

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

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”) submits these reply 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) of the Communications Act.¹ As described herein, neither Petitioners nor commenters have persuasively established any legal or factual basis to contradict the fact that Section 332(c)(3) preempts state-level regulation of all price terms in wireless service contracts, including late payment and reactivation fees, whether assessed on a monthly or one-time basis, and whether assessed before or after the delivery of service. Thus, late fees and reactivation fees that subscribers agree to pay as part of their overall wireless service rate plan appropriately fall within the category of preempted price terms.

INTRODUCTION AND SUMMARY

Section 332(c)(3)(A) provides that “no 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

¹ 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).

commercial mobile services.”² As discussed in CTIA’s opening comments,³ the term “rates” encompasses all price terms in a contract, including those that apply in the event of a contractual default. Late fees and reactivation fees plainly fall into that category. As courts have held, a payment qualifies as a rate if it “ha[s] relation to some other amount or basis of calculation.”⁴ Here, late fees are plainly related to “some other amount or basis of calculation” in that they are commonly expressed as a prescribed rate of interest times the underlying amount that would be charged if a customer had paid on time or by reference to some other contractual amount.

Late fees and reactivation fees are thus “rates”—just as initial activation fees, flat-rate directory-assistance charges, international roaming charges, text messages and charges for initial activation are all indisputably “rates” too, even though none of them could be characterized as “standard monthly rates.” There is no principled way to distinguish late fees from those other rates for preemption purposes, and no commenter has suggested otherwise. The Commission therefore has exclusive jurisdiction over the substantive reasonableness of wireless late fees, just as the Commission has exclusive jurisdiction over late fees charged by wireline long distance providers. That conclusion comports with Congress’s intent to ensure national consistency in the regulation of the price terms of these inherently nomadic services.⁵

² 47 U.S.C. § 332(c)(3)(A) (emphasis added).

³ CTIA Comments at 3-9. Unless otherwise indicated, citations of a party’s comments refer to the opening comments that party filed in this docket in April 2010.

⁴ *NASUCA v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006) (quotation marks omitted) (quoting Oxford English Dictionary); *see also* Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19906 ¶ 19 (“[T]he term ‘rate’ is defined in the dictionary as an ‘amount of payment or charge based on some other amount.’”) (emphasis omitted; citing *Webster’s Third New Int’l Dictionary* (1993)).

⁵ *See* CTIA Comments at 15, 18-19.

As further discussed in CTIA’s opening comments,⁶ this conclusion also follows from all relevant precedent from appellate courts and the Commission. For example, in *MCI Telecommunications Corporation v. FCC*,⁷ the D.C. Circuit rejected an argument that certain “rate” provisions in a contract addressed only standard periodic rates and not “cancellation and discontinuance charges.”⁸ As the court explained, that argument would contradict the plain meaning of the term “rate”: “a charge to a customer to receive service.”⁹ And the court added that the term encompasses not only standard price terms for customers that satisfy their contractual commitments, but also price terms for customers that *breach* those commitments.¹⁰ That reasoning applies with equal force here.¹¹

The Commission’s own precedent confirms the same conclusion. As it explained in *Southwestern Bell Mobile Systems*, “the term ‘rates charged’ in Section 332(c)(3)(A) may include both rate levels and rate structures,” and thus “states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS services.”¹² Here, Petitioners’ state-law causes of action challenge not only the “rate levels” of

⁶ See *id.* at 6-9.

⁷ 822 F.2d 80 (D.C. Cir. 1987).

⁸ *Id.* at 86.

⁹ *Id.* (citing Black’s Law Dictionary).

¹⁰ See *id.* (emphasis added).

¹¹ See CTIA Comments at 7; see also *Smiley v. Citibank*, 517 U.S. 735 (1996). As Petitioners and the Minnesota Attorney General point out, a small handful of district courts have concluded—in terse, conclusory form—that late fees do not qualify as “rates.” To the extent these decisions contain any explicit reasoning at all, that reasoning is untenable. See CTIA Comments at 9. The one district court that *has* engaged in a sustained analysis of the issue has concluded that a “late payment charge” is “part of the overall rate structure” and “not merely a ‘term and condition’ of the parties’ service contract.” *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999); see also *Gilmore v. Sw. Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001) (same conclusion for administrative fees). As explained in CTIA’s opening comments (at 7-8), Petitioners and their allies have no valid basis for distinguishing *Kiefer*.

