

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Petition for Declaratory Ruling Regarding the) WT Docket No. 10-42
Interpretation of Section 332 (c)(3)(A) of the)
Communications Act, as Amended as Applied)
to Fees Charged for Late Payments)

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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COMMENTS OF CTIA—THE WIRELESS ASSOCIATION®

CTIA—The Wireless Association®¹ submits these comments in response to the Public Notice of February 19, 2010, concerning whether late-payment and reactivation fees are “rates” within the preemptive scope of Section 332(c)(3)(A).²

I. INTRODUCTION AND SUMMARY.

As discussed below, late-payment and reactivation fees qualify as “rates” just as much as initial activation fees do, and their substantive reasonableness is properly subject to the Federal Communications Commission’s (“FCC” or “Commission”) exclusive jurisdiction, not to a patchwork of 50 different schemes enforced by state courts and lay juries.

Before we address that question, however, it is important to clarify what is not at issue here. As an initial matter, no one is seeking to insulate the amount of the late-payment and

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR, and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

² See Public Notice, *Wireless Telecommunications Bureau Seeks Comments 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*, DA 10-264 (Feb. 19, 2010); Opening Comments of California Consumers Challenging Commercial Mobile Service Providers’ Practice of Charging Unlawful Penalty Fees Under California State Consumer Protection Statutes, WT Docket No. 10-42 (filed Jan. 14, 2010) (“Pet. Comments”).

reactivation fees from review. The question instead is *who* will conduct that review. No matter how this proceeding is resolved, consumers will remain free to bring complaints about unjust or unreasonable rates under Sections 201 and 202 of the Communications Act of 1934, as amended, which apply in full to wireless carriers.

The sole question, then, is whether the Commission has exclusive jurisdiction over the substantive reasonableness of these rates, or whether it shares that jurisdiction with each of 50 state legal systems. The answer to that question is clear on the face of the statute. By its plain terms, Section 332(c)(3) preempts state-level regulation of all price terms in wireless service contracts, whether assessed on a monthly or one-time basis, and whether assessed before or after the delivery of service. The category of preempted price terms thus includes the late fees and reactivation fees that subscribers agree to pay as part of their overall rate plan for wireless services. Petitioners identify no basis in the statute or in common sense to distinguish, for these purposes, between (1) the rates applicable to customers who honor their commitment to pay their bills on time and (2) the rates applicable to customers who violate those commitments and thus temporarily obtain service for free. Ultimately, Section 332(c)(3) simply places all these rates in the same jurisdictional position as the corresponding rates charged by wireline long-distance carriers: subject to the exclusive jurisdiction of this Commission.

Petitioners' contrary interpretation would contradict not only the plain language of Section 332(c)(3), but also the Commission's broader policy goals for the wireless industry. First, it would discourage carriers from offering nationwide rate plans by subjecting them to inconsistent state-by-state restrictions on the key rate elements of their service plans. Worse, it would give carriers incentives to recover the costs of nonpayment from end users generally, in the form of higher across-the-board rates (which are unquestionably exempt from state

oversight), rather than from delinquent customers in particular. That outcome would harm the majority of consumers while rewarding the minority who violate their contractual commitments.

The threat of those policy harms could hardly come at a worse time. The Commission's own *National Broadband Plan* underscores the urgent need to encourage greater deployment and adoption of mobile broadband. Petitioners' position would subvert that objective by raising the prices that all consumers would pay for popular nationwide wireless plans that bundle a variety of services, including both the wireless voice services at issue here and wireless broadband Internet access. Accordingly, the Commission should deny the Petition.

DISCUSSION

II. SECTION 332(C)(3)(A) PREEMPTS STATE-LEVEL REGULATION OF ALL WIRELESS RATES, INCLUDING LATE FEES AND REACTIVATION FEES.

