MAIL DATE
10/14/2004

Decision 04-10-013 October 7, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities.	Rulemaking 00-02-004 (Filed February 3, 2000)

ORDER MODIFYING AND DENYING APPLICATIONS FOR REHEARING OF DECISION 04-05-057

I. INTRODUCTION

In D.04-05-057 ("Decision") the Commission adopted General Order ("G.O.") 168, Rules Governing Telecommunications Consumer Protection ("the Rules"), applicable to all Commission-regulated telecommunications utilities. As explained in the Bill of Rights ("BOR"), which precedes the Rules, the purpose of the Rules is to protect telecommunications consumer rights concerning disclosure, choice, privacy, public participation and enforcement, accurate bills and redress, and safety. *See* G.O. 168, Part 1. To this end, G.O. 168 imposes a number of requirements on telecommunications carriers in a number of areas such as billing methods, terms of service, marketing, and slamming.

AT&T Wireless, et al. ("Joint Wireless Carriers" or "JWC"), and Nextel of California, Incorporated ("Nextel") both filed timely applications for rehearing of the Decision. The Wireline Group ("Wireline") filed two applications for rehearing, one that solely addresses issues concerning the timeline for implementation of the Decision.[1] In addition, these three groups filed separate motions to stay the Decision, which we denied in D.04-08-056. Wireline, Consumers Union et al. ("Consumers"), the Attorney General and the Office of Ratepayer Advocates ("AG/ORA"), California Small Business Roundtable/California Small Business Association ("CSBRT/CSBA") filed responses to one or more of the applications for rehearing.

We have carefully reviewed the allegations of legal error raised in the applications for rehearing and find that the applications fail to demonstrate sufficient grounds for granting rehearing. We will, however, make some modifications to clarify the Decision and to address certain oversights, as discussed below.

II. DISCUSSION

The rehearing applicants assert numerous claims of error. We have categorized the applicants' claims into six general categories: (1) Federal preemption issues; (2) Constitutional issues; (3) Vagueness issues; (4) State law issues; (5) Procedural due process issues; and (6) Timing and Implementation issues.

A. FEDERAL PREEMPTION ISSUES

1. Section 332 Prohibition on Rate Regulation

The Wireless Carriers argue that several of the Rules are expressly preempted by federal law. The Wireless Carriers point to the Omnibus Budget Reconciliation Act of 1993, which amended section 332(c)(3)(A) of the Federal Communications Act ("Act") to provide:

> [N]o state or local government shall have any authority to regulate the entries of or the rates charged by any Commercial Mobile Service …, except this paragraph shall not prohibit a state from regulating the other

[1] In the discussion below, applicants are referred to as "Wireless Carriers" (for Nextel and JWC) or "Carriers" (for all three applicants) where their applications for rehearing raise similar issues.

> terms and conditions of Commercial Mobile Service.
> 47 U.S.C. § 332(c)(3)(A).

According to the Wireless Carriers, section 332 preempts states from determining "whether a price charged for a CMRS service was unreasonable" or from setting a "prospective price for CMRS service." JWC App. at 2 (citing *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021 (Aug. 14, 2000) (*Wireless Consumers*)). The Wireless Carriers also claim that the Federal Communication Commission ("FCC") has stated that the term "rates charged" in section 332(c)(3)(A) may include both rate levels and rate structures for CMRS, and that states may not prescribe the rate elements for CMRS or specify which of the CMRS services provided can be subject to charges by CMRS providers. *Id.* (citing *In re Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898, 1999 FCC LEXIS 5973, ¶ 20 (Nov. 24, 1999)).

Specifically, the Wireless Carriers claim that this provision expressly preempts Rule 3(f) (prohibits early termination fee within 30 days of service activation); Rules 8(a) (prohibits rate increases to non-term contracts absent a 25-day notice), 8(b) and 1(h) (prohibits rate increases for duration of term contracts); Rule 7(a) (prohibits late payment charges if payment received within 22 days after the date bill was mailed; restricts amount of late payment penalty to 1.5% per month on overdue balance); Rules 7(b) and 7(d) (prohibits billing intrastate services provided more than 3 months before bill date; delays in billing must not result in higher total charges); Rule 5(c) (interest on deposits); Rule 1(b) (requires website disclosure of key rates, terms and conditions of each offering); Rule 1(e) (requires responses to certain requests for information within a reasonable time); Rule 3(i) (requires affirmative means of authorization for pay-per-use features); Rules 4(f) (requires answering inquiries within one day for prepaid calling services), 4(g) (requires refund if network services fail to operate in commercially reasonable manner), 4(j) (requires maintenance of access numbers), and 4(l) (prohibits imposition of charges if consumer not connected to number called).

According to the Wireless Carriers, none of these Rules fall within the "other terms and conditions" proviso of section 332(c)(3)(A), but rather constitute rate regulation which is preempted by section 332.

