion, the court confronted “whether the validity of the tariff had to be determined to resolve the claim.”⁵⁹ And, in resolving the claim, the court explained that “Plaintiff’s contract allegations explicitly raise the issue of whether it received sufficient services in return for the Fee. That is a rate issue.”⁶⁰ The question raised by the Petition—*i.e.*, whether Section 332 preempts a challenge to a provider’s assessment of a late fee—calls for the same analysis. And the result should be the same too. State law claims challenging the assessment of late fees necessarily require a court to determine “whether the amount charged [is] unreasonable, unjust, or otherwise inappropriate.”⁶¹ Regardless of how cleverly a plaintiff characterizes his claim,⁶² this is the very essence of rate regulation.

⁵⁶ *In re Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19908.

⁵⁷ *See* Minnesota Attorney General Comments at 7.

⁵⁸ 156 F. Supp. 2d at 919.

⁵⁹ *Id.* at 922.

⁶⁰ *Id.* at 924.

⁶¹ *Id.* at 923.

⁶² *See id.*; *see also AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (“Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.”).

In the end, the Petition, the comments supporting it, and the judicial decisions on which they rely, all rest on the same conclusory argument: late fees are penalties.⁶³ But that is simply not true. Late fees are charged to account for the additional services, risks, and costs associated with the provision of wireless service to those customers who fail to render timely payment. Late fees, therefore, are both rates themselves and part of a wireless carrier’s overall “rate structure.” In fact, even the Petition defines a “rate” as “[a]n amount paid or charged for a good or service.”⁶⁴ Because AT&T provides significant additional services—both telecommunications and otherwise—to its late-paying customers, there should be no question that AT&T’s late fee fits comfortably within the definition of “rates charged.”⁶⁵

III. ALLOWING STATES TO REGULATE THE REASONABLENESS OF LATE FEES WILL UNDERMINE IMPORTANT AND HIGHLY SUCCESSFUL FEDERAL POLICIES AND HARM CONSUMERS

As AT&T has demonstrated, the relief requested by the Petition will undermine the national wireless framework, diminish carriers’ flexibility to craft innovative national service and rate plans, raise monthly access fees, and lead to unfair and inefficient subsidies of late-paying

⁶³ See, e.g., Petition at 1-2; see also Arizona Consumers Council Comments at 2 (arguing that “[l]ate fees are . . . penalties that certain customers pay for failing to perform certain conditions of the contract.”); Minnesota Attorney General Comments at 2 (arguing that “late-payment fees are no more than a *penalizing billing practice* going to the *manner* in which tardy customers pay the ‘rate charged’ them for wireless service”); *Brown*, 109 F. Supp. 2d at 423 (“While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment.”); *Gellis*, 2007 WL 7044762, at *2 (“[T]he Court . . . finds that the late fee is not charged in exchange for providing any service, but instead, is imposed as a penalty for failing to pay bills on time.”).

⁶⁴ *Id.* at 14.

⁶⁵ The National Association of State Utility Consumer Advocates (“NASUCA”) attempts to draw an analogy between late fees and early termination fees. See NASUCA Comments at 2-3. As AT&T has explained, however, see AT&T Comments at 20 n.63, 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 (¶ 9). The Commission should determine that “late fees” are “rates charged” under Section 332(c)(3)(A) based on the particular legal, regulatory, and factual aspects of the actual question presented in the Public Notice.

customers by those customers who pay their bills on time.⁶⁶ *First*, late fees keep monthly access fees low by permitting wireless carriers to impose the costs and burdens of late payments only on those customers who fail to pay their bill on time, rather than raising the monthly access fees of all customers. *Second*, late fees support national service and pricing plans because they allow carriers to utilize a few basic methods of calculation, thereby avoiding the burden of personalizing late charges on a state-by-state or customer-by-customer basis. None of the comments supporting the Petition has raised any factual or legal argument that would call this conclusion into question. Furthermore, no commenter has demonstrated that the relief sought is necessary to protect consumers; to the contrary, significant federal and state oversight and a highly competitive marketplace already protect consumers from abusive practices. In light of the corrosive effect the requested relief will have on consumer welfare and longstanding federal objectives, denying the Petition not only comports with the plain meaning of Section 332, but also is sound regulatory policy.