A. The Term "Rates" Encompasses All Price Terms in a Contract, Including Those That Apply in the Event of a Contractual Default

In 1993, Congress amended the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry." *Connecticut Dep't of Pub. Util. v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996). For present purposes, this amendment contained two key provisions. First, it amended Section 2(b) to give the Commission plenary authority over all aspects of wireless service, whether jurisdictionally "intrastate" or "interstate." *See* 47 U.S.C. § 152(b). Second, it preempted much, but not all, state regulation of wireless services by adding Section 332(c)(3)(A), which provides: "[N]o State or local government shall have any authority to regulate the entry of or *the rates charged by* any commercial mobile service . . . , except that this paragraph shall not prohibit a State from regulating the *other* terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A) (emphasis added). By its terms, this provision preempts state-level intervention in the *price terms* of wireless service, and allows the

states to regulate only the *non*-price-related “terms and conditions” of service.³ As discussed below, this includes not just rates, but also rate *structures*.

The only question before the Commission is whether the contractual late fees and reactivation fees at issue here are price terms within the preemptive scope of this provision. They plainly are. Congress intentionally phrased Section 332(c)(3)(A) broadly to encompass *all* rates, whether monthly or one-time, and whether bundled or unbundled. For example, Section 332 bars states from regulating not only standard monthly service charges—what petitioners call a “certain allotment or usage of minutes to make mobile telephone calls” or “‘bytes’ of data” (Pet. Comments at 14)—but also the various one-time charges that carriers impose as well, such as initial activation fees and rates for directory assistance.⁴ Late payment and reactivation fees are just as clearly “rates,” and thus fall outside the reach of state regulation. To qualify as a “rate,” a payment need only “hav[e] relation to some other amount or basis of calculation,”⁵ and the late payment charges at issue here plainly meet that standard. These charges are simply the rate that delinquent consumers pay for the privilege of having received wireless service for free for some period of time. Thus, a late fee is a charge for the service of extending credit to the customer beyond the due date. As the D.C. Circuit and other courts have held, *all* price terms a

³ See generally *Cellco Partnership d/b/a Verizon Wireless v. Hatch*, 431 F.3d 1077, 1083 (8th Cir. 2005) (the “rate” clause of Section 332 should be construed to encompass all “regulatory measures . . . that directly impact the rates charged by providers” in order “[t]o avoid subsuming the regulation of rates within the governance of ‘terms and conditions’”). Section 332 preempts not only prescriptive state regulation, but also any state-law cause of action that challenges the substantive reasonableness of wireless rates and seeks their invalidation. See Memorandum Opinion and Order, *Wireless Consumers’ Alliance, Inc.*, 15 FCC Rcd 17021, 17027, ¶ 12 (2000) (“[J]udicial action can constitute state regulatory action for purposes of Section 332”). Petitioners do not contend otherwise.

⁴ See, e.g., *Gilmore v. Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 924 (N.D. Ill, 2001) (preempting state regulation of wireless carrier’s monthly “Corporate Account Administration Fee” as unambiguously “a rate issue.”).

⁵ *NASUCA v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006) (quotation marks omitted) (quoting Oxford English Dictionary (2d ed. 1989)).

carrier imposes in connection with a service fall within the plain meaning of the term “rates,” including even charges triggered by a customer’s contractual defaults.⁶

The Commission removed any possible doubt on this point more than ten years ago, when it clarified that Section 332(c)(3) preempts state-level regulation not only of rate *levels*, but also of rate *structures*:

[W]e find that the term ‘rates charged’ in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.⁷

Here, the state-law causes of action that petitioners seek to push outside the scope of Section 332 are preempted because they challenge *both* the rate levels *and* the rate structures chosen by wireless carriers.

First, petitioners explicitly challenge the *amount* of the carriers’ late fees and reactivation rates. While they stress that they “are not claiming [that wireless] providers may not recoup *legally cognizable damages* caused by customers who pay late[,]” they nonetheless seek a regime in which state courts and lay juries, rather than the Commission, “make any determination as to a permissible amount of a fee that a wireless provider may charge due to a customer paying late.”

⁶ *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80, 86 (D.C. Cir. 1987) (because “[a] ‘rate’ is a charge to a customer to receive service,” the “Commission reasonably found that [charges triggered by a contractual breach] are ‘rates’”) (citing *Black’s Law Dictionary*); *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999) (“The late payment charge at issue here is part of the overall rate structure for paging services; not merely a ‘term and condition’ of the parties’ service contract.”).