In general, the Wireless Carriers overstate the scope of preemption under section 332, give too narrow an interpretation to "other terms and conditions," and too broadly construe what constitutes a "rate charged." The Carriers argue, for example, that General Order 168 defines "rate" as "[a]ny amounts requested to be paid by the user of a telecommunications service by whatever name, including charges, surcharges and fees, over which a carrier has discretion to charge." According to the Carriers, for example, an early termination fee is an "amount" and a "charge" that carriers request users to pay and over which the carrier has discretion.

The Wireless Carriers argue that several of the Rules intrude on carriers' decisions about the imposition of rates, and improperly restrict carriers' flexibility to establish their rate structures or their freedom to choose when to impose fees, and thus are preempted. Under the Wireless Carriers' interpretation, almost any Rule which may have the slightest effect on rates, or a carrier's ability to charge "whatever price it wishes," constitutes rate regulation and thus is prohibited by section 332.

However, section 332 is not so broadly construed. The meaning of "rates charged" for preemption purposes is not based on a state's definition of rates, but on how the term has been interpreted and applied under the Act. Also, States retain jurisdiction to regulate "other terms and conditions" of wireless service. 47 U.S.C. § 332(c)(3)(A). This phrase has been broadly defined to include consumer protection matters and customer billing information. Several courts have limited section 332's reach to regulations that *directly and explicitly* control rates or prevent market entry. *Communications Telesystems Intern. v.*

CPUC, 196 F.3d 1011, 1017 (9th Cir. 1999); *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366 (2001).

"In general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates and therefore is preempted under section 332(c)(3)(A); a claim that directly challenges some other activity, such as false advertising, and requires a determination of the value of services provided in order to award monetary relief is not rate regulation." *Spielholz,* 86 Cal. App. 4th at 1375. In addition, a challenge to service quality does not necessarily attack the reasonableness of rates. *Id*. at 1380. According to *Spielholz*, "rate regulation, or to 'regulate the rates charged' in the words of 332(c)(3)(A) refers to an action whose principal purpose and direct effect are to control prices." *Id*. at 1374.

Federal courts also have rejected claims that regulations that have incidental effects on rates are preempted by section 332. In *Brown v. Washington/Baltimore Cellular, Inc.,* 109 F. Supp. 2d 421 (D. Md. 2000), the court stated, "Any legal claim that results in an increased obligation for defendants could theoretically increase rates. . . . Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." *Id.* at 423.

Even the FCC has rejected arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for service. The FCC has stated that "a carrier may charge whatever price it wishes and provide the level of service it wishes, *as long as it does not misrepresent either the price or the quality of service*." *Wireless Consumers,* ¶ 27 (emphasis added).

Similarly, the FCC rejected CMRS carriers' claims that regulations that require an increase in operating costs had an impact on the rates charged, and thus were preempted. *See In re Pittencrieff Communications, Inc.* 13 F.C.C.R. 1735 (Oct. 2, 1997), ¶¶ 15-18, 20, 22.

The Rules the Wireless Carriers complain of require disclosure to the consumer, concern billing practices, require carriers to perform in the manner promised to the consumer, or concern customer service requirements. Although some of the Rules may have an incidental effect on rates, we find that none of these Rules purport to directly and explicitly regulate rates, and therefore are not preempted. In addition, we find that the contrary authority cited by the Carriers on some of the Rules is not persuasive or not binding.

2. Entry Regulation and Sections 332 and 253(a)

The Wireless Carriers argue that several of the Rules, individually and collectively, run afoul of sections 253(a) and 332 of the Act. Section 332 prohibits states from regulating the "entry of . . . any commercial mobile service." Section 253(a) prohibits state regulation that prohibits or has "the effect of prohibiting the ability of any entity to provide . . . telecommunications service." The Wireless Carriers argue that both of these sections have been interpreted expansively to include regulation that not only in fact precludes entry, but that "effectively precludes CMRS entry."

According to the Wireless Carriers, a regulation or group of regulations need not directly prohibit a carrier from providing service in order to be preempted under section 253(a). JWC App. at 15 (citing *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001)). Nextel argues that the rules constitute a substantial barrier to entry because they force carriers "to the Hobson's choice of foregoing service in the California market or foregoing the economies of scope and scale achieved by national business plans." Nextel App. at 17. JWC essentially argue that any rules that apply new requirements to wireless carriers that do not mirror existing obligations of generally applicable laws create barriers to entry.

The Carriers' arguments are not persuasive and misrepresent the scope of preemption under sections 253 and 332. Section 253(b) for example, leaves states free to “protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” The FCC has rejected the claim that regulations act as a form of entry regulation because the carriers may not provide service in a certain state unless they comply with that state’s regulations. “Although the contribution requirement arguably indirectly regulates entry by making it more difficult for some carriers to offer service, this is true of many of the requirements that Congress intended to include within ‘other terms and conditions’ of service.” *In re Pittencrieff Communications, Inc.,* 13 F.C.C.R. 1735, ¶ 22 (Oct. 2, 1997).

