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I. EXECUTIVE SUMMARY AND INTRODUCTION

Petitioners, California Consumers challenging commercial mobile service providers' practice of charging unlawful late payment and reconnect fees ("Penalty Fees") under California state consumer protection statutes, file this response to comments made by certain wireless providers.¹ For the reasons stated in Petitioners' opening comments and for the reasons set out below, Petitioners respectfully request that the Commission grant the Petition² and declare that late payment fees and reconnect fees which are determined to be penalties do not constitute "rates" within the meaning of section 332(c)(3)(A) of the Federal Communications Act of 1934 ("FCA").³

The comments by the wireless Industry unsurprisingly sing from the same song sheet.⁴ The wireless Industry marches arm-in-arm to a rhetorical tune that tries to expand the meaning of the word "rate" as well as the scope of the Petition. But the Commission should not allow the wireless Industry to drown out the voice of millions of consumers, regardless of the volume level of the Industry's drumbeat. By granting this Petition, the Commission will forcefully and affirmatively provide consumers something that has severely eroded in recent years: protection.

To protect consumers, the Commission should not interpret the meaning of the word "rate" in Section 332 to encompass contractual penalties for late payment. Nor should the Commission accept the Industry's invitation to reshape and expand the scope of the Petition.

¹ "Petitioners" or "California Consumers" refer to Cheryl Barahona, Kuba Ostachiewicz, Rudolph Thomas, Joseph Ruwe and Elizabeth Orlando.

² "Petition" or "Pet." refers to the Opening Comments of California Consumers Challenging Commercial Mobile Service Providers' Practice of Charging Unlawful Penalty Fees Under California State Consumer Protection Statutes.

³ 47 U.S.C. § 332(c)(3)(A) ("Section 332").

⁴ Four wireless providers have provided comments in this action – AT&T Inc., Sprint Nextel Corporation, T-Mobile USA, Inc. and Verizon Wireless. The CTIA-The Wireless Association, an industry association, has also provided comments in support of the wireless providers' position. Because all of these commentators present largely duplicative arguments, Petitioners refer to these providers jointly as the "Industry." Where possible, Petitioners provide parallel citations to each carrier's comments.

The Petition does not ask the Commission to declare under what circumstances or in what amount a late fee becomes an illegal or unreasonable penalty. Rather, the narrow question Petitioners present is whether a fee imposed to penalize consumers for breaching an agreement to make timely payments is a “rate” or an “other term and condition” of wireless service.

Said differently, Petitioners are not asking the Commission to declare whether a law would or would not be preempted if it prohibited a wireless carrier from recovering its actual damages caused by late payment. In fact, Petitioners are not aware of any such law in the United States. Nor has the Industry cited to such a law.⁵ Rather, the issue presented to the Commission is whether a carrier may use its terms and conditions to do what consumer protection law prohibits almost all other industries from doing to consumers – extracting punitive damages from consumers based on alleged contract violations. Contract law in general does not allow for punitive damages to be inserted into agreements with consumers.⁶ And there is no reason that the wireless Industry should be exempt from an entire body of contract and consumer-protection laws, and thus be allowed to extract these punitive damages under the guise of “rate preemption,” absent a clear and manifest Congressional intent to do so. There is none here.

And just because a court proceeding may ultimately examine whether a wireless carrier is trying to recover its actual damages or impose punitive damages requires examining the character and amount of the charges, it does not follow that such an analysis becomes rate regulation. The legality of a given contractual term imposing a penalty fee for breach is

⁵ For this reason, the Industry’s repeated policy argument that it is sensible to impose the costs of late payment on consumers who pay late, as opposed to spreading those costs across all consumers is a red herring. California consumers do not challenge fees that simply attempt to recoup costs of late payment. They challenge penalty fees that violate state consumer-protection law and operate as illicit profit centers.

⁶ See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (“[b]ut punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract”). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

determined, in large part, by whether the fee is intended to and indeed does compensate for damages caused by the conduct or is being imposed to deter future conduct.

As emphasized in their Petition, California Consumers do not challenge the *amount* of the late and reconnect fee penalties in this proceeding.⁷ Rather, Petitioners contend that if a late or reconnect fee is found to be an unlawful penalty in violation of state law, these fees, by definition, cannot be considered rates. A penalty, by definition is a “monetary sum that a contracting party agrees to forfeit if the party fails to comply with specified conditions.”⁸ A penalty is not in exchange for a service and does not represent actual costs incurred. Indeed, one of the wireless providers, AT&T Inc., candidly admits that late fees are penalties.⁹

In the Industry’s world of statutory interpretation, Section 332 frees the Industry from state consumer-protection laws as long as the punishment it metes out to consumers can be justified by having any downstream economic impact on a wireless carrier, regardless of how far away these tributaries run from providing mobile services. To support its all-encompassing, unbounded and elastic interpretation of the term “rate,” the Industry does not point to any statutory language or legislative history. This is because no such support exists. In fact the legislative text and history demonstrates the exact opposite: consumer protection matters, such as billing and billing disputes, historically part of the states’ police powers, are explicitly not preempted.