⁷ Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19907 ¶ 20 (1999). See also *Wireless Consumers Alliance*, 15 FCC Rcd at 17028, ¶ 13 (“Section 332(c)(3)(A) bars state regulation of . . . the rates or rate structures of CMRS providers.”); see also *Hatch*, 431 F.3d at 1081 (“The Commission . . . has ruled 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[.]”).

Pet. Comments at 3. Under their proposed approach, courts and juries would decide whether various wireless providers are “charging penalty fees far *exceeding the cost* caused by customers who pay late.” *Id.* (emphasis added). But this is just another way of saying that courts and juries in each of 50 states would determine whether a wireless carrier’s rate levels are “just and reasonable.” And that is the very inquiry that, under Sections 201, 202, and 332(c)(3), Congress assigned to the exclusive jurisdiction of this Commission.

Second, petitioners also plainly challenge the carriers’ underlying *rate structure* decisions as well as their rate levels. As an initial matter, Section 332 would indisputably preempt any state-level interference with a carrier’s decision to address the costs and risks of nonpayment by requiring *all* subscribers (or at least all subscribers in any state that regulates late fees) to absorb those costs and risks in the form of higher monthly rates. Petitioners’ challenge here, therefore, necessarily focuses on any carrier’s decision to address the same concerns in a more targeted and efficient way by targeting late-payment surcharges to the *causers* of these costs and risks: delinquent subscribers. D.C. Circuit precedent confirms that these are quintessential *rate* decisions—and thus compels an appropriately inclusive interpretation of the term “rates” to encompass all price terms associated with a service, including those triggered when subscribers default on their contractual commitments.

In particular, in *MCI Telecommunications Corp.*, the D.C. Circuit rejected a customer’s argument that certain contractual “rate” provisions encompassed only the standard rates AT&T charged for its private line services and not “cancellation and discontinuance charges.” 822 F.2d at 86. The court explained that the defaulting customer’s proposed narrow construction of “rates” would contradict the plain meaning of the term: “a charge to a customer to receive service.” *Id.* (citing Black’s Law Dictionary). And the court added that “rates” include not just

standard price terms for customers that *satisfy* their contractual commitments, but also additional price terms for customers that *default* on those commitments:

These acts result in customers' not paying rates sufficient to cover the cost of filling the orders and often subject AT&T to additional costs while facilities lie idle. In the past, AT&T recovered these costs by raising its general rates for private-line service, thereby spreading the costs among all ratepayers. [These] charges are designed to *unbundle* these discrete costs and impose them *directly on the customers who caused AT&T to incur these costs*. *This adjustment in billing does not mean that these cost items are not part of the charge to the customer to receive interconnection service*. We therefore conclude that the Commission reasonably found that [these] charges are 'rates' within the meaning of the Agreement.

Id. (emphasis added). That reasoning undermines petitioners' core submission here: that the term "rate" should be construed to encompass only price terms applicable to all consumers who take service, but not those applicable to the subset of consumers who violate their contractual obligations.

In other contexts as well, the Commission and courts have rejected proposals to assign radically different legal regimes to the price terms applicable to consumers generally and those applicable specifically to delinquent consumers. In *Kiefer*, for example, the court based its conclusion that a "late payment charge" was "part of the overall rate structure" and "not merely a 'term and condition' of the parties' service contract" on the following observation, similar to that made in *MCI*:

Plaintiff's argument ignores the fact that a service provider's overall rate structure can take several forms; *i.e.*, 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. Defendant chose the latter of these two options to be included in its overall rate structure.

Kiefer, 50 F. Supp. 2d at 685. Petitioners seek to distinguish *Kiefer* on the ground that the court there concluded that "late payment charges" were "part of the overall rate structure" for purposes of substantive FCC regulation under Section 201(b) rather than for purposes of federal

preemption under Section 332(c)(3). Pet. Comments at 20-21. But that is a distinction without a difference. *Kiefer* is instructive not because it involved Section 332 (it did not), but because it involved the *same economic fallacy* that leads petitioners here to disagree with the Kiefer court's conclusion. Like the plaintiff in *Kiefer*, petitioners argue that "late payment charges" are somehow *not* "part of the overall rate structure" and thus fall outside the scope of provisions that address rate regulation. The court's rationale for rejecting that position is every bit as persuasive in this context as in that one.