The Ninth Circuit addressed the scope of section 253 in *Communications Telesystems Intern.*, 196 F.3d at 1017. “The Act was designed to prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices.” The regulations at issue are imposed on a competitively neutral basis and are designed to protect the public safety and welfare and safeguard the rights of consumers. The Wireless Carriers fail to demonstrate how these requirements constitute an explicit prohibition on entry, and we accordingly deny their applications for rehearing.

3. Preemption by Federal Regulation of Technical Specifications for Wireless Service

The Wireless Carriers point to Rules 1(e), 4 and 15 as examples of regulations that mandate certain technical requirements for carriers. The Wireless Carriers claim these rules conflict with federal authority over “technical standards.” The Carriers specifically point to Rules 4(f),(g),(j), (l) and Rule 1(e) as imposing technical requirements on customer service call centers or imposing technical capacity requirements for access numbers associated with prepaid calling services. The Carriers also argue that Rule 15, which requires carriers to provide access to their 911 services, conflicts with exclusive federal authority over technical standards governing wireless service. However, the authority that the

Carriers cite does not support their claim that these Rules amount to an imposition of "technical standards" governing prepaid wireless, call centers, and Emergency 911 service. The only case cited by the Carriers, *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F. Supp. 2d 474 (D. Md. 2002), relates solely to preemption of state regulation of radio frequency emissions. Clearly, none of the CPUC Rules relate to radio frequency emission considerations. Likewise, the FCC case relied on by the Carriers has no bearing on regulations concerning customer service requirements, access to emergency services, or unfair business practices. In *In re An Inquiry Into Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469 (1981), the FCC stated three underlying reasons of federally adopting (and thus preempting) technical standards for cellular systems: (1) a uniform definition of cellular mobile radio for purposes of qualifying for operating licenses; (2) system compatibility; and (3) maintenance of signal quality and other quality aspects of system performance. *Id.*, ¶ 84. The FCC clearly stated that it was adopting "only the minimum standards necessary to accomplish these purposes." *Id*. The FCC also asserted federal primacy as to state licensing requirements and state franchising agreements, noting that states can continue their complementary role regarding certifications of carriers to provide mobile or cellular service. This decision does not support the Carriers' claim that the FCC has broadly asserted authority over all technical standards governing wireless service. Nor do these rules implicate the "technical standards" as defined by the FCC. Rather, these Rules ensure access to emergency services, require certain levels of customer service, and assure that prepaid telecommunications services offered actually provide the service expressly or implicitly offered. Accordingly, the Carriers' claims on this point are without merit.

4. Federal Provisions Implementing Universal Service Fund and Prohibiting Discrimination Among Carriers and Rule 8(b)

According to the Wireless Carriers, Rules 8(b) and 1(h) prohibit carriers from increasing rates on term contracts during the contract term, even where the increase is due to an increase in certain federally-mandated taxes or fees that federal law authorizes, but does not require, carriers to collect from subscribers. The Joint Wireless Carriers claim that these rules prohibit carriers from increasing the percentage of such fees charged to customers in cases where federal law would permit carriers to increase the amount they could recover.

The Joint Wireless Carriers also claim that Rule 8(b) conflicts with federal law requiring that all telecommunications providers contribute to the Universal Service Fund (USF) program "on an equitable and nondiscriminatory basis." 47 U.S.C. § 254(d). The Wireless Carriers argue that Rule 8(b) singles out wireless carriers who conduct business largely through term contracts by prohibiting any changes in term contract rates, which in turn could prevent any recovery of certain funds permitted by federal law to be passed on to California subscribers. The Wireless Carriers argue that wireline carriers, who conduct business through published tariffs, presumably would be permitted to pass these charges on to California subscribers, so long as the minimum notice required by Rule 8(a) is provided.

These Rules are intended to protect consumers from certain unilateral contract changes. It was not our intent, however, to prevent carriers from passing through mandated government fees and taxes, as allowed by applicable law. As the Decision states, "Rule 8(b) applies only to changes in terms or conditions of service specified in a term contract, so it also would not typically encompass, e.g., changes in taxes, or changes in roaming or other charges incurred by the subscriber on another carrier's system and simply passed through by the carrier without markup." Decision at 78. We shall modify the Rules, therefore, to make it clear that carriers may collect the precise amount of the USF charge, or other similar required fees as identified in their applications for rehearing, that they actually pay, even if that amount increases during the term of a contract. Carriers may file a petition to modify the Rules to add additional federal programs that may be implemented in the future. We find that this modification addresses the Carriers' arguments concerning preemption and discrimination with respect to these programs and Rules 8(b) and 1(h), and accordingly deny rehearing on this issue.