The Commission is well-versed in the Industry’s arguments. Already pending before the Commission is a proceeding regarding the wireless Industry’s imposition of early termination penalties, where the Industry has made nearly identical arguments. According to the Industry,

⁷ Pet. at 3.

⁸ Black’s Law Dictionary (1996).

⁹ See Comments of AT&T Inc. at 12 (“[i]nformation about the penalties for non-payment is included in ‘dunning’ notices that are sent to customers who have missed a payment due date”).

whether in the form of penalizing for early termination or paying late, punishing consumers is part of the Industry's "rates" or "rate structure" because Congress intended any act that involves an economic benefit or detriment to the Industry to be preempted from state consumer protection laws. Specifically, the Industry argues that "all price terms," i.e., any money consumers pay to carriers for any reason are "rates."¹⁰ Fortunately for consumers across the United States, because no support for the breadth of this argument is found in Section 332's text or legislative history, courts have soundly rejected the wireless carriers' interpretation.¹¹ But not only have dozens of courts heard and rejected this expansive interpretation, so too has the predecessor Chairman of the Commission after the Industry trotted out these very same arguments.

After hearing all of these arguments, when asked by Senator Klobuchar whether he believed early termination penalties were rates, former Commission Chairman Kevin Martin expressed his skepticism that early termination fees ("ETF") were rates charged by wireless providers:

I think that the problems relating to early termination fees are significant. I am concerned about and I think they're going and they're proliferating not only in the wireless industry but we're beginning to see them pop up across other sectors as well. And I think that they are problems. The Commission would potentially be able to regulate them as a fair-business practice under section 201 of the Communications Act. But I think that the consumer . . . and I've had, we've had, and I've had multiple discussions with both consumer advocates and the industry about it, including several sessions with both of them. The consumer advocates actually who have encouraged the commission to not rule on what would be reasonable under section 201 because they are concerned about wanting to make sure that they preserve the opportunity for, the, their state litigation to go forward. I actually think that the Commission, though, if there were enough complaints acted that we wanted to, we would probably have authority under section 201 to talk about what was a reasonable

¹⁰ See Comments of CTIA-The Wireless Association at 2; Declaration of Robert G. Harris at 7-8.

¹¹ See Pet. at 17-21 (citing cases).

practice. ***But I don't necessarily agree that it is part of their rate as you would say.***¹²

Although the precise issue presented by the California Consumers' Petition is different, the conclusion remains the same – penalties are terms and conditions, not rates.

Finally, the Industry's attempt to dress up their legal arguments in economic garb must fail. These arguments fall away when the Commission looks at the real-world facts of the wireless marketplace instead of an ivory tower theory. Late and reconnect fees are buried illegal profit centers, largely protected from competitive market forces, as there is no economic evidence that consumers consider these penalty fees as part of the price for wireless service. This is in part due to the wireless Industry not advertising or marketing these penalties up-front to the consumer, but instead burying these penalties in multi-page, small-font legal terms and conditions. Given this obvious, real-world information asymmetry, competitive forces are not at work to protect consumers.

In sum, these penalties are not “rates charged” by wireless providers. Accordingly, Petitioners request a narrow ruling from the Commission – that is, that Penalty Fees are not considered “rates” under Section 332 of the FCA.

II. ARGUMENT

A. The Canons of Statutory Interpretation Support Narrowly Construing the Phrase “Rates Charged”

There is a strong presumption against preemption under the Supremacy Clause.¹³ In determining the scope of possible preemption of Section 332, the canons of statutory construction require that the Commission look to the “plain meaning” of the statute, including

¹² See *Media Ownership Rules*: Hearing Before the Commerce, Science and Transportation Senate Committee, 110th Cong. (Dec. 13, 2007) (statement of then-Chairman of the Federal Communications Commission, Kevin Martin), available at <http://www.c-spanvideo.org/program/202021-1> (last visited May 4, 2010). Upon realizing that the ETF proceedings might not result in victory for the wireless Industry, the CTIA sought to withdraw its petition. See Letter from CTIA's Christopher Guttman-McCabe to Marlene H. Dortch, FCC Secretary (WT Docket 05-194, filed on June 12, 2009), <http://fjallfoss.fcc.gov/ecfs2/document/view?id=6520220831>.

¹³ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

the intended meaning of the words “rates charged.”¹⁴ And in reaching its conclusion, the Commission must consider the maxim that *expressio unius est exclusio alterius*: Congress’s choice of the more restrictive word “rate” instead of the more expansive word “charge” strongly demonstrates Congress’s intent to limit the preemptive scope of Section 332. This more narrow construction weighs against finding preemption here.

1. The Express Language of Section 332 Recognizes the Power of the States to Regulate “Other Terms and Conditions”

Petitioners and commentators have extensively addressed the express text of Section 332 and its legislative history. Petitioners do not repeat it here. It is worth noting, however, that canons of statutory interpretation require that the “plain meaning” of the statute be strictly construed.¹⁵ The relevant portion of Section 332 reads:

[N]o 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 services.¹⁶

The vast weight of legal authority supports a narrow interpretation of the term “rates charged.”¹⁷ Moreover, the use of “rates” in Section 332 must be juxtaposed with the broader language in Section 201(b) of the FCA, which covers all “charges” and “practices.”¹⁸ Although Congress could have utilized alternate wording or even the broader language of Section 201(b), it chose to

¹⁴ See *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990).

