

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

In the Matter of)
)
Petition for Declaratory Ruling Regarding) WT 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)
)
)
_____)

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless submits these Reply Comments in response to comments on the above-referenced Petition for a Declaratory Ruling (“the Petition”). Most commenting parties agree that late fees are rates, and hence state regulation of their reasonableness is preempted.¹ Parties who take the opposite position are mistaken, as discussed in Verizon Wireless’ opening comments and below. In addition, none of the commenting parties disputes that reconnect fees – charges applied when a customer whose service has been impaired due to nonpayment seeks to re-establish service – are rates within the meaning of Section 332(c)(3)(A) of the Communications Act.² Accordingly, the Commission should deny the Petition, and find that wireless late fees and reconnect fees are “rates” within the meaning of Section 332(c)(3)(A).

¹ See generally Verizon Wireless Comments; AT&T Comments; Sprint Nextel Opposition; T-Mobile Comments; CTIA Comments.

² See generally National Association of State Utility Consumer Advocates (“NASUCA”) Comments; Arizona Consumer Counsel (“ACC”) Comments; California Public Utilities Commission (“CPUC”) Comments; Minnesota Attorney General (“MN AG”) Comments.

I. THERE IS NO MEANINGFUL DISTINCTION BETWEEN A “CHARGE” AND A “RATE” WITH RESPECT TO THE PREEMPTIVE EFFECT OF SECTION 332(C)(3)(A).

The Minnesota Attorney General attempts to draw a distinction between “charges” under Section 201 of the Act and “rates” under Section 332(c)(3)(A), arguing that what constitutes a charge is irrelevant to what constitutes a rate.³ But, there is no legal, economic or factual support for the claim that the term “charge” as used in Section 201 has a broader meaning than “rate” as used in Section 332. Courts and the Commission have construed “rate” as the “amount of a charge or payment.”⁴ There is simply no basis for Petitioners or other parties to argue that this common definition does not apply. Moreover, as Dr. Harris explains in his declaration, economists and regulatory bodies use the terms “charge” and “rate” interchangeably, and the fact that particular fees are customarily called “charges” (as in “call termination charges” or “access charges”) does not mean that they are not also “rates.”⁵ Therefore, the observation in *Kiefer v. Paging Network, Inc.* that a late payment charge is “not merely a ‘term and condition’ of the parties’ service contract” but rather “part of the overall rate structure” is clearly on point.⁶

Nor is there any basis for the argument that a charge can only be a rate if it is linked to a specific service, as the Minnesota Attorney General asserts,⁷ citing *AT&T v. Central Office Tel.*, 524 U.S. 214 (1998). That case, however, does not stand for the proposition that a “rate” must be tied to an element of service for which it applies. In *Central Office Telephone*, the Court held that a plaintiff may not avoid the filed rate

³ MN AG Comments, at 7.

⁴ See Verizon Wireless Comments, at 9-10; T-Mobile Comments, at 6.

⁵ Declaration of Robert G. Harris (“Harris Decl.”) ¶¶ 13, 17-18 (attached to “Comments of Verizon Wireless” filed Apr. 7, 2010).

⁶ 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999).

⁷ MN AG Comments, at 8-9.

doctrine by recasting a challenge to a filed rate as a claim of inadequate service, because adequacy of service is merely the flip side of a claim that the rate is unreasonable in light of the service provided.⁸ The Court’s holding thus supports a broad definition of the term “rate” and protects “rates” from challenges couched as claims for adequacy of service.⁹

*Gilmore v. Sw. Bell Mobile Sys., Inc.*¹⁰ is particularly instructive on this point. *Gilmore* involved a “Corporate Account Administration Fee” that the plaintiff claimed was not based on any specific services.¹¹ The court concluded that a challenge as to the reasonableness of this fee – including the question of “whether [the plaintiff] received sufficient services in return for the Fee” – “is a rate issue.”¹² As *Gilmore* illustrates, there does not need to be a link to a specific wireless service for a challenge to fees charged by Commercial Mobile Radio Service (“CMRS”) providers to be preempted from state regulation of their reasonableness.¹³

The Minnesota Attorney General is also wrong in contending that the class action plaintiffs challenging the fees, unlike the plaintiffs in *Gilmore*, do not seek to secure “more or higher quality services” by their claims.¹⁴ To the contrary, the plaintiffs’ litigation claims against Verizon Wireless depend on establishing, and seek to establish, that the late and reconnect fees are disproportionate to the costs that Verizon Wireless

⁸ 524 U.S. at 223.