5. Rate Discrimination

The Wireless Carriers argue that the Rules conflict with section 202(a) of the Act, which prohibits carriers from engaging in any unjust or unreasonable discrimination in rates and from giving undue or unreasonable preferences or advantages to any person, class of persons, or locality. The Wireless Carriers argue that the Rules violate this provision because they require CMRS carriers to treat California customers significantly differently than customers in other states, and would encourage "undue or unreasonable prejudice or disadvantage" to certain customers in contravention of section 202(a).

These claims are not compelling. First, the Wireless Carriers fail to demonstrate that the "preferences or advantages" of which they speak are the type prohibited under section 202(a). Secondly, they fail to show that such "preferences or advantages" are in any way "undue or unreasonable." In addition, the Ninth Circuit Court of Appeals in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), found unpersuasive arguments that the "purpose of §§ 201(b) and 202(a) is to ensure national uniformity of carrier rates, terms and conditions." *Id*. at 1138. Surely, when Congress preserved states' authority to regulate "other terms and conditions," including consumer protection matters, it did not envision that every state would pass uniform laws. Accordingly, we find that these claims are without merit.

6. Obligation to File Tariffs

The Wireless Carriers next argue that Rule 1(b)'s requirement to establish and maintain Internet websites setting forth all "key rates, terms and conditions of each non-tariffed offering" is preempted because it conflicts with federal de-tariffing policy. According to the Wireless Carriers, such requirements present the very same burdens that led the FCC to forego tariffing requirements for CMRS providers. Again, the Carriers' argument is not convincing, or supported. This Rule is purely a disclosure measure, and does not impact the rates that carriers can charge. It does not involve the same degree of complexity or legal standing that tariffs encompass, and thus we do not find present the same burdens that led the FCC to forego tariffing requirements for CMRS providers. As stated above, requiring adequate disclosure to consumers is not preempted rate regulation.

7. E911 Services

The Wireless Carriers argue that Rule 15, which requires wireless carriers to provide customers access to 911 emergency service, is preempted. According to the Wireless Carriers, there is already an extensive federal regulatory framework that occupies the field for wireless 911 services, and Rule 15 is therefore preempted. However, the Wireless Carriers fail to demonstrate that Congress has so pervasively "occupied the field" as to completely preempt state laws on this issue. Ensuring public access to 911 emergency services is within the police powers of the state, and federal law does not expressly preempt states from adopting regulations governing access to 911 services. Indeed, Public Utilities Code section 2892, which predates the 1996 Telcommunications Act, requires facilities based wireless carriers to provide access to 911 services in California. Moreover, 47 U.S.C. § 615 specifically directs the FCC to "encourage each State to develop and implement statewide deployment plans" for 911 services, indicating that the provision of 911 services is not so comprehensively regulated at the federal level that there is no room for states to adopt their own regulations.

8. Preemption of the Rules as a Whole

The Joint Wireless Carriers argue that the Rules as a whole are preempted by longstanding and pervasive federal regulation of CMRS services. The JWC assert that Congress intended that an appropriate level of regulation be established and administered for CMRS providers and has passed legislation since the Radio Act of 1912 to ensure that unwarranted regulatory burdens are not imposed upon any CMRS provider. JWC App. at 30. The JWC point to the preemptive effect of section 332(c)(3)(A) as the culmination of evidence of that federal objective. The JWC argue that the Rules as a whole place substantive limitations on rates, terms and conditions of service provided to California subscribers, and therefore constitute the type of regulatory disparity Congress sought to avoid. The JWC also claim that the rules impose "massive new regulatory burdens" on CMRS providers and discourage investment and new technology.

The JWC's arguments that the Rules as a whole are preempted are not compelling. Congress will be considered to have preempted a field only when the regulatory scheme clearly and manifestly is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuerta,* 458 U.S. 141 (1982). In addition, a court will find conflict preemption where a State law actually conflicts with federal law, insofar as it is impossible to comply with both State and federal requirements or State law stands as an obstacle to the purpose and objective of federal law. Although it appears that the JWC is arguing this latter point, its analysis must fail simply because it cannot establish a clear federal preemption of the State regulation at issue. The Act and the related legislative history confirm that States have the jurisdiction and authority to regulate "terms and conditions" of wireless service. As discussed above, the Ninth Circuit, the FCC, and other courts have upheld

States' rights to exercise police powers to protect consumers, including regulating unfair business practices, false advertising, and billing errors. Accordingly, we find this claim to be without merit.

B. CONSTITUTIONAL ISSUES

1. Contracts Clause

The JWC argue that to the extent the rules may govern existing contracts between wireless carriers and their customers, they would necessarily alter and impair their contractual rights and obligations in violation of the Contracts Clause of the U.S. and California Constitutions. Nextel also raises a Contracts Clause issue.