¹⁵ See *Sullivan*, 494 U.S. at 89.

¹⁶ 47 U.S.C. § 332(c)(3)(A).

¹⁷ See Pet. at 17-21. See also *Brown v. Wash./Balt. Cellular*, 109 F. Supp. 2d 421, 423 (D. Md. 2000); *Phillips v. AT&T Wireless*, No. 4:04-cv-40240, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa July 29, 2004); *Carver Ranches Wash. Park, Inc. v. Nextel South Corp.*, No. 04-80607-CIV, slip op. (S.D. Fla. Sept. 23, 2004) (Appendix of Materials Submitted in Support of Petition for an Expedited Declaratory Ruling That Section 332 of the FCA Does Not Preempt State Law Protecting Consumers Against Unlawful Penalty Fees (“Pet. App.”), Ex. 23); *Zobrist v. Verizon Wireless*, No. 02-Cv-1000, slip op. (S.D. Ill. Dec. 3, 2002) (Pet. App., Ex. 24); *Kinkel v. Cingular Wireless, LLC*, No. 02-999, slip op. (S.D. Ill. Nov. 8, 2002) (Pet. App. Ex. 25); *Iowa v. U.S. Cellular Corp.*, No. 4-00-CV-90197, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa Aug. 7, 2000); *Cedar Rapids Cellular Tel., L.P. v. Miller*, No. C00-58, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa Sept. 15, 2000); *Esquivel v. Sw. Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996); *Pac. Bell Wireless, LLC v. Pub. Utils. Comm’n*, 140 Cal. App. 4th 718 (2006).

¹⁸ 47 U.S.C. § 201(b) (“Section 201(b)”).

narrowly construe the preemptive effect of Section 332 to “entry” or “rates charged.” It is against this backdrop which the Commission must construe the Industry’s sweeping request for preemption of state regulation of Penalty Fees.

Similarly, the Industry encourages the Commission to ignore Section 332’s reservation to the states of regulation of “other terms and conditions.”¹⁹ The courts have cautioned that the preemptive scope of the word “rate” cannot be read so broadly as to deprive the complementary phrase “other terms and conditions” of all meaning.²⁰

2. The Plain Meaning of “Rate” Requires an Exchange for a Good or Service – In this Case Mobile Service

Petitioners, all commentators in this proceeding, prior decisions of this Commission and courts agree – the “plain meaning” of “rate” requires that the price paid must be in exchange for a good, service or some other commodity. As defined by various dictionaries, a “rate” is “[a]n amount paid or charged for a good or service.”²¹ This fundamental precept – that the money paid by a consumer under the guise of a “rate” must be in exchange for some good or service – underlies the decisions of courts who have defined the scope of Section 332.²² This Commission has also emphasized that “a ‘rate’ has no significance without the element of service for which it applies.”²³ Petitioners have demonstrated that in the context of mobile telephone service, consumers pay a certain amount of money – set forth in the wireless providers’ rate plans – in

¹⁹ Comments of CTIA-The Wireless Association at 13. *See also* Opposition of Sprint Nextel Corporation at 13-16.

²⁰ *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1257 (11th Cir. 2006).

²¹ Black’s Law Dictionary (7th ed. 1999). *See also* Oxford English Dictionary (2d ed. 1989) (“[t]he amount of a charge or payment . . . having relation to some other amount or basis of calculation”); Merriam-Webster’s Online Dictionary, available at <http://www.merriam-webster.com/dictionary/rate> (last visited May 6, 2010) (“a charge per unit of a public-service commodity”).

²² *See, e.g.*, Pet. App., Ex. 15 at 5-6 (*Gellis* Nov. 5, 2007 Order); Pet. App., Ex. 16 at 3-5 (*Gellis* Mar. 18, 2009 Order). *See also* *Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 223 (1998) (“Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.”).

²³ *In re Matter of Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd 19898, 19907 (1999).

exchange for a certain allotment or usage of minutes to make mobile telephone calls.²⁴ It is these monthly access fees and overage charges that are “rates” as contemplated in Section 332.

The Industry’s argument against limiting the meaning of “rate” to transactions involving “units” of service is that the Industry offers data plans that include unlimited voice, text and data. But this is a red herring.²⁵ These “unlimited” offerings are still establishing a price in exchange for a quantity of mobile service. Thus, regardless of the number of minutes, bytes of data or number of text messages, be it one or unlimited, an amount of mobile services are being offered in exchange for an advertised price – and this price is what constitutes the “rates charged” under Section 332 of the FCA.

The Industry also argues that rates should be defined as the “amount[s] of charge or payment.”²⁶ But this definition, which relies on a dictionary reference source, omits the latter half of the definitional text: “Having relation to some other amount or basis of calculation.”²⁷ So not only does the Industry rely on half of the definition, its argument tries to equate any “charge” to a “rate.” This argument is completely untethered to the common meaning of the word “rate,” and thus, must also be rejected.

