

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

**REPLY 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 reply 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 (Section 332), As Applied to Fees Charged for Late Payments.

In its Notice, the FCC requests comment on the following question: whether 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) (wireless carriers) are “other terms and conditions” of service, and therefore may be regulated under state consumer protection laws.

I. COURTS HAVE HELD THAT LATE PAYMENT FEES ARE NOT RATES

The cellular carriers contend that, even if federal law does not preempt all state regulation, late fee charges are preempted by Section 332(c)(3)(A), which prohibits state regulation of wireless rates. Specifically, in its opening comments, AT&T asserts that late “fees” are part and parcel of “rate structures” and therefore immune from state jurisdiction.¹ However, AT&T’s assertion is legally incorrect.

In this regard, the CPUC agrees with the Opening Comments of the State of Minnesota² that to run afoul of Section 332, a state consumer protection rule must

¹ See, Comments of AT&T, p. 4

² See, Comments of the State of Minnesota, p. 3.

directly affect rates. Rate regulation does not occur when state consumer protection rules merely produce an “increased obligation” on the wireless carrier that “could theoretically increase rates.”³ As the Opening Comments of the State of Minnesota make clear, “[e]very court that has considered the question of how to characterize late-payment penalties in regards to Section 332 has held that such fees are part of the ‘other terms and conditions’ of the wireless service, not ‘rates’ under the provision.”⁴

It is important to note that the wireless carriers’ late fee charges relate to *billing*, and not to *rates*. See H.R. Rep. 103-111, at 261, 1993 U.S.C.C.A.N. 378, 588. It is the intent of the Congressional Committee that the states still would be able to regulate such matters as customer billing information and practices and billing disputes and other consumer protection matters. Rules relating to late fees pertain to contract penalties, not rates. While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment.⁵ Similarly, rules relating to the timing of bills pertain to contractual issues, and do not constitute rate regulation.⁶

³ Accord, *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000). “Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.” See also *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, at *36 (S.D. Iowa 2004) (‘rate’ must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business).

⁴ See, Comments of State of Minnesota, p. 5. Sprint-Nextel attempts to support its position that late fees should be considered “rates” under Section 332 by relying on *Kiefer v Paging Network, Inc.*, 50 F. Supp.2d 681, 682-83 (E.D. Mich. 1999). However, the *Kiefer* case involved an interpretation of the broader word, “charge,” and not the word, “rate,” in the context of construing a *different* statute, 47 U.S.C. 201(b). Thus, the *Kiefer* decision is not relevant to the inquiry before the FCC here.

⁵ Accord, *Ball v. GTE Mobilenet of Calif.*, 81 Cal. App. 4th 529, 538-39, 96 Cal. Rptr. 2d 801, 807-08 (2000) (late fees are not analogous to the types of practices that courts have concluded are part of a

The wireless carriers' assertions that federal policy in favor of national uniformity is so comprehensive that the term "rate" should be given an expansive reading such that there is little room for state regulation is wrongheaded. State law may be preempted only when (a) a federal statute expressly preempts state law; (b) where federal law is so pervasive that it occupies an entire field, leaving no room for state action; or (c) where state and federal law actually conflict.⁷ Particularly where, as here, the state's police powers are challenged, congressional intent to preempt state law must be "clear and manifest," and if a Court has any doubts, they should be resolved against a finding of preemption.⁸

State regulation of late fees of wireless carriers easily meets these standards. Federal law neither expressly preempts all state regulation, nor occupies the field of wireless telecommunication regulation. To the contrary, the Communications Act of 1934 (1934 Act), 47 U.S.C. Section 151 *et seq.*, as amended, expressly authorizes state regulation in several sections. Section 332(c)(3)(A) authorizes states to establish terms and conditions for wireless services, other than those that directly regulate rates or market entry. More generally, Section 253(b) of the 1934 Act confirms state authority to

carrier's "rate structure," such as charging for whole-minute increments ("rounding up"), or charging for incoming calls).