Although the Wireless Carriers claim confusion over the timing of the application of the Rules to their contracts, nothing in the Decision suggests that the Rules are not to be fully implemented in accord with the schedule specified, including modification, as required, to existing contractual obligations.

The Wireless Carriers have failed to demonstrate that the Rules, when applied to existing contracts, run afoul of the Contracts Clause. Impairment of a contract is not necessarily unconstitutional. There is a sequential, three-part test in analyzing whether state regulations violate the Contracts Clause: (1) whether the regulations in fact *substantially* impair existing contracts; (2) if the state law constitutes a substantial impairment of contract rights, does it nevertheless have a significant and legitimate public purpose such as the remedying of a broad and general social or economic problem; and (3) are the regulations reasonable in light of that purpose. *See 20th Cent. Ins. Co. v. Sup. Ct,* 90 Cal. App. 4th 1247, 1268 (2001) Aside from conclusory allegations that the impairment here is substantial, the Wireless Carriers make no effort to demonstrate that they satisfy part one, and only insubstantial efforts to show that they satisfy parts two and three. The Carriers fail to discuss the degree of impairment, or how important the specific contractual provisions at issue are in relation to the fundamental purpose of the contract and the expectations of the parties. *See Energy Reserves Group, Inc. v.*

Kansas Power & Light Co., 459 U.S. 400, 411 (1982) ("state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment"). This failure is dispositive, as failure to satisfy the first factor means a court need not reach the other two. *See Rui One Corp. v. City of Berkeley,* 371 F.3d 1137, 1147 (9th Cir. 2004).

Even so, we find that the Carriers fail to make a proper showing as to the remaining factors as well. For example, we reject Nextel's claim that there is nothing in the record to show that telecommunications consumers need the sort of protections that the Rules offer, and that the record shows that more competition and less regulation are better for consumers. At the very least Nextel's argument ignores the fact that the California Legislature has acknowledged the need for the consumer protection measures implemented in the Decision and has directed the Commission to ensure that carriers of all classes abide by certain basic standards of disclosure and customer service. Pub. Util. Code §§ 2896, 2897. Moreover, parties did present evidence of such a need. *See, e.g.*, Reply of the California Attorney General and the Office of Ratepayer Advocates to Applications for Rehearing of Decision 04-05-057, at 56-59 (citing comments and other evidence of need).

Nextel also argues that protection of telecommunications consumers is not the sort of legitimate purpose contemplated by the second factor, evidently because the Rules only benefit telecommunications consumers, not all state citizens. That argument, too, falls short. A valid regulation need not benefit all state citizens generally. *See, e.g., Campanelli v. Allstate Life Ins. Co.,* 322 F.3d 1086, 1099 (9th Cir. 2003) (Calif. statute reviving lapsed claims for earthquake damage stemming from Northridge earthquake served legitimate purpose to "bring needed relief to the victims of the Northridge earthquake"). The authority on which Nextel relies does not dictate a contrary conclusion.

Regarding the last factor, it is important to note that the Commission's judgment regarding the balance of burdens and benefits is entitled to a high degree of deference. *See Energy Reserves,* 459 U.S. at 412-13. Nextel's contention that consumer-protection measures are not entitled to deference is not well-taken. *See id.* (deference to be afforded to both regulations that pertain to health and safety, as well as economic regulations). In any event, both JWC and Nextel address the third factor, but only in a conclusory fashion. JWC merely states that the Rules are unnecessary because consumer interests are "adequately served by existing law." It does not, however, identify any particular rules and demonstrate how they are so redundant with existing law that the public benefits those rules confer do not outweigh their contractual burdens. Nextel argues that the Rules go too far because, "It is manifestly unreasonable and inappropriate to impose millions of dollars in costs on the wireless industry in order to get wireless subscribers a better deal than similarly situated consumers in other industries receive as the result of generally applicable consumer protection laws." This contention is flawed for at least two reasons. First, the argument assumes that generally applicable consumer protection laws protect wireless subscribers as well as they protect other consumers. But Nextel provides no evidence to support that view, and the record belies Nextel's contention. Second, even if *all* consumer protection laws were less adequate than they should be, the Constitution does not prevent the state from addressing that inadequacy on a piecemeal basis, rather than all at once. *See Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489 (1955).

In summary, the Wireless Carriers have failed to establish grounds for granting rehearing on this issue.