And contrary to the Industry’s suggestion, Petitioners nowhere conceded that “activation fees” fall within the scope of “rates.”²⁸ The determination of whether or not a fee is preempted rate regulation or not is an extremely fact-intensive question and the issue of activation fees is not before the Commission at this time. For the same reason, the Industry’s reliance on the D.C.

²⁴ See Pet. at 14-15.

²⁵ See Comments of Verizon Wireless at 12; Comments of AT&T Inc. at 16.

²⁶ See, e.g., Comments of Verizon Wireless at 9-10.

²⁷ See Oxford English Dictionary (2d ed. 1989).

²⁸ See, e.g., Comments of CTIA-The Wireless Association at 10-11; Opposition of Sprint Nextel Corporation at 4.

Circuit's opinion in *MCI* is inapposite.²⁹ In *MCI*, the court ruled that it was not unreasonable that charges for the cancellation or discontinuance of large service orders were included in the terms of a settlement agreement between AT&T and MCI.³⁰ The charges at issue in *MCI* were the costs of providing initial access to service, not punitive penalties incurred for late payment.³¹

Moreover, there is an obvious distinction between activation fees on the one hand and penalties for paying late on the other. Activation fees are charged and paid at the outset of service and are not being imposed as damages for allegedly breaching the terms and conditions of service.

3. The Wireless Providers' Penalty Fees Are Not in Exchange for CMRS Services

Implicitly recognizing that a "rate" must be in exchange for a "good or service," the Industry manufactures two post-hoc justifications for Penalty Fees and inappropriately labels them "services." *First*, the Industry suggests that late penalties are charges for extending credit to customers.³² *Second*, the Industry also argues that a reconnect penalty is a charge for "restoring normal operations" to a device that has been impaired due to nonpayment.³³

But the Industry's argument stretches to the breaking point. By expanding the "services" provided far beyond mobile services – to the provision of credit – the Industry seeks to expand the meaning of the word "rate" far beyond the intent of the FCA and the prior decisions of this Commission.

²⁹ See *MCI Telecomms. Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987). See also Comments of Verizon Wireless at 20-21.

³⁰ *MCI*, 822 F.2d at 86.

³¹ *Id.* at 93.

³² See Comments of Verizon Wireless at 11. See also Comments of AT&T Inc. at 12-15 (describing collection procedures); Comments of CTIA-The Wireless Association at 4 ("a late fee is a charge for the service of extending credit to the customer beyond the due date").

³³ See Comments of Verizon Wireless at 11.

For example, in *In re Matter of Sw. Bell Mobile Sys., Inc.*, the Commission recognized that states “may not prescribe the rate elements for CMRS or specify which among the *CMRS services provided* can be subject to charges by CMRS providers.”³⁴ Included in this statement is the recognition that the service provided must be related to mobile service.

To that end, this Commission defines, in relevant part, “Commercial mobile radio service” or “CMRS” as a “mobile service.”³⁵ Section 332 defines “commercial mobile service” as, in part, “any mobile service . . . that is provided for profit.”³⁶ Section 153 of the Act (cross-referenced in Section 332) defines “mobile service” as: “[A] radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.”³⁷ Each of these definitions returns to the fundamental underlying premise that the business the wireless carriers are in is providing wireless communication services, not financial services.

And so this is again another example of where the Industry’s argument fails. By expanding the definition of mobile services to include extending credit (or the removal of impairment on a wireless device), the Industry has moved far beyond the rates charged in exchange for mobile services and into the realm of other “terms and conditions” which are expressly permitted to be regulated by state law.

Indeed, statutory language in Section 332 includes the desired goal of “encourag[ing] competition” in the mobile services market, not other tangential services or industries.³⁸ To accept that “mobile services” include the provision of *any* service, e.g., the extension of credit,

³⁴ *In re Matter of Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd at 19907.

³⁵ 47 C.F.R. § 20.3 (2010).

³⁶ 47 U.S.C. § 332(d)(1).

³⁷ 47 U.S.C. § 153(27).

³⁸ 47 U.S.C. § 332(a)(3).

arbitraging, market-making, rendering legal advice or lobbying, would be at odds with the intent of the statutory scheme and render the meaning of “rate” limitless. The Industry would be limited only by its creativity in (post hoc) defining the “mobile service” it claims to be providing. The Industry’s attempt to limitlessly expand the scope of the term rate (and therefore preemption) should be rejected.

4. Reconnect Penalties Are Not in Exchange for Any Service

The Industry’s arguments regarding the reconnect penalty further underscore the overly-expansive interpretation of “mobile services” it proposes the Commission should adopt. The Industry argues that the reconnect penalties are imposed for “restoring normal operations of a wireless device that has been impaired due to nonpayment.”³⁹ This simply means a consumer has to pay an additional penalty for the wireless provider to stop impairing service to the device. A customer during this period already pays – *and continues to be charged* – a monthly access charge for the wireless service itself. So the reconnect penalty is clearly being charged to cease the punitive behavior – that is, to stop the carrier from impairing the outgoing calls. The Industry’s broad proposed scope of “mobile services” that it attaches to the term “rate” would cast a preemptive shadow over services unrelated to the actual provision of mobile services. This would provide an ever-expanding gulf which would denude “terms and conditions” of almost all consumer protection force.