⁶ See, *Fedor v. Cingular Wireless*, 355 F.3d 1069, at 1074 (7th Cir. 2004), which held that a state is not preempted from addressing whether a "carrier improperly attributed calls made in one month to the call-time for a different month."

⁷ See, *Ting v. AT&T*, 319 F.3d 1126, at 1135-36 (9th Cir. 2003).

⁸ See, *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984). Also see, *National Association of State Utilities Consumer Advocates v. FCC*, 457 F.3d 1238, 1252 (11th Cir. 2006), which applied the presumption against preemption in rejecting Section 332 preemption of state regulation of line items contained in wireless telephone bills.

safeguard the rights of consumers. Moreover, Section 601(c) of the Telecommunications Act of 1996 (1996 Act) further provides a savings clause: “This Act . . . shall not be construed to modify, impair, or supersede . . . State . . . law unless explicitly so provided.” See, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996) , *reprinted in* note to 47 U.S.C.

§ 152.

In interpreting Section 332(c)(3), the FCC itself has made clear that Congress’ preference for market forces to shape the development of the industry is not “absolute” and Congress specifically chose not to “foreclose . . . state regulation.”² The 1996 Act thereafter both maintained the dual regulatory framework in Section 332(c), and reinforced the states’ important role to protect consumers and to ensure reasonable terms and conditions of all telecommunications services, including wireless. While the 1996 Act was designed to promote competition, Congress expressly understood that the Act’s provisions fostering competition “depend in part on state law for the protection of consumers in the deregulated and competitive marketplace” and that state “consumer protection laws . . . form part of the competitive framework to which the FCC defers.”¹⁰

Specifically, Congress made clear that “[n]othing in this section [governing state regulatory authority] shall affect the ability of a State . . . to impose requirements necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C.

² See, *In re Pet. of Ohio*, 10 FCCR 7842, ¶¶ 9, 44 (1995). Also see, *GTE Mobilenet v. Johnson*, 111 F.3d 469, 480 (6th Cir. 1997); *Cellular Telecom. Indus. Ass’n v. FCC*, 168 F.3d 1332, 1335 (D.C. Cir. 1999).

¹⁰ See, *Ting, supra*, 319 F.3d at 1145.

Section 253(b). In this regard, it is noteworthy that Congress also added Section 601(c) to the 1996 Act to make clear its intent not to occupy the field, and to limit the preemptive effect of the Act only to those specific areas where the intent to preempt is express, stating: “This Act . . . shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided.”

Furthermore, in the absence of utility-style regulation as is the case in the wireless industry, consumer protection rules have an important symbiotic relationship with competition. The federal scheme contemplates a dual system of regulation, requiring some national uniformity and preserving states specific authority in other areas.¹¹

II. VERIZON’S REFERENCES TO PAST CPUC DECISIONS ARE INAPPOSITE

In its comments, Verizon asserts that “. . . the California Public Utilities Commission declared in CPUC Decision (D).93-05-062 (*Toward Utility Rate Normalization v. Pacific Bell*, 49 CPUC 2d 299, 307) that “late payment charges and reconnection charges are part and parcel of the rates charged for telephone service. . .”¹² Verizon goes on to “[n]ote the timing of this CPUC decision: May 19, 1993, shortly before the passage of OBRA [Omnibus Budget Reconciliation Act of 1993] on August 10, 1993.”¹³ Next Verizon asserts that “[t]here could hardly be a clearer statement of the meaning of the term 'rates' as used by state regulators and in Section 332.”¹⁴ Finally,

¹¹ See, generally, H.R. Rep. No. 103-111, at 260-61 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587-88 (discussing Section 332(c)(3)(A)).

¹² See, Verizon’s Opening Comments, Robert Harris Declaration, p. 10, Appendix A, p. 1.