2. Alleged First Amendment Violations

The Carriers argue that certain Rules violate their freedom of speech rights under the First Amendment. Specifically, the Carriers refer to Rules that require disclosure of information to consumers, prohibit incorporating certain information by reference in service agreements or contracts, require a certain type size, and prohibit carriers from combining solicitation materials with written authorizations for service. However, in making their First Amendment arguments, the Carriers rely on the wrong standard of review. The principal authorities on which the Carriers rely pertain to statutes that *prohibit* truthful commercial speech (*e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980)), or to attempts to regulate *non*-commercial speech (*e.g.*, *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988)). The Rules at issue here, however, pertain to purely commercial speech, and rather than prohibiting that speech, mandate disclosure of truthful and accurate information. Such rules are subject to a different, and more lenient, standard than the standards that pertain to non-commercial speech or to prohibitions on speech. *National Elec. Mfg's Ass'n v. Sorrell,* 272 F.3d 104, 115 (2d Cir. 2001).

The Supreme Court specifically rejected the test that the Carriers contend applies here, holding that where rules require the disclosure of truthful, factual information, they will be upheld provided that they are "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985). There is little question that the challenged Rules satisfy this test. We find the authority relied on by the Carriers unpersuasive in altering this conclusion.

3. Wireline's Takings Clause Claims

Wireline, alone among the Carriers, asserts that two rules – Rules 3(f) and 3(m) – violate the Takings Clause of the Fifth Amendment to the United States Constitution. According to Wireline, Rule 3(f) prohibits carriers from recovering from an individual subscriber the costs of certain off-premises work associated with establishing the subscriber's service, provided the subscriber cancels within 30 days of initiation of service. Rule 3(m) requires carriers to give subscribers a $25 credit if they fail to initiate a service appointment within a specified time.

Wireline's arguments lack merit for several reasons. First, to trigger a Takings Clause inquiry, the government actually must deprive a person of his or her property. *See* U.S. Const., 5th Amend. Assuming that Wireline's complaint is that it has a property right to recover certain costs, that claim must fail because the Rules do not prohibit any cost recovery. Wireline is free, under the Rules, to recoup the costs associated with Rules 3(f) and 3(m) as part of its basic rates. All these Rules do is prohibit a carrier from charging one specific subscriber – the one identified in each Rule – for those costs.

In any event, even if these Rules did prohibit carriers from recovering these costs, Wireline has not established a violation of the Takings Clause. Not only does Wireline fail to address the standard for determining when a regulatory taking occurs, the cases it cites are inapposite. They pertain not to regulatory takings, but instead to actual takings of property. Where a regulation allegedly takes money from a regulated entity, or limits the entity's ability to recover certain costs, the mere fact that the government has disallowed the recovery of certain costs is insufficient to establish a taking. *See Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310 (1989) (citing *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944)). Whether a regulation runs afoul of the Takings Clause is analyzed under a three-factor test: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 429 n.59 (5th Cir. 1999); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986).

Here, Wireline makes no effort to quantify or present evidence regarding the first factor. Thus, Wireline cannot carry its burden as to that factor. *See Texas Office of Pub. Util. Counsel*, 183 F.3d at 429 n.59. Regarding the second factor, because telecommunications companies are highly regulated, and because Congress specifically delegated to the states regulation of terms and conditions of service, *see* 47 U.S.C. § 332(c)(3), it is difficult to conclude that imposition of the regulations embodied in the challenged rules interferes with legitimate investment-backed expectations. Finally, the character of the state action here also supports the conclusion that there is no taking. As a rule, state action that does not physically invade or occupy property, but merely adjusts the "benefits and burdens of economic life to promote the common good," is of a character that is less likely to support the conclusion that there has been a taking. *Connolly*, 475 U.S. at 226.

4. Alleged Commerce Clause Violations

The Wireless Carriers argue that several of the Rules – including Rules 1(b), 3(i), 4, 7(a), 7(d), and 9 – violate the Commerce Clause because they impermissibly regulate or burden interstate commerce. In essence, the Wireless Carriers contend that because wireless services are not limited to wholly intrastate service, those Rules that regulate terms and conditions of service necessarily directly regulate or burden interstate commerce. We find these claims to be unconvincing.

The Commerce Clause does not, by its terms, prohibit states from enacting laws that directly regulate or otherwise affect interstate commerce. Instead, it merely grants Congress authority to regulate interstate commerce. U.S. Const. Art. I § 8, cl. 4. Courts, however, have held that this "affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Institute*, 491 U.S. 324, 326 n.1 (1989). That is, because the Constitution gives Congress authority to regulate interstate commerce, courts have held that states are prohibited from enacting legislation that materially interferes with that authority.

On their most fundamental level, the Wireless Carriers' Commerce Clause arguments cannot succeed because Congress itself has delegated to states authority to regulate the terms and conditions of wireless service. *See* 47 U.S.C. § 332(c)(3). Because Congress has affirmatively delegated this authority to the states, it is difficult, at best, to give credence to the contention that California's exercise of this authority interferes with Congress' commerce powers.