Any other outcome would simply be nonsensical, as the Supreme Court indicated in *Smiley v. Citibank*, 517 U.S. 735 (1996)—a case that petitioners criticize but do not attempt to distinguish (Pet. Comments 23-24). In *Smiley*, the Court upheld a federal agency's preemption of certain state efforts to regulate the late fees that credit card companies impose on their card-holders. A delinquent card-holder had argued that the relevant preemption provision barred states only from regulating interest charges "expressed as functions of time and amount owing," and thus not separate late fees. *Smiley*, 517 U.S. at 745. The Court rejected this argument on the ground that

[i]t would be surprising to find such a requirement in the Act, if only because *it would be so pointless*. Any flat charge may, of course, readily be converted to a percentage charge. . . . And there is no apparent reason why home-state-approved percentage charges should be permissible but home-state-approved flat charges unlawful.

Smiley, 517 U.S. at 745-46 (emphasis added).

Although *Smiley* involved a different statutory scheme with different language, the Court's logic applies in this context just as forcefully. It would have been economically "pointless" for Congress to have *permitted* the states to restrict "flat charges" for, say, reactivation of a delinquent account while *forbidding* the states (as it indisputably did) to restrict

a carrier’s decision to “convert” such flat charges into higher monthly charges for all subscribers to address the same underlying problem—delinquency—less efficiently and fairly. And given that late payment charges fall within the plain language of the term “rates” in the first place, it would be improper to attribute to Congress any countertextual intent to enact any such “pointless” distinction in the scope of this preemption provision.⁸

B. Petitioners’ Contrary Position Is Countertextual and Illogical.

Relying on an unpublished district court order in *Gellis v. Verizon Communications, Inc.*, No. 07-3679, 2007 WL 7044762 at *3-4 (Nov. 5, 2007), petitioners suggest that the term “rate” has a narrower meaning than the term “charge” and is limited to the standard monthly fees charged to customers who pay their bills on time. Pet. Comments at 13. But neither the scant reasoning in that unpublished order nor petitioners’ singular reliance on it can withstand scrutiny. Both the *Gellis* order and petitioners try to squeeze legal significance from the fact that Section 201(b) of the Communications Act of 1934 requires a carrier’s “charges” to be “just and reasonable,” whereas Section 332(c)(3) speaks to a carrier’s “rates.” From this difference in language petitioners would infer that the latter term must be narrower than the former. *See id.* at 20. This is untenable. There is no reason to infer that Congress’s use of those two terms in these two provisions, enacted decades apart and in different titles of the Act, meant that Congress wished to give them different meanings—or, in particular, to give the term “rate” an interpretation far narrower than its plain meaning.

⁸ Petitioners cite post-*Smiley* developments in the credit card industry as supposed evidence of the putative consumer-welfare concerns that can arise in the absence of adequate regulatory oversight of late-payment fees. Pet. Comments at 23-24. But that argument simply confuses two separate issues: what rules should apply to late fees, as distinguished from who should write and enforce such rules (the Commission or 50 different states). Again, Congress has spoken to this issue, by expressing a clear preference for national oversight of wireless rates and rate structures.

Petitioners also suggest (*e.g.*, *id.* at 16-17) that the term “rate” encompasses only what consumers pay in exchange for discrete *future* benefits associated with a service, rather than what they pay for those benefits *retrospectively* if they do not pay on time. But that construction is both substantively implausible and largely irrelevant. First, it is implausible because, as discussed, the preemptive scope of Section 332 “include[s] both rate levels and rate structures for CMRS,” *Southwestern Bell Mobile Systems*, 14 FCC Rcd at 19907 ¶ 20, and the state law claims at issue here challenge both the rate levels *and* the rate structure of wireless service. Again, to qualify as a “rate,” a payment need only “hav[e] relation to some other amount or basis of calculation,” *NASUCA*, 457 F.3d at 1254 (quotation marks omitted), and the late payment charges at issue here plainly meet that standard.