⁹ See Verizon Wireless Comments, at 10-11; CTIA Comments, at 12-13.

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

¹¹ *Id.* at 919.

¹² *Id.* at 924.

¹³ The Minnesota Attorney General’s argument (MN AG Comments, at 2-3) that the “presumption against preemption” applies in this case is incorrect. The presumption does not apply where there is a history of significant federal presence, as is the case with wireless services, and the United States has agreed on that point. See Verizon Wireless Comments, at 31; CTIA Comments, at 14-15; Sprint Opposition, at 16-17; AT&T Comments, at 9 n.34. Moreover, the Obama Administration’s directive to federal agencies on regulatory preemption does not apply in this case where there is express statutory preemption. Verizon Wireless Comments, at 30-31; see AT&T Comments, at 9 n.34; CTIA Comments, at 15 n.17.

¹⁴ MN AG Comments, at 7.

incurs in providing numerous services, such as extending credit to the customer beyond the due date and reactivating a customer's service.¹⁵

In any event, even if a link to a specific service were required, it is clearly established for late fees. As the CMRS providers' opening comments explained, the services provided in connection with late fees are credit¹⁶ and the continued provision of wireless service to non-paying customers.¹⁷ Likewise, the service tied to the reconnect fee is re-initiating wireless service to a device that has been impaired or suspended for non-payment.¹⁸ Furthermore, the Minnesota Attorney General is wrong in arguing that a fee based on the timing of payment is not itself a rate.¹⁹ To the contrary, provisions governing the manner and timing of payment are an integral part of the price of the good or service, as recognized by the United State Supreme Court, economic theory, and the California Public Utilities Commission.²⁰

II. HOW TO CHARGE FEES FOR LATE BILL PAYMENT IS PART OF A CARRIER'S RATE STRUCTURE; THEREFORE, STATE REGULATION OF LATE FEES IS PREEMPTED.

None of the comments disputes that "rates charged" in Section 332 include both rate levels and rate structures, and that states are precluded from regulating both.²¹ The

¹⁵ Verizon Wireless Comments, at 8; Sprint Opposition, at 2-3; CTIA Comments, at 5-6. Indeed, the *Gellis* court in the underlying California litigation expressly noted that the reconnect fee for restoring a customer's phone service is "essentially charged for the same service" paid for through the monthly access fees. See Verizon Wireless Comments, at 6-7.

¹⁶ See Verizon Wireless Comments, at 11-16; Sprint Opposition, at 4-5.

¹⁷ See AT&T Comments, at 13-15.

¹⁸ See Verizon Wireless Comments, at 13-14; Harris Decl. ¶¶ 51-52.

¹⁹ MN AG Comments, at 4.

²⁰ See Verizon Wireless Comments, at 14-16; Harris Decl. ¶¶ 30-35.

²¹ The Minnesota Attorney General (Comments, at 7 n.30) makes the cursory assertion that while "rates charged" may encompass both "rate levels" and "rate structures," this does not "magically expand the [preemptive] authority of ... [Section 332] beyond what the statutory language allows," citing *National Ass'n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238, 1255-56 (11th Cir. 2006) ("*NASUCA*"). The issue in *NASUCA*, however, involved the presentation of charges on a bill, not whether a specific type of charge was part of a company's rate structure. The Minnesota Attorney General also ignores the Commission's own statement that "the term 'rates charged' in Section 332(c)(3)(A) may include both rate

comments that do address this issue recognize that late fees reflect a decision about how to structure rates (i.e., to collect certain costs from late payers rather than all customers), and thus are part of a CMRS provider's rate structure.²²

As discussed in Verizon Wireless' opening comments, challenges to late fees are challenges to a CMRS provider's rate structure. Wireless carriers have several options in structuring their rates to address the costs associated with late payments.²³ These alternative rate structures are ways in which carriers compete with one another. For example, some carriers compete by offering plans with no late fees – rather than charge a late fee, they simply turn off service until payment is made.²⁴ Other carriers, including Verizon Wireless, offer prepaid plans in which all charges are paid in advance and the carrier does not bear any credit risk or incur the cost of attempting to collect overdue bills. Carriers could also recover all of their costs solely by means of access fees.²⁵ Or, carriers can recover some of their costs by imposing additional charges, such as late fees. How a carrier decides to recover its costs goes to the heart of its rate structure.