B. The Industry’s Post Hoc Suggestion of Offering “Credit” as a Mobile Service Is Factually Unsupported

Although the Commission need not look beyond the “plain meaning” of Section 332 to find that preemption does not apply to the Penalty Fees, should it choose to, the facts available in the record to date greatly undermine the Industry’s arguments. In response to the Petition, the

³⁹ See Comments of Verizon Wireless at 11.

Industry has wholesale embraced the argument that it does provide a “service” in exchange for the late payment penalty – the extension of credit. That argument, however, is unsupported by the facts. *First*, the wireless carriers do not even try to comply with any of the multitude of federal or state statutes governing the provisioning of consumer credit, confirming that they themselves do not believe they are actually providing credit to wireless subscribers. *Second*, wireless providers cannot be providing credit for the simple reason that wireless subscribers pay in advance for their wireless services, even on “postpay” plans. The Industry’s arguments in these proceedings are unsupported by reality.

1. The Wireless Carriers Do Not Even Try to Comply with Laws Governing the Extension of Credit

The Industry’s claim that it is extending “credit” to customers is further undermined by the wireless providers’ complete failure to comply with any consumer credit protection statutes. Consumer credit is regulated by a complex set of statutes, regulations and commentary, including the Truth in Lending Act (“TILA”)⁴⁰ as implemented through Regulation Z. Without arguing the merits of exactly what type of credit transaction the late fees might be categorized as under TILA, at a minimum, if wireless providers were extending credit to customers as a part of their “mobile services,” they would be required to make disclosures “clearly and conspicuously . . . in writing, in a form that the consumer may keep.”⁴¹

TILA requires an initial disclosure statement with the “circumstances under which a finance charge will be imposed and an explanation of how it will be determined,” including any corresponding annual percentage rate; periodic statements where an account has a credit balance of more than one dollar; and delivery of the periodic statement at least twenty-one days prior to

⁴⁰ 15 U.S.C §§ 1601 *et seq.*

⁴¹ Regulation Z, 12 C.F.R. § 226.5(a)(1).

any financing charge.⁴² If the Industry was truly offering a consumer credit service, it fails to comply with any of TILA's disclosure mandates, further underscoring that even the wireless Industry does not believe that late penalties are an extension of credit.

Thus, the Industry's reliance on the Supreme Court's decision in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) is inapposite.⁴³ In *Catalano*, the Supreme Court ruled that a conspiracy to eliminate short-term trade credit formerly granted on beer purchases was *per se* illegal price fixing under section 1 of the Sherman Act.⁴⁴ As demonstrated above, given the wireless providers' failure to comply with TILA and other consumer law, what is at issue here is certainly not the extension of credit. But *Catalano* is an illusory comparison for other reasons. In *Catalano*, the commercial parties had specifically negotiated credit terms as a part of the agreements.⁴⁵ The Supreme Court accepted as true that prior to the unlawful agreement, "wholesalers had competed with each other with respect to trade credit, and the credit terms for individual retailers had varied substantially."⁴⁶ And that is the key difference between credit offered as a term in an agreement, as in *Catalano*, versus purported credit as an "other term and condition." The late fees here are nothing more than a penalty for breach of contract, not a method of alternate performance. They are not a term contained in an agreement that is freely negotiated. And as demonstrated by Dr. Braunstein, an economist and Professor at the University of California at Berkeley, no competition on credit terms exists in the wireless

⁴² Regulation Z, 12 C.F.R. §§ 226.5(2)(i)-(ii), 226.6.

⁴³ *See, e.g.*, Comments of Verizon Wireless at 15.

⁴⁴ *Catalano*, 446 U.S. at 643-44.

⁴⁵ *Id.* at 644.

⁴⁶ *Id.* at 644-45.

industry.⁴⁷ And so, although under some circumstances credit terms may be considered part of the price, this is not the case here.

2. Late Penalties Cannot Be in Exchange for Credit When Consumers Are Charged and Pay in Advance of Service

The Industry's arguments that late fee penalties are in exchange for credit also fail because the purported credit here is not being extended for more than a matter of days. It is standard in the wireless industry for the CMRS providers to bill the customer its access fees a month in advance of receiving the wireless service.⁴⁸ Late fees are assessed within days of the "due date" on the consumer's wireless bill.⁴⁹ Thus, "credit" is not being extended at all, as the customer has not consumed the full month of services for which he is being charged. Instead, the wireless companies are just not fully recouping in advance their fees for wireless service.