Petitioners’ apparent distinction between prospective and retrospective payments is also largely *irrelevant* because, in fact, the late fees at issue here are often paid in exchange for future benefits: additional months of service, despite past defaults. This is as true of monthly late-payment surcharges as it is of the “reactivation” fees that petitioners also wish to subject to state-level regulation. Further, consumers often pay after-the-fact for costs incurred in roaming, text messaging, and more, and these expenses clearly are part of the rate. There is also no discernible distinction for these purposes between *reactivation* fees paid by delinquent subscribers and the *initial activation* fees paid by all subscribers. Petitioners nowhere face up to that fact, but it is fatal to their position, since initial activation fees plainly fall within the preemptive scope of Section 332. Indeed, although it has not yet addressed the issue under

Section 332, the Commission has confirmed that activation fees are a component of wireless carriers' rate plans.⁹

In a similar vein, plaintiffs argue that Section 332 should be read to exclude late fees and reactivation fees on the ground that they are “not up-front pricing terms that consumers are likely to see and compare to other wireless providers at the beginning of the customer relationship,” and “providers do not market [them] as a service or a distinguishing feature.” Pet. Comments at 22. Whether or not those empirical claims are true, they are utterly irrelevant to the classification of these price terms as “rates.” Plaintiffs could make essentially the same argument for a limitless variety of other price terms, such as charges for directory assistance, monthly overages, text messages, or international roaming fees, but those are all rates as well. As such, Section 332 insulates them all from state regulation and commits them instead to the exclusive jurisdiction of this Commission.

Petitioners further suggest that if the term “rates” is construed to encompass the price terms applicable to contractual defaults, it would somehow collapse the statutory distinction between rate terms and the “other terms and conditions” of wireless service, on the theory that “any legal claim that results in an increased obligation for [wireless providers] could theoretically increase rates.”¹⁰ That makes no sense. Congress and the Commission have drawn a highly pragmatic, easily implemented line between two types of state-law challenges to carrier practices: those that directly challenge the substance of either the “rate levels” or the “rate

⁹ See, e.g., First Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8868 ¶ 70 (1995) (noting activation “fees” may be part of “cellular prices”); Report and Order, *Petition of California and the Pub. Utilities Comm’n to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, 7540 ¶ 122 (1995) (“*California Petition*”) (referring to activation fees in the context of cellular prices).

¹⁰ Pet. Comments at 17 (quoting *Brown v. Washington/Baltimore Cellular*, 109 F. Supp. 2d 421, 423 (D. Md. 2000)).

structures” of wireless service, and those that do not. *Southwestern Bell Mobile Systems*, 14 FCC Rcd at 19907 ¶ 20. State-law challenges in the first category, such as these, are categorically preempted. Enforcing that principle by its terms does not somehow imperil “any legal claim that results in an increased obligation for” wireless carriers (Pet. Comments at 17) if, unlike the claims at issue here, the claim does *not* directly challenge the substantive reasonableness of rate levels or rate structures. That was the case, for example, in *NASUCA*, where the Eleventh Circuit rejected Section 332 preemption of state line item billing rules, because those rules addressed only a question of billing *format* rather than the substantive reasonableness of rate levels or rate structures. In the end, it is *petitioners* that are proposing an inherently unstable dichotomy that courts and the Commission have rejected in a broad variety of contexts: a dichotomy between price terms applicable to all subscribers (preempted) and economically substitutable price terms applicable only to delinquent subscribers (which they argue are not preempted).

Finally, petitioners claim that, in *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), the Supreme Court “cautioned” courts and agencies “not to label something a ‘rate’ in a vacuum.” Pet. Comments at 17. The Court cautioned no such thing, and *Central Office Telephone* has no discernible relevance to the issue presented here. In that case, the Court held that the “filed tariff doctrine” prohibits contractual claims about “inadequate service” *as well as* claims about “rates,” because otherwise plaintiffs “could defeat the broad purpose” of the doctrine “by the simple expedient of providing an additional benefit at no additional charge.”¹¹ That is what the Court meant when it observed that “[r]ates . . . do not exist in isolation” and “have meaning only when one knows the services to which they are attached.”