Even if the Rules plausibly could be alleged to interfere with interstate commerce, despite section 332(c)'s delegation of authority, we find that the Wireless Carriers' rehearing requests fail to establish that the Rules affect interstate commerce to the extent prohibited by the Constitution. In evaluating challenges to state regulation under the Commerce Clause, courts follow "a two tiered approach:"

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 476 (9th Cir. 2001). The Wireless Carriers fail to establish a Commerce Clause violation under either tier of the test.

The Carriers provide no authority to support their contention that the Rules directly regulate interstate commerce, and we find that the Rules at issue here are not the type that typically have been struck down as directly regulating interstate commerce. Here, the challenged Rules are of a different ilk, and the Wireless Carriers cite no case in which a statute or regulation similar to the ones they challenge here has been invalidated on the theory that it directly regulates interstate commerce. Indeed, most challenged Rules merely regulate, directly or indirectly, the terms and conditions of services offered by wireless carriers within California. Courts have held that such regulations affecting the terms and conditions of contracts that may relate, in part, to interstate transactions do not constitute direct regulation of interstate commerce. *See Gravquick A/S v. Trimble Navigation Intern. Ltd.,* 323 F.3d 1219, 1223-24 (9th Cir. 2003) (distinguishing, *e.g.*, *Healy*).

The Wireless Carriers' challenge to the Rules on the ground that they indirectly, but unduly, burden interstate commerce, also lacks merit. As noted above, such challenges cannot succeed unless the challenger shows that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Here, the Wireless Carriers' rehearing applications are virtually devoid of citation to any evidence pertaining to that balancing test. One carrier, Nextel, argues that in the interest of efficiency, it will be forced either to conform its conduct in all states to that mandated by the Rules, or to implement two sets of contracts – one for California customers, and one for the rest of the states. Nextel App. at 24. Courts, however, have expressly rejected Commerce Clause challenges on such grounds. *See Nat'l Elect. Mnfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2nd Cir. 2001). The fact that the Rules, by their terms, do not *require* the carriers to implement the Rules in all states, appears to be dispositive. *See id.* And the fact that setting up a separate system in California to comply with the Rules may cost the carriers money, does not alter that conclusion.

Nextel also points to a putative burden on interstate commerce arising from potential conflicts between the Rules and the regulations in effect in other states. However, the weight of authority does not support Nextel's contention. It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states. *See id*. at 112; *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring) ("This is not a hypothetical inquiry."); *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 77 (7th Cir.1975) ("The Supreme Court has indicated that in a case involving environmental legislation it is actual conflict, not potential conflict, that is relevant.").

Here, the Wireless Carriers fail to point to any instance of an actual conflict. Instead, they focus on what they claim is the need for uniform regulation.

For example, Nextel contends, “Interstate wireless networks, like railroads, interstate highways, and the Internet, constitute an area of the economy that particularly demands uniform rules and regulations.” Nextel App. at 22. As noted above, however, Congress already has spoken on the need for uniformity, and determined that individual states are free to adopt their own regulations regarding the terms and conditions of wireless services. *See* 47 U.S.C. § 332(c)(3).

In short, the Wireless Carriers have not demonstrated that the challenged rules run afoul of the Commerce Clause.

C. Vagueness Issues

In their rehearing applications, the Carriers allege that various portions of D.04-05-057 and/or G.O. 168 are vague and ambiguous. In determining whether a statute, regulation or quasi-legislative administrative ruling is impermissibly vague, there is a strong presumption of constitutionality. Statutes should be “sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating” statutory provisions, but cannot be held void for uncertainty if reasonable and practical construction can be given to the statutory language. *See, e.g., Williams v. Garcetti,* 5 Cal. 4th 561, 568 (1993); *Walker v. Superior Court,* 47 Cal. 3d 112, 143 (1988). Statutes must be given a “liberal, practical common-sense construction . . . in accordance with the nature and ordinary meaning of words,” and only a reasonable degree of certainty is required. *See, e.g., Amador Valley Joint High School District v. State Board of Equalization,* 22 Cal. 3d 208, 245 (1978); *People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090, 1117 (1997).

In order to prevail on claims that certain provisions of D.04-05-057 and/or G.O. 168 are impermissibly vague, the Carriers must demonstrate that these provisions present a “total and fatal conflict with applicable constitutional prohibitions,” and must show that “no set of circumstances exists under which” the provisions would be valid. *Personal Watercraft Coalition v. Marin County Bd. of Supervisors,* 100 Cal. App. 4th 129, 138 (2002); *see also Kaufman v. ACS*

Systems, Inc., 110 Cal. App. 4th 886, 920-21 (2003); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1200-01 (1988). "A facial challenge must fail if courts can conceive of a single situation in which the legislative enactment can be constitutionally applied." *Personal Watercraft Coalition*, 100 Cal. App. 4th at 138; *see also Superior Court v. County of Mendocino,* 13 Cal. 4th 45, 59-61 (1996); *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal. App. 4th 1473, 1494 (1998). Finally, when an administrative regulation is challenged, the standard of constitutional vagueness is less strict than when a criminal law is attacked, and greater leeway is allowed in the field of regulatory statutes governing business activities. *Ford Dealers Assn v. Dept. of Motor Vehicles,* 32 Cal. 3d 347, 366 (1982).