Similarly, the Industry wrongly suggests that late fees "are often paid in exchange for future benefits: additional months of service, despite past defaults."⁵⁰ But this argument overlooks the fact that subscribers must also continue to pay monthly access fees *in addition to* any late or reconnect fees. As the court noted in *Gellis*, where a fee is in addition to monthly fees, this strongly suggests that it is a penalty, and not a charge for service.⁵¹

Finally, there is no evidence that consumers are actually presented with a choice at the outset of the transaction to pay on credit terms, such as paying only a minimum balance. Nor are consumers informed as to how many days the customer has to make payments before the "credit

⁴⁷ See Declaration of Yale M. Braunstein in Support of Petitioners' Response to Comments ("Braunstein Decl."), ¶¶ 11-22, filed concurrently herewith; see also section II.C, *infra*.

⁴⁸ See, e.g., Comments of Verizon Wireless at 14 ("In a postpay service plan, Verizon Wireless and most carriers bill the monthly access charges for the next billing period in advance and do not provide that part of wireless service on credit.").

⁴⁹ Pet. at 4-7.

⁵⁰ Comments of CTIA-The Wireless Association at 10. See also Opposition of Sprint Nextel Corporation at 4 ("[late] fees are paid so the delinquent customer can continue to receive service despite past defaults").

⁵¹ Pet. App., Ex. 16 at 4 (*Gellis* Mar. 18, 2009 Order).

terms” being offered will be terminated by the carrier. Rather, the Industry has only internal policies dictating unilaterally when to terminate service due to late payment.

C. Section 332’s Statutory Intent of Encouraging Competition Does Not Support a Conclusion that Penalty Fees Are “Rates”

If the plain meaning of a statute is unclear, canons of statutory interpretation allow the courts and agencies to look at the Congressional intent in passing such a statute.⁵² Here, Congress intended to “encourage competition” in the wireless market to benefit consumer welfare.⁵³ But interpreting the word “rate” to include Penalty Fees would hurt, not benefit, consumer welfare. This is because Penalty Fees are not presented as part of a consumer’s purchasing decision and the Industry does not appear to compete against other firms based on late payment and reconnect penalty fees.

As Dr. Braunstein demonstrates, firms do not advertise or market the Penalty Fees to consumers as a part of the services offered at the point of sale. Thus, consumers do not meaningfully and knowingly differentiate between wireless carriers based on these Penalty Fees when making a purchase decision. And when price comparisons are done in the wireless industry, they do not include comparing Penalty Fees. In addition, econometric studies further demonstrate that analysis of the economics of industry participants do not include these penalties when examining the demand for mobile services (voice, messaging, and data), industry structure, investment strategy, productivity, and substitution between fixed and mobile telephony. From this and other economic evidence, it is clear that late payment and reconnect penalties should not be considered “rates” charged, but instead are properly included within “other terms and

⁵² See *Sullivan*, 494 U.S. at 89 (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

⁵³ 47 U.S.C. § 332(a)(3).

conditions.” A contrary conclusion would be inconsistent with the goals of furthering consumer welfare through rate competition.⁵⁴

1. Consumers Are Unaware of the Amount of Penalty Fees, Leading to Lack of Industry Competition Based on Penalty Fees

For markets to function efficiently, consumers need to understand what they are purchasing and the prices they are being asked to pay. Consumers are not aware of the amount of Penalty Fees, as wireless carriers seek to keep this information from them. Wireless providers do not include Penalty fees when advertising pricing plans to consumers. For example, although Verizon Wireless’s pricing plans detail the monthly access fees to consumers, as well as the per-minute overage costs, consumers are not presented with a schedule of charges such as late-payment fees or service reconnection fees.⁵⁵ The same is true for AT&T Mobility’s pricing plans: although the monthly access costs for consumers are clear, the fees for late payment and service reconnection are not easily found and cannot be assumed to be part of the consumer’s decision making process.⁵⁶ The wireless providers’ advertising demonstrates a clear distinction between two categories. On the one hand, there are rates associated with the components of wireless service, such as monthly access fees and overage charges, which are promoted to consumers to influence their decisions about which wireless carrier to choose and which services to purchase. On the other hand, there are “other terms and conditions,” including late and reconnect fees which are not levied on or even clearly disclosed to consumers as they make their purchase decisions.

The objective of the wireless Industry in publishing its rate plans is to identify a unit of service that can carry a low price, avoiding the need to explain credit terms. But by including

⁵⁴ Braunstein Decl., ¶ 7.

⁵⁵ Braunstein Decl., ¶¶ 11-13.

⁵⁶ Braunstein Decl., ¶¶ 15-18.

certain fees, such as Penalty Fees, in the “other terms and conditions,” it contributes to the lack of complete information. And, despite any claims to the contrary,⁵⁷ it is in the carriers’ interest to maintain the condition where detailed information is not readily available. This information asymmetry is a well-known phenomenon of modern markets: “Some of the most serious market performance problems in the contemporary American economy are due more to inadequate knowledge on the consumer’s part than to structural imperfections of a traditional sort.”⁵⁸

Given this information asymmetry between consumers and the wireless carriers when it comes to Penalty Fees, and resulting absence of competition based on Penalty Fees, consumer welfare will be benefitted by finding late and reconnect fees are “terms and conditions” rather than “rates charged.”