As AT&T has explained, the Commission should remain faithful to Congress' pro-competitive, deregulatory framework. That framework, implemented over the preceding 15 years, has proven highly successful, transforming the wireless industry into a dynamic marketplace that offers consumers numerous choices in technology, service, and payment plans. The Commission has lauded the resultant national⁶⁷ and unlimited⁶⁸ service plans and has

⁶⁶ See AT&T Comments at 8-9, 12-14, 19-20.

⁶⁷ The Commission has noted that after AT&T introduced its own innovative national pricing plan, "[t]oday virtually all of the major operators offer a similar type of [digital-one-rate] pricing plan, where customers can purchase a bucket of MOUs (Minutes of Use) on a nationwide or on a nearly-nationwide network without incurring roaming or long distance charges. The entry price point for these plans has fallen substantially." 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 Servs.*, Fifth Report, 15 FCC Rcd 17660, 17676 (2000). The Commission has further observed that AT&T's *Footnote continues on next page . . .*

observed that “U.S. consumers continue to reap significant benefits—including low prices, new technologies, improved service quality, and choice among providers” in the wireless marketplace.⁶⁹ The Commission thus should protect the public interest by vindicating Congress’ conclusion that expressly preempting state regulation of the “rates charged” by wireless carriers would “foster the growth and development of mobile services that, by their nature, operate without regard to state line as an integral part of the national telecommunications infrastructure.”⁷⁰

The fairness and efficiency of this pricing model also directly benefit consumers. As one court has observed, a wireless carrier has alternatives in recovering the costs associated with late payments; 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.”⁷¹ AT&T has chosen the latter approach, which avoids the unfairness identified by other commenters, including Verizon Wireless’ economist: if AT&T cannot charge separate fees to recover the costs of late payments, “[it] would, in effect, be recovering those costs from other,

introduction of that pricing model was “an independent pricing action that altered the market and benefited consumers.” *Eighth Competition Report*, 18 FCC Rcd at 14829 (¶ 94).

⁶⁸ *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.”).

⁶⁹ *Id.* at 6189 (¶ 1).

⁷⁰ H.R. Rep. No. 103-111, at 260 (1993); *cf. Bank One, N.A. v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) (concluding that in preemption cases, “the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.”); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (same).

⁷¹ *Kiefer*, 50 F. Supp. 2d at 685.

non-late paying customers, who do not cause these costs.”⁷² No commenter has presented any evidence undermining this conclusion. Nor has any commenter attempted to argue that the Petition’s desired regime would be more equitable for the vast majority of customers who pay on time or that it would keep monthly access fees low.

To the contrary, as discussed above, Minnesota’s Attorney General expressly seeks to impose late payment costs on customers who pay on time by raising monthly access fees for everyone.⁷³ At its core, Minnesota argues that, from the *ex ante* perspective of a customer who will pay late, the lower monthly access fees that result from separate late fees “conceal” the “actual cost” of that customer’s wireless service.⁷⁴ It is perhaps unsurprising, then, that the Minnesota Attorney General prefers a regime in which *all* customers pay higher monthly fees so that the customers who will ignore their contractual obligations can more “accurately evaluate”⁷⁵ *ex ante* the total costs they will face as a result of their contractual breach. Again, this approach would be unfair to customers who make timely payment by forcing them to internalize the costs and risks created by customers who choose not to pay on time. It is also wholly unnecessary because, as explained above,⁷⁶ the amount of any applicable late fees are already clearly explained in AT&T’s Service Agreement for those customers who wish to understand the cost consequences of late payment. Because such an approach would lead to inefficient and unfair

⁷² Declaration of Robert G. Harris at 22; *see also* CTIA Comments at 17 (noting the incentive state regulation of late fees would provide to adopt alternative rate structures with higher monthly charges, “including [for] those who honor their contractual commitments”).

⁷³ *See supra* at 4-5.

⁷⁴ Minnesota Attorney General Comments at 8.

⁷⁵ Minnesota Attorney General Comments at 8-9 (encouraging CMRS providers to “roll the costs of late payment into their overall rates”).

⁷⁶ *See supra* at 6-7.

subsidies and undermine the continued availability of low national pricing plans that benefit customers,⁷⁷ it should be flatly rejected by the Commission.

Nor should there be any concern that adhering to the plain meaning of Section 332, and vindicating its preemption of state regulation of late fees, would open the door to abusive carrier practices. The Petition claims that confirming preemption of late-fee regulation by the states would “substantially free” carriers to “impose on consumers whatever economically punitive measures” they see fit.⁷⁸ And, at least one commenter implies that denial of the Petition will leave states without any authority to protect consumers.⁷⁹ But these hyperbolic arguments blatantly ignore the substantial protection afforded to consumers under both federal law and state law.