¹² *Southwestern Bell Mobile Systems*, 14 FCC Rcd at 19907 ¶ 20; see also *Wireless Consumers’ Alliance, Inc.*, 15 FCC Rcd 17021, 17028, ¶ 13 (2000) (“Section 332(c)(3)(A) bars state regulation . . . rates or rate structures”).

wireless late fees, but also the “rate structures” chosen by wireless carriers. It is undisputed that carriers could address the risk of nonpayment by requiring *all* subscribers to pay higher monthly rates: in effect, a universal insurance premium to cover the risk of default in advance. Petitioners’ claims here necessarily challenge a carrier’s decision to address the same concern more efficiently by targeting late-payment surcharges to delinquent subscribers. As *MCI* confirms, whether and how a carrier implements that decision is an exercise of its core discretion over “rates,” subject to the regulatory oversight of a single authority: this Commission.

In her comments, the Minnesota Attorney General unwittingly confirms this very point. She argues that a wireless carrier could bring itself within the preemptive scope of Section 332(c)(3)(A), and insulate itself from the prospect of balkanized state-by-state litigation, only if it “change[s] the current practice” of recovering late fees only from delinquent subscribers and instead “roll[s] the costs of late payment into [its] overall rates,” thereby “raising its rates generally” for all customers.¹³ This argument is instructive in two respects. First, it confirms a central point of CTIA’s opening comments: that any attack on late fees is inherently an attack on a wireless carrier’s rate structure—and is thus preempted under the reasoning of *Southwestern Bell* and *MCI*.

Second, the Minnesota Attorney General’s position underscores just how irrational and destructive Petitioners’ preferred outcome would be as a policy matter. Under her proposal, rates would increase for all Minnesotans, instead of late fees and reactivation fees being applied only to those customers that violate their contract. While this result clearly is within carriers’ authority, it obviously would not be good for the overwhelming majority of consumers the Minnesota Attorney General is tasked with protecting. As the Commission begins implementing

¹³ Minn. AG Comments at 9 (internal quotation marks omitted).

its *National Broadband Plan*, it will be increasingly essential to ensure both a *unified national policy* for wireless services and *affordable rates* for those services. Allowing courts and juries in each of 50 states to review the substantive reasonableness of late fees would undermine both of those goals. As discussed in CTIA’s opening comments, that regime would (1) create state-by-state balkanization of wireless policy and reverse favorable trends towards national unification of wireless rate terms and (2) drive up rates for popular bundles of wireless broadband and CMRS services at precisely the time this Administration is emphasizing the role of wireless in bringing greater competition to the broadband ecosystem.¹⁴ The Commission can and should prevent those outcomes by treating substantive review of wireless late fees just as it has always treated such review of late fees for traditional long-distance services: subject to the exclusive jurisdiction of this Commission.

DISCUSSION

Of the six commenters that filed substantial (*i.e.*, more than three substantive pages) opening comments, only one—the Minnesota Attorney General—opposes preemption. The remainder of these reply comments briefly respond to the new arguments presented by the Minnesota Attorney General and the handful of other commenters supporting Petitioners, rather than the arguments presented in Petitioners’ own comments, which CTIA has previously addressed.¹⁵

1. The Minnesota Attorney General bases her conclusion that late fees are not “rates” on the surprising theory that such fees have “*nothing* to do with the actual provision of

¹⁴ See CTIA Comments at 15-19.

¹⁵ NASUCA’s effort (Comments at 2) to tie this proceeding to the question of early termination fees is unavailing. The sole issue that the courts have referred to this Commission is the applicability of Section 332 to state regulation of late-payment fees, and that is the only issue the Commission need or should resolve. Indeed, the question of early termination fees is not before the Commission at all, because the previous petition filed on that issue has been withdrawn.

any type of wireless service to the customer,” serve only to “incentivize customers to pay their bill[s] on time,” and thus merely “go[] to the *manner* in which CMRS providers seek to have their customers pay.”¹⁶ Each component of that argument is false.

First, as the carrier commenters have explained, late fees do in fact pay for service, just as much as any other type of fee does.¹⁷ For example, they ensure continued service despite the breach of contractual conditions, and they independently pay for the past receipt of service on credit. The Minnesota Attorney General is thus incorrect in claiming that “customers receive no type of service in return for payment” of late fees.¹⁸ And the argument is particularly untenable as to reactivation fees, which the most delinquent subscribers must pay to turn full service back on after it has been discontinued for nonpayment. Significantly, neither Petitioners nor any commenter has explained how *reactivation* fees could possibly be distinguished from *initial activation* fees for preemption purposes. Just as a state regulator or court obviously may not tell a wireless carrier that a given initial activation fee is “too high” a rate for turning on service at the beginning of a contractual relationship,¹⁹ neither may a state regulator or court tell a wireless carrier that a given *reactivation* fee is “too high” a rate for resuming full service after a contractual default.