¹¹ 524 U.S. at 223 (quoting *Competitive Telecommunications Ass’n v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993)).

Id. And the Commission need not even construe the preemptive scope of Section 332(c)(3) as broadly as the Supreme Court construed the preclusive scope of the filed tariff doctrine in order to resolve the question presented here in favor of preemption because, again, the state-law claims petitioners seek to push outside the scope of Section 332 are *direct challenges to rates*.

C. Neither the Legislative History Nor Any Presumption Against Preemption Supports Petitioners’ Countertextual Interpretation of Section 332(c).

Without support in the statutory text, petitioners resort to legislative history and an asserted “presumption against preemption” to support their claim that the Commission should interpret “rates” and the scope of Section 332(c)(3)(A)’s preemptive effect narrowly here. Even if legislative history or the cited presumption could ever somehow overcome the plain language of a preemption provision, they certainly could not do so here.

Petitioners focus on the legislative history underlying the “savings clause” in Section 332(c)(3)(A), which preserves state authority over “other terms and conditions” of service—*i.e.*, all terms and conditions “other” than rates. As petitioners note, Congress intended this carve-out to allow the states to oversee “such matters as customer billing information and practices and billing disputes and other consumer protection matters[.]”¹² But the question here is not whether states may oversee *how clearly* late-payment or reactivation fees are presented to customers or whether carriers erroneously impose such fees on non-delinquent customers. The question instead is whether state courts and lay juries may invalidate such fees as “unreasonably” *high* no matter how clearly they are disclosed in the terms of service.¹³ That is not a “billing dispute,”

¹² H.R. Rep. No. 103-111, at 261 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 378, 588.

¹³ *See, e.g.*, Pet. Comments at 9 (“the parties never made a reasonable endeavor to estimate the damages caused by the late payment when arriving at” the late payment fee amount).

but a dispute about the *amount of the rate*.¹⁴ And for these purposes, the Commission has always distinguished between state regulation of disclosure and similar issues (not preempted) and state regulation of “the reasonableness of the CMRS carrier’s charges” (preempted).¹⁵ Indeed, unless the Commission construes the latter category to encompass all “regulatory measures . . . that directly impact the rates charged by providers,” it would violate Congress’s intent by “subsuming the regulation of rates within the governance of ‘terms and conditions.’” *Hatch*, 431 F.3d at 1083.

Petitioners next invoke the traditional “presumption against preemption.” *See* Pet. Comments at 11-12. For three independent reasons, that presumption is inapplicable here. First, that presumption applies only where a preemption provision is ambiguous, and it does not apply to an express preemption provision in which “Congress has made clear its desire for pre-emption.”¹⁶ Again, that is the case here: Congress preempted state regulation of “rates,” and these are rates. Second, the “presumption against preemption” is inapplicable when a state wades into “an area where there has been a history of significant federal presence.” *Locke*, 529 U.S. at 90. That is also the case here. The Commission has played the primary role in regulating wireless services since the invention of cellular technology. Finally, in the limited circumstances where the presumption applies at all, it applies solely to courts, not to federal agencies construing

¹⁴ *See, e.g., Wireless Consumers Alliance*, 15 FCC Rcd at 17035 ¶ 25 (“If a plaintiff asks a state court to make an outright determination of whether a price charged for a CMRS service was unreasonable, the court would be preempted from doing so by Section 332.”).

¹⁵ *See id.* at 17028-29, 17035 ¶¶ 14, 26.

¹⁶ *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (indicating that presumption can be overcome even in the absence of clear statutory language where a court can conclude that “Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law”); *United States v. Locke*, 529 U.S. 89, 106 (2000) (“declin[ing] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law”).

their organic statutes, and “the presumption against preemption cannot trump . . . *Chevron*.” *NASUCA*, 457 F.3d at 1252 (citing *Smiley*, 517 U.S. at 743-44).¹⁷

III. PETITIONERS’ PROPOSED NARROW CONSTRUCTION FOR SECTION 332(C)(3) WOULD DEFEAT THE COMMISSION’S BROADER POLICY OBJECTIVES.