¹³ *Id.*

¹⁴ *Id.*

relying partially on CPUC D.93-05-062, Verizon concludes that "the California Commission treated 'charges' as equivalent to 'rates' in its rate regulation of cellular carriers."¹⁵

By citing D.93-05-062, Verizon reveals the shallowness of its argument. The statement on which Verizon relies is taken out-of-context, and is irrelevant to the legal point being discussed here. In that decision, the CPUC was dealing with a tariff issue and compliance with the California Public Utilities (PU) Code Section 532¹⁶, which concerns tariffs, not rates. Consequently, the CPUC was addressing neither rates nor a “rate structure” issue.

D.93-05-062 was a complaint case brought against Pacific Bell,¹⁷ a *wireline*, not a wireless, telecommunications company, for failing to follow its tariffs when it processed customer payments, including late payments. The CPUC’s decision in that case found that Pacific Bell violated PU Code Section 532, a Commission Order, and its tariff in processing customer payments between 1986 and February 1991. *See*, 49 CPUC 2d 299, 303. When the CPUC ordered the payment of owed refunds and imposed a penalty of \$15 million, it found that although a local exchange telephone carrier’s approved late payment fee tariffs did not represent rates for a “product, commodity, or service” per se, they still were part of the utilities rate tariffs charged for telephone service and thus cover by PU Code Section 532.

¹⁵ *Id.*

¹⁶ PU Code Section 532 states that “no public utility shall charge...products or commodity or service...for any service rendered...than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time.”

¹⁷ Now AT&T.

It is a long and incomprehensible leap from a 1993 case having to do with an entirely different regulatory scheme for wireline carriers to Verizon's assertion that "[m]oreover, the California Commission treated 'charges' as equivalent to 'rates' in its rate regulation of cellular carriers."¹⁸ Verizon's argument in this regard completely misrepresents the common use of the terms "rates" and "charges" as they are commonly applied by regulators when discussing tariffed rates. Verizon's effort to tie that state activity to how those terms would be interpreted or applied when discussing a "rate structure" under the Omnibus Budget Reconciliation Act of 1993 is strained at best. The other CPUC decisions that Mr. Harris cites in his Declaration (D.84-06-111, June 13, 1984; D.87-10-036, October 16, 1987; and D.87-11-061, November 25, 1987) occurred even earlier in time and are, if possible, both less relevant and less apposite.

In short, Verizon is attempting to demonstrate that CPUC decisions indicate a broad state agenda to impose rate regulation on wireless carriers. Yet, the decisions cited are now seventeen years in the past, and preceded federal pre-emption of state regulation of wireless rates and entry. Thus, Verizon's efforts are simply overblown and misplaced.

Finally, it is correct that after the passage of the Omnibus Budget Reconciliation Act of 1993, the CPUC *did* exercise the jurisdiction it retained under that law over wireless carriers' terms and conditions of service regarding early termination fees. For example, in 2004, the CPUC fined Cingular Wireless (now AT&T Wireless) \$12.1 million and ordered refunds for Cingular's imposition of an early termination fee

¹⁸ Verizon Opening Comments, Harris Declaration, p. 10.

that the CPUC found unjust and unreasonable.¹⁹ In these decisions, the CPUC found that certain *terms and conditions* of Cingular’s service offerings – not the rates Cingular was charging – were unconscionable. The CPUC’s determination in this regard was upheld by the California Court of Appeal.²⁰

III. CONCLUSION

For the reasons stated, the CPUC agrees that late payment fees or penalties which wireless carriers impose are “terms and conditions of service” for purposes of applying state consumer protection statutes.

Respectfully submitted,

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¹⁹ See, CPUC D.04-09-062 and D.04-12-058.

²⁰ See, *Pacific Bell Wireless [Cingular] v. Public Utilities Commission*, 140 Cal. App. 4th 718, 732 (2006), quoting *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, at ¶¶ 25, 27, cert. denied. 549 U.S. 1334 (2000).