

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

In the Matter of	)	
	)	
Petition for an Expedited Declaratory Ruling	)	WC Docket No. 10-42
That Section 332 of the FCA Does Not	)	
Preempt State Law Protecting Consumers	)	
Against Unlawful Penalty Fees	)	

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**REPLY COMMENTS OF  
THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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On January 14, 2010, a group of California consumers filed a Petition asking the Federal Communications Commission (“FCC” or “Commission”) “to enter a declaratory finding that the commercial mobile service (‘CMS’) providers’ practice of imposing penalty fees for late payment involve ‘terms and conditions’ of service and are not ‘rates’ under Section 332 of the Federal Communications Act (‘FCA’).”<sup>1</sup> If penalty or late fees are “rates,” then Section 332 precludes any state regulation; contrariwise, if penalty or late fees are “other terms and conditions of service,” then Section 332 expressly allows state regulation.

In response to the Commission’s Public Notice,<sup>2</sup> a number of parties filed comments, principally wireless carriers that oppose any state regulation of their services.<sup>3</sup>

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<sup>1</sup> Petition at 1. CMS service is also commonly referred to as commercial mobile radio service, or “CMRS,” or, more generally, as “wireless” service. The petitioners are named at page 7 of the Petition; the procedural posture of the cases that led to the filing of the Petition is set forth at pp. 7-11.

<sup>2</sup> DA 10-264 (rel. February 19, 2010).

<sup>3</sup> AT&T Inc. (“AT&T”); CTIA – The Wireless Association® (“CTIA”); Sprint Nextel Corporation

Comments supporting state regulation were filed by state agencies and consumer advocates.<sup>4</sup>

NASUCA<sup>5</sup> files these reply comments to again support the Petition, specifically supporting a finding that late fees are not rates under 47 U.S.C. § 332(c)(3)(A), and that states are not preempted from regulating such late fees. The wireless carriers' arguments, would, as before, simply read the words "other terms and conditions" out of the statute. For example, carriers argue that state regulation of late fees would conflict with a Congressional requirement for a uniform federal regulatory framework.<sup>6</sup> As the Commission has emphasized for more than a decade in rejecting arguments for a general wireless exemption from state contractual or consumer protection laws, this ignores Congress's express grant of state authority over "other terms and conditions" of wireless service.<sup>7</sup>

Thus the key (if not the only) issue here is whether late fees are rates. Penalties charged for late payment for a service are no more "rates" than are penalties charged for canceling a service before the contract term, so-called "early termination fees" ("ETFs"). As cited by NASUCA in its initial comments, the Commission has received extensive

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("Sprint"); T-Mobile USA, Inc. ("T-Mobile"); Verizon Wireless ("Verizon").

<sup>4</sup> Arizona Consumers Council ("AZ CC"); California Public Utilities Commission and the People of the State of California ("California"); Office of the Minnesota Attorney General (MN AG"); National Association of State Utility Consumer Advocates ("NASUCA").

<sup>5</sup> NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>6</sup> Sprint Comments at 9-12; CTIA Comments at 2-3.

<sup>7</sup> *In the Matter of Southwestern Bell Mobile Systems*, 14 F.C.C.R. 19898, 19902-03 (1999).

arguments on this latter issue that show that ETFs are not “rates.”<sup>8</sup>

Sprint argues that the Commission has already found late fees to be reasonable under Section 201(b) of the Telecommunications Act.<sup>9</sup> Yet the question of state jurisdiction was not considered in *Kiefer*; and under Section 332(b), states are entitled to make their own judgments as to the reasonableness of “other terms and conditions” of wireless service.

The wireless carriers assert that court decisions support the determination that late fees are rates.<sup>10</sup> Yet the consumer comments show that the relevant court decisions have uniformly reached the opposite conclusion and held that late fees are **not** rates.<sup>11</sup> The legislative history supports that result.<sup>12</sup>

And the wireless carriers argue that late payment fees are payment for a service: that is, the “service” of not receiving the money owed on a bill.<sup>13</sup> Looked at under any reasonable view, this is hardly a service.<sup>14</sup> Which may be why the carriers do not

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<sup>8</sup> See, e.g., *In the Matter of Cellular Telephone & Internet Association’s Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, WT Docket No. 05-194 (“05-194”), NASUCA Initial Comments (August 15, 2005) at 12-27; see also 05-194, NASUCA Reply Comments (August 25, 2005) at 5-14.

<sup>9</sup> Sprint Comments at 6-7, citing *Kiefer v. Paging Network*, 16 FCC Rcd 19129 (2001).

<sup>10</sup> CTIA asserts that the Supreme Court case of *Smiley v. Citibank*, 517 U.S. 735 (1996) supports its position. Yet *Smiley* reviewed an entirely different regulatory scheme, and the basis for the Supreme Court’s decision was also entirely different. (*Smiley* was one of the cases cited by the wireless carriers in their unsuccessful attempt to get the Supreme Court to reverse the 11<sup>th</sup> Circuit decision in *National Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1252 (11<sup>th</sup> Cir. 2006), *cert. den. sub nom. Sprint Nextel v. National Ass’n of State Util. Consumer Advocates*, 128 S. Ct. 1119 (2008)).

<sup>11</sup> MN AG Comments at 5-7, citing *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp.2d 421 (D. Md. 2000); *Gellis v. Verizon Communications, Inc.*, 2007 WL 7044752 (N.D. Cal. 2007).

<sup>12</sup> AZ CC Comments at 1-2; MN AG Comments at 3-4.

<sup>13</sup> E.g., AT&T Comments at 3, 15.

<sup>14</sup> MN AG Comments at 2.

mention their late fees in advertising the *services* they provide.<sup>15</sup>

The wireless carriers also claim that argue that the availability of unlimited usage packages undercuts consumers' arguments that "rates" have only to do with a unit of service, and thus late fees are not rates.<sup>16</sup> The existence of these relatively new packages cannot, of course, magically transform fees assessed on late payments into rates for a service.

CTIA argues that because the language of the statute is clear, the presumption against preemption does not apply.<sup>17</sup> Both of these assertions are false: If the language were clear, there would not have been so many disputes about it; and this is why the presumption against preemption is an important consideration here.<sup>18</sup>

As NASUCA stated in the initial comments,

[I]f the wireless carriers had their way, every aspect of their operations would be deemed to be "rates," thus leaving nothing for the states to have jurisdiction over. This would violate the express words of the statute, legislative history and common sense. Preemption is neither required nor appropriate. The Petition should be granted.<sup>19</sup>

The comments of other parties – particularly the wireless carriers – reinforce NASUCA's view.

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<sup>15</sup> AZ CC Comments at 2.

<sup>16</sup> AT&T Comments at 16-17.

<sup>17</sup> CTIA Comments at 14.

<sup>18</sup> See MN AG Comments at 2-3, citing *National Ass'n of State Util. Consumer Advocates v. FCC*, *supra*.

<sup>19</sup> NASUCA Comments at 3 (footnotes omitted).

Respectfully submitted,

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