In fact, the Minnesota Attorney General implicitly concedes that late fees are part of a CMRS provider's rate structure. After asserting that late fees cannot be rates because they are motivated by a desire to encourage customers to pay on time²⁶ (an irrelevant allegation, as motivation has nothing to do with the question of whether a particular charge is a rate), the Minnesota Attorney General then states that “CMRS providers are, of course, free to change the current practice at any time and roll the costs

levels and rate structures,” and that “states are precluded from regulating either of these.” *Sw. Bell Mobile Sys*, 14 FCC Rcd 19898, 19901, ¶ 20 (1999); *see also* Verizon Wireless Comments, at 23-26.

²² Verizon Wireless Comments, at 23-27; AT&T Comments, at 18-20; T-Mobile Comments, at 10-11; CTIA Comments, at 6-9.

²³ *See* AT&T Comments, at 18-20; Harris Decl. ¶¶ 36-40.

²⁴ *See* http://www.metropcs.com/customer_support/faq.aspx#15 (visited on May 3, 2010).

²⁵ *See* AT&T Comments, at 18.

²⁶ MN AG Comments, at 9.

of late payment into their overall rates.”²⁷ This statement underscores the point that how late fees are charged represents a decision about how a wireless service provider structures its rates.

Since decisions about charging late fees go to the heart of wireless rate structures, there is no basis for applying one regulatory regime to one type of rate structure and a different regime to an alternative structure – especially when the purpose of Section 332 is to allow market competition to drive rate structures.²⁸ Yet that is exactly what Petitioners and the supporting commenters are suggesting. The Commission must reject that position.

III. ADEQUATE DISCLOSURE OF LATE FEES IS IRRELEVANT TO WHETHER LATE FEES ARE RATES.

Both the Arizona Consumers Counsel and the Minnesota Attorney General erroneously suggest that carriers do not adequately disclose their late fees, and that a finding that Petitioner’s late fee claims are preempted would preclude suits based on nondisclosure. For example, Arizona Consumers Council devotes much of its comments to arguing that a wireless provider’s late fees are difficult to find.²⁹ Similarly, the Minnesota Attorney General’s argument that preempting state regulation of late fees

²⁷ *Id.*

²⁸ See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8004, ¶ 29 (1994); *Petition of New York State Public Service Commission to Extend Regulation, Report and Order*, 10 FCC Rcd 8187, 8190, ¶ 18 (1995) (noting Congress’ actions were designed to implement its “general preference in favor of reliance on market forces rather than regulation”); see also CTIA Comments, at 15-19.

²⁹ ACC Comments, at 2-3. The ACC (Comments, at 3) makes the meritless argument that late fees should be deemed “terms and conditions” because in “broader commercial practices,” the provisions that define time, place and manner of performance of a contract are described in the “terms and conditions” of the contract. However, as Dr. Harris explains (Decl. ¶ 14), in the context of telephone service rate-making, all terms, including rate terms such as late fees, were deemed terms and conditions of service. And, rate regulating bodies such as the FCC and California PUC deemed late fees as rates. Consistent with that practice, Section 332(c)(3)(A) makes the distinction between “rates” and “other terms and conditions.” It is within that context that Congress preempted state authority to regulate rates, which include late fees.

would not advance competition is premised on the notion that they are not adequately disclosed to consumers.³⁰

But whether late fees are adequately disclosed to consumers is not at issue in this Petition.³¹ As Verizon Wireless noted in its opening comments, disclosure is something that can be, and should be, addressed separately.³² Indeed, Petitioners have not even asserted any nondisclosure claims against Verizon Wireless.³³

IV. THE CPUC'S RECENT DECISIONS ON WIRELESS ETFS AND LATE FEES ARE IRRELEVANT AND CONTRARY TO ITS OWN PRACTICES.

The CPUC asserts that it has consistently rejected the position that late payment fees are rates. The CPUC's decisions, however, are neither controlling on the Commission nor on point.

The CPUC relies on a decision in which it imposed a penalty on Cingular based on its imposition of Early Termination Fees ("ETFs") combined with its failure to disclose limitations on its network capacity.³⁴ The core issue in *Cingular* was not whether ETFs were rates, but whether Cingular had engaged in nondisclosure and misrepresentation.³⁵ The CPUC's own quotation from this opinion illustrates this point: the only cases that are mentioned relate to nondisclosure and consumer fraud, not the reasonableness of a fee.³⁶

³⁰ MN AG Comments, at 8.