Congress enacted Section 332(c)(3)(A) to avoid “balkanized state-by-state” rate regulation and to ensure that wireless carriers can offer their customers, no matter where they live or move, a single schedule of price terms for this inherently nomadic type of telecommunications service.¹⁸ As a result, all oversight of wireless rates is centralized within the national jurisdiction of this Commission, just as it has long been for conventional wireline long-distance services.

Never before has this national, unified policy for wireless services been more essential than it is today, as the Commission begins implementing the *National Broadband Plan*. In the words of the *Plan*: “From smartphones to app stores to e-book readers to remote patient monitoring to tracking goods in transit and more, mobile services and technologies are driving innovation and playing an increasingly important role in our lives and our economy.”¹⁹ Likewise, in establishing a “shot clock” to govern state-level consideration of wireless tower

¹⁷ Despite petitioners’ contrary suggestion, President Obama’s May 20, 2009, *Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 24,693 (May 20, 2009), is likewise irrelevant here. That Order simply directs regulators in executive agencies to ensure that there is “a sufficient legal basis for preemption.” *Id.* at 24,693. As the Order makes clear, through its reference (*see id.*) to Executive Order 13132, “an express preemption provision” or “some other clear evidence that the Congress intended preemption of State law” constitute the requisite legal basis. Exec. Order No. 13,132: Federalism, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

¹⁸ *See California Petition*, 10 FCC Rcd at 7499 ¶ 24 (Section 332(c) “establish[es] a national regulatory policy for [CMRS], not a policy that is balkanized state-by-state.”); H.R. Rep. No. 103-213, at 480-81 (1993) (“State regulation can be a barrier to the development of competition in [the wireless] market, [and thus that] uniform national policy is necessary and in the public interest.”).

¹⁹ *See Connecting America: The National Broadband Plan* at 9 (Mar. 16, 2010) (“*National Broadband Plan*”).

siting applications, the Commission observed that “[w]ireless services are central to the economic, civic, and social lives of over 270 million Americans. Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services.”²⁰ Indeed, “[n]o area of the broadband ecosystem holds more promise for transformational innovation than mobile.”²¹

As the Commission and the Administration more broadly all have explained, our overriding national priority must be to help mobile wireless broadband enrich the broadband ecosystem and develop into a full-blown competitor with fixed broadband providers.²² But the evolution of mobile *broadband* depends largely on the regulatory treatment of traditional *CMRS* services today. Providers typically bundle voice (*CMRS*) and data (broadband) services, and their ability to deploy the latter services will depend considerably on keeping the former services free from disparate regulation by 50 different states. The industry thus needs from the Commission today the bold national leadership that Congress envisioned for it when it enacted Section 332(c)(3) and amended Section 2(b) to give the Commission both plenary and exclusive jurisdiction over wireless rates.

²⁰ Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994 ¶ 13 (2009).

²¹ See Prepared Remarks of Chairman Julius Genachowski, *Mobile Broadband: A 21st Century Plan for U.S. Competitiveness, Innovation and Job Creation* at 2 (Feb. 24, 2010) (“*Genachowski Feb. 24 Remarks*”).

²² See also *National Broadband Plan* at 9, 43 (“Mobile broadband . . . is a nascent market in which the United States should lead”); Ex Parte Letter from Larry Strickling, Dep’t of Commerce, to Julius Genachowski, Chairman, FCC, GN Doc. No. 09-51, at 4 (Jan. 4, 2010); see also Ex Parte Submission of the U.S. Dep’t of Justice, GN Docket No. 09-51, at 22 (Jan. 4, 2010) (“*DOJ Broadband NOI Ex Parte*”) (“[M]ore spectrum would allow providers to increase the capacity and reliability of their offerings . . . [and] the increased capacity in the systems would help support new applications.”).