At the federal level, wireless rates remain subject to the Act’s ban on “charges, practices, and classifications” that are either “unjust or unreasonable”⁸⁰ or discriminatory.⁸¹ The Commission has concluded that wireless rates are presumptively reasonable and non-discriminatory because the market is highly competitive and carriers lack market power.⁸² Moreover, when called upon to evaluate late fees indistinguishable from those here under attack,

⁷⁷ See, e.g., CTIA Comments at 18-19 (criticizing state-by-state variations in rate structures as leading to “balkanization of carrier rate structures”).

⁷⁸ Petition at 2.

⁷⁹ See e.g., Minnesota Attorney General Comments at 2.

⁸⁰ 47 U.S.C. § 201(b).

⁸¹ *Id.* at § 202(a). Consumers can enforce Sections 201(b) and 202(a) of the Act by filing a complaint with the Commission, *id.* § 208, or by filing suit in federal court, *id.* § 207.

⁸² *Second Report and Order*, 9 FCC Rcd at 1478; *accord Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd 8987, 8998 (2002) (noting that “market forces protect” customers from unreasonable discrimination and practices), *aff’d Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003).

the Commission rejected the claim that a late fee in the amount of \$5.00 was unjust and unreasonable under federal law.⁸³ At the state level, Congress' preemption of state rate regulation has no effect on state laws designed to protect customers from fraud and misrepresentation. For example, "state law claims stemming from state contract or consumer fraud laws governing *disclosure* of rates and rate practices are not generally preempted under Section 332"⁸⁴ and can be applied to late fee practices in appropriate cases. It is thus clear that federal authority, the competitive market,⁸⁵ and state consumer protection laws together provide ample and complementary consumer protection for wireless consumers.

IV. CONCLUSION

For the reasons provided above, as well as in its opening comments, 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

⁸³ See *Kiefer*, 16 FCC Rcd at 19131 (¶ 4) (rejecting argument that the late fee violated Section 201(b) because it "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 (¶ 5) (concluding that petitioner had not demonstrated that late fees are "requir[ed]. . . to be based on an estimate of [the carrier's] actual losses.").

⁸⁴ *Wireless Consumers Alliance*, 15 FCC Rcd at 17028-29 (¶ 14) (emphasis added) (discussing *In re Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19908 (¶ 23)); see also *id.* at 17035-36 (¶ 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. Conversely, a carrier that is charging a 'reasonable rate' for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing.").

⁸⁵ Notwithstanding the highly competitive market for wireless services, the Arizona Consumers Council argues that carriers do not compete with each other on the terms of their late fees because they do not include them in marketing materials, and that this alleged lack of competition means that late fees are not rates. See Arizona Consumers Council Comments at 3. The argument is incorrect. Late fees, in fact, do "play a significant role in competition in the mobile communications" market and have "significant competitive impacts." Declaration of Robert G. Harris (¶ 49). And the fees are relevant to carriers' competitive positions; among other things, the inability to collect late fees would affect their monthly access fees, which would clearly impact their competitive pricing. *Id.* In any event, any absence of direct marketing on the amount of a fee has no bearing on its status as a rate.

expressly preempted under Section 332(c)(3)(A). Commenters offer no persuasive legal or factual argument that can refute AT&T's demonstration that late fees are "rates charged" for the variety of telecommunications, billing, and related services provided to customers who fail to pay their bills on time. Indeed, by exhorting carriers to roll the costs of late payments into overall monthly access fees, rather than imposing costs solely on late-paying customers, commenters supporting the Petition confirm that late fees are, at the very least, part of wireless rate structures. Nor do these commenters offer any evidence that their unduly narrow interpretation of Section 332 will benefit consumers or promote the policy objectives of Congress or the Commission. To the contrary, the legal regime they seek to impose not only would restore the balkanized regime of wireless rate regulation that Congress explicitly rejected in Section 332, but also would harm wireless customers by raising prices for all consumers and undermining the national pricing plans that have driven wireless adoption and innovation. As a matter of law and policy, the Commission should deny the Petition and adhere to the highly successful national framework for wireless regulation that has been in place since 1993.

Respectfully submitted,

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