³¹ See Verizon Wireless Comments, at 29; AT&T Comments, at 23; CTIA Comments, at 11.

³² Verizon Wireless Comments, at 29.

³³ *Id.*

³⁴ *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless dba Cingular Wireless*, D.04-12-058, 2004 Cal. PUC LEXIS 577 (Dec. 16, 2004) ("*Cingular*").

³⁵ See *id.* at *1.

³⁶ See CPUC Comments, at 2 (quoting *Cingular*, 2004 Cal. PUC LEXIS 577, at *5, with cites to *Communications Telesystems Intern. v. CPUC*, 196 F.3d 1011, 1017 (9th Cir. 1999) (involving a provider's practice of "slamming"); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366 (2001) (false advertising claim); *Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17035-36 (2000) (false advertising claims);

Likewise, the California Court of Appeal found that the CPUC's decision was not preempted because "the [CPUC]'s challenge to the ETF and to Cingular's policy of permitting no grace period, *combined with the misrepresentations regarding service*, is not a preempted regulation of rates or of market entry."³⁷ The question here, however, is whether regulation of late fees based on their reasonableness, without regard to disclosure, is preempted.

In addition, the CPUC's own actions with respect to late fees undermine its position. Prior to the enactment of Section 332, the CPUC itself expressly concluded that "late payment charges and reconnection charges are *part and parcel of the rates charged for telephone services*."³⁸ In 2004, the CPUC attempted to reverse course and to promulgate rules governing wireless carriers' late fees, among other rules applicable to numerous rates and practices.³⁹ Verizon Wireless and other wireless carriers brought a lawsuit to challenge this rule. In response, the CPUC stayed, and later vacated the rules.⁴⁰ The CPUC's own interpretation of Section 332, which was not tested in court

Pittencrieff Communications, Inc., 13 FCC Rcd 1735 (1997) (relating to a requirement that CMRS providers contribute to a state universal service support mechanism)). The Minnesota Attorney General (Comments, nn. 2, 6, 11) similarly relies on authorities rejecting preemption arguments in the context of claims for failure to disclose. See *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057-58 (9th Cir. 2008) (claim that state taxes were not adequately disclosed); *Farina v. Nokia*, 578 F. Supp. 2d 740 (E.D. Pa. 2008) (claims concerning alleged concealment of safety risks of cell phones); *Iberia Credit Bur. Inc. v. Cingular Wireless*, 668 F. Supp. 2d 831, 834 (W.D. La. 2009) (plaintiffs claim that defendants "failed to 'disclose the true nature of the billing and/or trade practices'").

³⁷ *Pacific Bell Wireless v. CPUC*, 140 Cal. App. 4th 718, 734 (2006) (emphasis added).

³⁸ *Toward Util. Rate Normalization, Inc. vs. Pacific Bell*, 49 CPUC 2d 299, at III.E., 1993 Cal. PUC LEXIS 394, *16 (1993) (emphasis added).

³⁹ *Order Instituting Rulemaking on Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, D.04-05-057, 2004 Cal. PUC LEXIS 240, *104-08, Rule 7 (May 27, 2004); see also D.04-10-013, at 2-6 (Cal. PUC Oct. 7, 2004) (denying rehearing on issue of whether Section 332(c)(3)(A) preempted rules concerning rates, including late fees).

⁴⁰ See *Order Instituting Rulemaking on Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, D.06-03-013, 2006 Cal. PUC LEXIS 86 (Mar. 9, 2006). The 2006 Order superseded the 2004 order, and did not contain any rules governing wireless carriers' late fees.

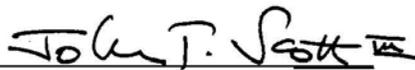
and contradicts its prior interpretation of the term "rate," has no persuasive force in this proceeding.

V. CONCLUSION

For the foregoing reasons, along with the reasons expressed Verizon Wireless' opening comments, the Commission should declare that: (1) late and reconnect fees are rates and rate structures within the meaning of Section 332(c)(3)(A); (2) the state law claims, whether common law or statutory, currently being raised against the fees seek to regulate rates under the statute; and (3) the state law claims are therefore expressly preempted by Section 332.

Respectfully submitted,

VERIZON WIRELESS

By: 
John T. Scott, III
Vice President & Deputy General Counsel

William D. Wallace
Senior Counsel

Verizon Wireless
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
(202)589-3760

May 7, 2010