The three separate class actions that have triggered this proceeding stand in stark contrast to that vision of a unified, national policy for wireless services. And petitioners' cramped construction of Section 332(c)(3) would not only violate the plain language of that provision, but also frustrate key Commission objectives. First, a wireless carrier's exposure to unpredictable state-by-state constraints on late payment fees and reactivation fees for CMRS services would give it strong incentives to address the costs and risks of nonpayment by adopting alternative rate structures that Section 332(c)(3) indisputably insulates from state regulation: specifically, by raising standard monthly charges for all customers, including those who honor their contractual commitments. Such upward pricing pressures would discourage—rather than facilitate—adoption of mobile services, which would in turn depress the use of advanced wireless services.²³ Increasing the cost of mobile service generally would separate affluent from less affluent Americans.²⁴ It would make no sense to resolve the question presented here in a way that would induce providers to *increase* general wireless rates, even at the margin, at the same time the Commission has made increased *adoption* of mobile broadband and other wireless services a key national priority.

This effect of state-by-state restrictions on late fees—inducing carriers to raise monthly charges for all subscribers—would also be economically wasteful, because it would remove late

²³ As the Commission has found, “in recent years mobile telephone providers have introduced a growing number of pricing plans that directly bundle mobile voice service and mobile broadband and other data services together in a single monthly service package.” Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1996 – Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 24 FCC Rcd 6185, 6205 ¶ 30 (2009). And carriers “are increasingly offering packages that ‘bundle’ voice and broadband and deliver them over the same infrastructure.” See *National Broadband Plan* at 149. Thus, an increase in the cost of one service within a bundle makes service generally more expensive for consumers.

²⁴ See, e.g., *Genachowski Feb. 24 Remarks* at 5. As the Broadband Plan explains, cost is the single most important barrier to broadband adoption today. See *National Broadband Plan* at 168.

fees as a disincentive for consumers to default in the first place. Late payments and other contractual defaults indisputably increase the costs and risks of doing business for wireless carriers. Insofar as state regulation induces carriers to replace late payment fees with higher charges to all subscribers, it would force consumers in general to absorb the costs of the particular handful of customers who pay late. And those delinquent customers would themselves pay *nothing* more for what amounts to a “talk now, pay later” (or perhaps pay nothing) service plan. Worse yet, because delinquent subscribers would no longer have to internalize the costs of nonpayment, they would be tempted to put off more and more of what they owe, and more and more subscribers would conclude that defaulting on their payment obligations makes good financial sense—which in turn would raise the costs still more for all other subscribers.

Of equal concern, these effects would impose mounting costs and risks on wireless carriers just as they face the substantial costs associated with deploying 3G and 4G technology and bidding for new spectrum as it becomes available. These effects could also dampen incentives for some providers to bring mobile services—including broadband services—to unserved areas with more economically unstable populations, where late payment issues may arise more often than elsewhere.

Finally, state-by-state regulation of late fees would also lead to state-by-state balkanization of carrier rate structures—an outcome the Commission has sought to avoid in regulating wireless services, and precisely the opposite outcome from what Congress intended when it enacted Section 332(c)(3)(A). As discussed, regulation of late fees in states that sharply constrain them would lead carriers to address the costs and risks of nonpayment by raising rates across the board for all consumers in those states. But in states that do not impose such constraints, carriers would retain the more efficient (and fairer) approach they follow today:

imposing the costs of nonpayment on the delinquent subscribers that cause them, while leaving all subscribers' rates at low levels.

Such state-by-state variation in wireless rates would reverse favorable trends towards national unification of wireless rate terms, and it would ultimately harm consumers. As the Commission has explained, carriers "typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis."²⁵ Carriers' rates, rate structures, and rate elements reflect this nationwide scope of service. When consumers move, they often take their wireless devices and services with them and, in general, need not worry about incurring rate changes in the process. Petitioners' efforts to carve out late fees from the preemptive scope of Section 332 could very easily reverse that pro-consumer trend.

IV. CONCLUSION

This primary-jurisdiction referral gives the Commission an important opportunity to reinforce national consistency in wireless rate regulation and avoid the unintended policy consequences of unpredictable state-by-state regulation, including upward rate pressures at the same time the Commission is striving to increase wireless broadband adoption. The Commission accordingly should confirm that (1) late-payment and reactivation fees are "rates charged" for

²⁵ Second Report and Order, *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 20 FCC Rcd 6448, 6467 ¶ 35 (2005).

wireless services as that term appears in section 332(c)(3)(A), and (2) any effort by a state court to invalidate such fees is fully preempted.

Respectfully submitted,

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