2. Telecommunication Providers Do Not Include Penalty Fees When Comparing Prices

Comparisons made in other geographic and related markets confirm that wireless providers do not include Penalty Fees when competing on price.

For example, voice telecommunications services, both fixed and mobile, are provided in virtually every country in the world. There is a long tradition of comparing the prices for these services across countries. Originally, when there was commonly a single monopoly telephone carrier in each country, that carrier’s rates were used in the comparisons. As competition emerged, the comparison either focused on the prices of a single dominant carrier or on a weighted average of rates from several national or local carriers. The purpose behind these

⁵⁷ See, e.g., Comments of Verizon Wireless at 14-15.

⁵⁸ Braunstein Decl., ¶ 21 (citing F. M. Scherer, “Consumer Information Programs” in *Industrial Market Structure and Economic Performance* 417ff (Rand McNally, 1970)).

comparisons was to develop a reasonable approach to allow the comparison of services available to consumers in different countries.⁵⁹

A review of these international telecommunications plans for both fixed and mobile services demonstrates that while there is up-front competition for service initiation fees, monthly service fees, calls, messages and data usage, no such competition exists for late payment fees or service reconnection fees.⁶⁰ That is – Penalty Fees are not included in these pricing comparisons. This further underscores that neither consumers nor the Industry believes (i) Penalty Fees are “rates;” or (ii) the Industry competes on Penalty Fees as a pricing component.

Similarly, comparative shopping information from the cable industry confirms that wireless providers, its competitors and industry experts do not consider Penalty Fees as “rates.” Over the past decade, there has been an increase in inter-modal competition in communications. This means that cable television operators have introduced both broadband services and traditional voice telephony. And wireline local telephone companies have, vice versa, offered broadband services and wired video services. These services are available on a stand-alone basis and in various “bundles” of two or three services. In some cases, the bundles also include mobile telephone services.⁶¹ The introduction of these competitive services, both individually and in bundles, has created a need for comparative shopping information. Market research firms obtain detailed information on the wide variety of offerings and their prices, using surveys, publicly-available information (such as company web sites), and reviews of monthly bills. These comparisons consistently examine the monthly fees – such as access fees or the purchase of

⁵⁹ Braunstein Decl., ¶ 23.

⁶⁰ Braunstein Decl., ¶¶ 24-27.

⁶¹ Braunstein Decl., ¶ 28.

specific services such as ring tones, text messaging, etc. – and do not include late payment or other similar fees.⁶² This type of comparative information between competitive industries further confirms that Penalty Fees are not considered by industry participants or consumers as “rates” for the purpose of pricing competition.

3. Econometric Analyses of the Wireless Industry Do Not Consider Penalty Fees a Part of the Industry’s “Rates”

Industry practice further confirms that Penalty Fees are not considered part of the Industry’s “rates” and are simply not examined when economists are performing pricing comparisons. Econometric studies of the wireless industry use standard pricing, including monthly fees, per-minute or per-message fees, as their measure of prices or rates.⁶³ The vast preponderance of these studies *exclude* late and reconnect penalties. This industry practice further confirms that Penalty Fees are not considered a part of the “rates” charged for wireless service, but instead are “other terms and conditions.”

D. The Commission Should Not Broadly Interpret “Rates” to Preempt Any Law that Impacts How Carriers Recover the Costs of Doing Business

The term “rates charged” cannot be interpreted so broadly that state regulation would be preempted if it “impact[s] how carriers recover the costs of doing business.”⁶⁴ Essentially, this is all the wireless carriers argue. Dr. Harris, on behalf of Verizon Wireless, dwells on the “economics” of late penalties. But his discussion of the costs incurred by the wireless providers (in pursuing collection procedures against customers), is nothing more than the recognition that there are costs associated with doing business.⁶⁵ States are not prohibited from regulating penalties merely because there may be some impact on the carriers’ costs of doing business. Nor

⁶² Braunstein Decl., ¶¶ 29-31.

⁶³ Braunstein Decl., ¶¶ 32-36.

⁶⁴ *NASUCA*, 457 F.3d at 1257.

⁶⁵ Declaration of Robert G. Harris at 20-24. *See also* Comments of AT&T Inc. at 13-14.

is a state law preempted merely because it “impacts the rates that a wireless service provider charges its customers.”⁶⁶

In fact, as Petitioners argued in their opening comments, the wireless providers are free to charge up-front rates in exchange for mobile service in the amount they choose, when recouping business expenses and seeking to return a profit.⁶⁷ But what the wireless providers cannot do, however, is bury punitive charges in the terms and conditions of boilerplate contracts to create illegal profit centers. Again, these Penalty Fees are charges that customers do not even consider when evaluating the cost of wireless service, and charges on which the wireless providers do not compete.

For this reason, the Industry’s reliance on prepaid plans is irrelevant.⁶⁸ Whether or not the Industry may transfer certain purported costs of doing business into an up-front term of their agreements with consumers, on which the carriers would compete on price or otherwise, is not the issue. Instead, Penalty Fees are hidden provisions, buried deep within “other terms and conditions,” which consumers do not know about, do not consider in their purchasing decisions and on which market forces do not efficiently act.