Second, despite the Minnesota Attorney General’s contrary suggestion, rates are rates even if their levels are adjusted to “incentivize” customers to pay sooner rather than later. For example, some wireless carriers, such as TracFone, T-Mobile, and Jitterbug, have offered lower

¹⁶ Minn. AG Comments at 4 (emphasis in original).

¹⁷ See, e.g., Verizon Wireless Comments at 11-12; AT&T Comments at 12-16.

¹⁸ Minn. AG Comments at 8.

¹⁹ See, e.g., Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8868 ¶ 70 (1995) (grouping “activation” fees within category of “cellular prices”).

fees if customers pre-pay their services on a monthly, quarterly, or even yearly basis.²⁰ From a carrier's perspective, one of the key advantages of offering such plans is to give subscribers incentives to pay sooner rather than later. No one could plausibly suggest that such incentive characteristics affect whether a rate qualifies as a rate, and the same is true for late fees as well. *How much* to charge, and *when* and *how often* to charge *which* customers, are all inextricably related components of a carrier's discretion over rate levels and rate structures, whether or not they can also be described as "the manner in which CMRS providers seek to have their customers pay."²¹ As such, they are preempted under the logic of *Southwestern Bell Mobile System* and *MCI*.

2. The Minnesota Attorney General (Comments at 3, 5-6), California (Comments at 2), NASUCA (Comments at 3), and the Arizona Consumers Council (Comments at 1) confuse the issues by suggesting that, if the Act preempts substantive state regulation of late fees, it would necessarily preempt *all* state laws "related to" rates. And that, they say, would contradict legislative history suggesting that Congress wished to allow states to exercise oversight of "customer billing information and practices and billing disputes and other consumer protection matters."²² This argument is without merit. The only question here is whether Section 332(c)(3)(A) preempts state law claims that (like these) explicitly challenge *the substantive reasonableness* of late fees. It plainly does preempt such claims, even if it does not also preempt,

²⁰ See, e.g., TracFone, *Buy Airtime*, <https://www.tracfone.com/direct/Purchase?payGo=true> (last visited May 6, 2010) (offering various prepaid plans for 30, 90, and 365 days of service, plus a "Double Minutes for Life Card" for \$19.99); T-Mobile, *Go Gold*, http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_GoldRewards (last visited May 6, 2010) ("To qualify, spend just \$100 (in any combination of \$10, \$25, \$50, or \$100) in T-Mobile refills for your Prepaid phone. If you buy a combination of refills that add up to \$100, you'll receive 15% more minutes free on the NEXT refill card redeemed.").

²¹ Minn. AG Comments at 4

²² Arizona Consumers Council Comments at 1 (quoting H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 1993, reprinted in 1993 U.S.C.C.A.N. 378, 588).

for example, state law measures to ensure the disclosure of such late fees to potential new customers.

Section 332(c)(3)(A) forbids the states “to regulate . . . the rates charged by any commercial mobile service....” That language raises two distinct questions, which Petitioners and their allies illogically conflate. The first question is whether a given contractual price term is a “rate.” As discussed above, the late fees at issue here satisfy that test. The second question is whether a given state law action *relating* to rates can be said to *regulate* rates—a question that arises not only as to late fees, but also as to any other price term in a wireless service contract. Sometimes state law measures that *relate to* rates cannot be said to *regulate* rates and thus escape preemption.²³ For example, 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.²⁴

The legal claims at issue here, however, *do* relate explicitly to the substantive reasonableness of rate levels, not to whether they were adequately disclosed. In particular, while Petitioners say that they “are not claiming [that wireless] providers may not recoup legally cognizable damages caused by customers who pay late[,]” they explicitly seek a regime in which state courts and lay juries invalidate fees that, in their view, “exceed . . . costs.”²⁵ And there can

²³ See *Southwestern Bell Mobile Systems* at 19901-19902, ¶ 7 (citing court decisions holding “that Section 332(c)(3)(A) does not preempt complaints that do not allege that billing practices of CMRS providers are unlawful *per se*, but challenge the implementation of these practices on grounds of breach of contract, consumer fraud, or false advertising”).

²⁴ See *NASUCA*, *supra*. Merely characterizing a state law restriction as a “consumer protection” measure is insufficient to remove it from the preemptive scope of Section 332. And restrictions concerning the substantive reasonableness of *late fees* are no more or less “consumer protection” measures than restrictions concerning the substantive reasonableness of any *other* type of wireless service rate. The Minnesota Attorney General, in suggesting that wireless customers who pay their bills on time should bear the costs imposed by those who do not, seemingly would object to the “cost based” regime proposed by Petitioners. See Minn. AG Comments at 9.

²⁵ Opening Comments of California Consumers at 2-3 (Jan. 14, 2010) (“Pet. Comments”).

be no more direct form of a state law effort “to regulate . . . the rates charged by any commercial mobile service” than a claim that the rates charged are too high and should be capped at some lower amount.²⁶

In short, the Act preempts any state law or cause of action that would challenge the *substantive reasonableness* of late fees, just as it preempts any state-level challenge to the substantive reasonableness of any other type of rate.²⁷ But that rule of preemption does not necessarily preclude all legal claims that “relate” to rates (of any kind) but that do *not* challenge them as “too high” or otherwise “unreasonable.” This distinction—between claims that challenge the substantive reasonableness of contractual price terms and those that do not—not only comports with the statutory language and Commission precedent, but is highly administrable as well.

Petitioners’ approach, in contrast, would be not only wrong on the merits, but also highly inadministrable. For example, Petitioners and their supporters suggest that the Commission should distinguish between (1) standard monthly fees per minute of usage (what Petitioners call “a certain allotment or usage of minutes to make mobile telephone calls” or “‘bytes’ of data” and (2) other contractual price terms.²⁸ But that approach would nonsensically exclude a variety of

²⁶ 47 U.S.C. § 332(c)(3)(A). Neither Petitioners nor their supporting commenters contest the proposition that “judicial action can constitute state regulatory action for purposes of Section 332,” *Wireless Consumers’ Alliance, Inc.*, 15 FCC Rcd at 17027, ¶ 12, and that Section 332 therefore bars any state-law cause of action that challenges the substantive reasonableness of wireless rates and seeks their invalidation. *See* CTIA Comments at 4 n.3.

²⁷ As support for the proposition that “the Commission . . . has appropriately taken a narrowly-tailored view of what charges and fees fall within the meaning of ‘rates’ under [Section 332(c)(3)(A)],” the Minnesota Attorney General relies on *Wireless Consumers Alliance, supra*. That order has nothing to do with this issue. It instead holds only that, because wireless carriers do not tariff their rates, the filed-rate doctrine does not shield such carriers from damage awards for otherwise unpreempted state law claims. 15 FCC Rcd at 17031-32, ¶¶ 19-22. Similarly, the Minnesota Attorney General’s reliance on another filed-rate case—*American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214 (1998); *see* Minn. AG Comments at 8-9—is misconceived for the reasons explained in CTIA’s opening comments (CTIA Comments at 12-13).

²⁸ Pet. Comments at 14.

other charges that everyone presumably concedes are “rates,” including directory-assistance charges, text messages, initial activation fees, roaming and more, which Petitioners and their supporters do not address. There is only one approach to this statutory scheme that is at once faithful to the statutory text and administrable in application, and it is the one outlined here.

Finally, there is no merit to the claim of the Arizona Consumers Council that late fees cannot be rates because wireless carriers “don’t tout” them in “marketing materials” or because “many consumers might not ever pay a late fee.”²⁹ Each of these propositions may be equally true of other charges that no one could reasonably doubt are “rates,” including directory-assistance charges, international roaming rates, text messaging and more. Again, the question presented here—whether late fees and reactivation fees are “rates”—is independent of whether Section 332(c) would preempt state regulation of how such fees are disclosed to consumers. The Commission can resolve the former question in favor of preemption without prejudging the latter.³⁰

CONCLUSION

The Commission should confirm that (1) late-payment and reactivation fees are “rates charged” for 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.

²⁹ ACC Comments at 2-3.

³⁰ The Minnesota Attorney General repeats Petitioners’ arguments that the “presumption against preemption” and a recent executive order both warrant a narrow view of Section 332(c)(3)(A). *See* Minn. AG Comments at 2-3. Those arguments are baseless for the several independent reasons discussed in CTIA’s opening comments (at 14-15 & n.17).

Respectfully submitted,

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May 7, 2010