The Industry’s argument that regulation of Penalty Fees will result in an increase in the “rates” paid by consumers is purely speculative. The evidence likely leads to the opposite result. There has been an overall trend toward lower prices in the cellular mobile telephone industry, not higher. This trend also applies to declines in average revenues per user. As a result there is no evidence that by allowing state consumer protection statutes to apply to fees for late payment

⁶⁶ *NASUCA*, 457 F.3d at 1256.

⁶⁷ Pet. at 3.

⁶⁸ *See, e.g.*, Comments of Verizon Wireless at 28; Declaration of Robert G. Harris at 18-20. *See also* Comments of AT&T Inc. at 18-20.

penalties or for service reconnection this would somehow cause higher rates charged to consumers.⁶⁹

E. Congress Chose Not to Adopt the Expansive Definition of “Rate” Used in Some State Regulatory Codes

The Industry also suggests that in 1993 when Section 332 was added to the FCA certain state utility code provisions defined “rate” to include any type of charge, and then without any legal support leap to the conclusion that Congress must have intended to incorporate these broad definitions into the FCA.⁷⁰ For example, Verizon Wireless states that simply because the 1993 amendment divested the states of regulatory power over rates, the precise scope of preemption must be coextensive with scope of the state’s regulatory powers.⁷¹ Verizon Wireless cites only to its paid economic expert as authority for this statutory construction argument, but cites to no legislative history that suggests that Congress intended to divest the states of all of its regulatory power over any type of fee the Industry imposes.⁷² Similarly, T-Mobile suggests, without any supporting authority, that the mere fact that Congress used the word “rate” in Section 332 means that Congress intended to tacitly adopt the expansive definition used in some state utility statutes.⁷³

There is no doubt that prior to 1993, certain states wanted to regulate all aspects of the Industry’s business and defined “rate” broadly in order to do so. But it does not follow that Congress wanted divest the states of the entirety of this regulatory power. In fact, Section 332 itself shows that the opposite is true, as it expressly leaves the states some of its regulatory power. Whereas, prior to 1993 the states were able to regulate, for example: “[E]very . . .

⁶⁹ Braunstein Decl., ¶ 22.

⁷⁰ See Comments of Verizon Wireless at 16-19; Comments of T-Mobile USA, Inc. at 7-9.

⁷¹ See Comments of Verizon Wireless at 16.

⁷² *Id.*

⁷³ See Comments of T-Mobile USA, Inc. at 6-7.

charge . . . or other compensation of any public utility,”⁷⁴ in the 1993 amendment, Congress separated rates, which states could no longer regulate, from “other terms and conditions” which states may still regulate. Moreover, Congress’ choice not to incorporate into the 1993 amendment to the FCA one of the many available broad definitions of the term “rate” used in state utility codes shows the opposite of what the carriers suggest: that Congress intended the term “rate” to have its ordinary, plain meaning and not the expansive meaning certain states expressly gave the term in their utility codes.⁷⁵ Tellingly, in more recent years, state public utilities have rejected the wireless carriers assertions that the regulation of late penalties involve the imposition of rates.⁷⁶

Nor are the carriers correct in stating that the expansive definition of rate used by some state regulatory codes comports with the “common understanding” of the word.⁷⁷ Compare the Black’s Law Dictionary definition of “rate” which is “an amount paid or charged for a good or service,”⁷⁸ with Chapter 220 of the Illinois Public Utilities Act which states that a rate includes:

[E]very individual or joint rate, fare, toll, charge rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or other compensation of any public utility or any schedule or tariff thereof,

⁷⁴ See Comments of Verizon Wireless at 16 n.50 (quoting 220 Ill. Comp. Stat. 5/3-116).

⁷⁵ In the analogous arena of ETFs, the National Association of Regulatory Utility Commissioners (“NARUC”) strongly urged the Commission to find that ETFs were not rates, even though these state regulators would have had the power to regulate ETFs under the expansive definitions of rates used in the old state regulatory regime. See Appendix of Materials Submitted in Support of Petitioners’ Response to Comments, Ex. 29. The NARUC also noted that former Commission Chairman Kevin Martin told a Senate panel that he did not think the Commission would find ETFs rates. *Id.* at 3 n.6. ETFs, like late fees and reconnect fees would fit within the expansive definitions of “rates” used by some states under the old regulatory regime. It thus follows that the state utility commissioners and former Chairman Martin would agree that late and reconnect fees are not necessarily rates just because states used to regulate them. Because the old state utility code definitions that Congress did not adopt are irrelevant to the analysis, the question becomes whether penalty fees are “amounts paid for a good or service.” As discussed in section II.A, *supra*, they are not.

⁷⁶ See Comments of the California Public Utilities Commission and the People of the State of California at 2 (citing to CPUC docket numbers D.04-10-013 and D.04-12-058).

⁷⁷ See Comments of Verizon Wireless at 16.

⁷⁸ See Black’s Law Dictionary (7th ed. 1999).

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