The Carriers allege that several commonly used words and phrases, and certain defined terms, are unconstitutionally vague. For example, Wireline argues that the definition of "clear and conspicuous" is impermissibly vague. Wireline App. at 2-3. However, California courts have upheld phrases similar to "clear and conspicuous" against vagueness claims, and have noted that other courts have determined that the phrase "clear and conspicuous" is not impermissibly vague. *See Ford Dealers Ass'n.*, 32 Cal. 3d at 368; *see also Haynes v. Farmers Insurance Exchange*, 32 Cal. 4th 1198, 1204-08 (2004) (articulating the meaning of the terms "clear" and "conspicuous" under California law). The Carriers also argue that the definition of "key rates, terms and conditions" is impermissibly vague and ambiguous. Nextel App. at 36-38; Wireline App. at 4-5; JWC App. at 42. However, the definition gives examples of items that are included in "key rates, terms and conditions" that put the Carriers on notice regarding matters that must be disclosed. *See* G.O. 168, Part 2, Section B at 5-6. These examples are sufficiently specific so as to put the Carriers on notice as to what constitutes "key rates, terms and conditions."

Wireline further asserts that the definition of "small business" is impermissibly vague and ambiguous. Wireline App. at 5-9. The definition clearly indicates that a business entity having up to 20 telephone access lines and/or one T-1 line is considered a "small business," and thus is not impermissibly vague. *See* G.O. 168, Part 2, Section B at 6. Similarly, JWC's allegation that the phrase "sufficient information to enable consumers to make informed choices among services" is impermissibly vague lacks merit, as this phrase is virtually identical to the language contained in P.U. Code section 2896(a), which was enacted in 1993. *See* JWC App. at 43. JWC also allege that Rule 2 is impermissibly vague because it does not define "offer" as the term is used in Rule 2. JWC App. at 43. However, the term "offer" is sufficiently defined by California law. *See, e.g., City of Moorpark v. Moorpark Unified School Dist.,* 54 Cal. 3d 921, 930 (1991); *Donovan v. RRL Corp.,* 26 Cal. 4th 261, 276 (2001). As such, JWC's claim that the term "offer" is impermissibly vague lacks merit.

Nextel alleges that the definition of "subscriber" in G.O. 168 is impermissibly vague. Nextel App. at 38-39. General Order No. 168 defines "subscriber" as "[a]ny individual or small business that purchases or subscribes to any telecommunications service subject to Commission jurisdiction." G.O. 168, Part 2, Section B at 6. Nextel complains that this definition is vague and ambiguous because it does not comprehensively define the telecommunications services over which the Commission exercises jurisdiction. However, there is no requirement that we lay out the precise limits of our jurisdiction in this area in order to withstand a vagueness challenge. We clearly intend the Decision and General Order to apply to all matters within our jurisdiction, as spelled out in the California Constitution, the Public Utilities Code, and other sources of California statutory and decisional law. Thus, this allegation of error lacks merit.

We will, however, make two modifications to the Decision in order to eliminate inconsistencies between the final version of the Decision and the final version of the Rules. First, the word "Quotations" in the first paragraph of D.04-05-057, page 39, should be changed to "Statements" to track the final language of Rule 2(a). Second, the following phrase should be deleted from the last paragraph of D.04-05-057, page 38: "The term 'solicitation' as used in this Rule and elsewhere is now defined as an 'offer' with the intent to sell . . . ." This phrase should be deleted because the term "offer" does not have the precisely the same meaning as "solicitation" and "solicitation" as used in the Decision and the Rules has a broader meaning.

No further discussion of the Carriers' vagueness allegations is required.

D. STATE LAW ISSUES

The Carriers claim that several portions of D.04-05-057 and/or G.O. 168 conflict with various provisions of state law. However, a review of these arguments reveals no conflict between the Decision, the Rules and state law.

Several rules of construction have been established by California courts in order to interpret statutory and regulatory provisions. First, it should be noted that the rules and regulations articulated by the Commission constitute general laws of the State of California. *See Leslie v. Superior Court*, 73 Cal. App. 4th 1042, 1046 (1999); *see also* California Constitution, article XII, § 8; *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 914-915 (1996). In resolving alleged conflicts between state laws, courts are generally instructed to discern the probable intent behind legislative and regulatory enactments so as to effectuate the purpose of the laws in question. *See, e.g., California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal. 4th 627, 632 (1997); *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 309-310 (2000). Statutes and regulations are examined in their context and with other enactments on the same subject. *See California Teachers Ass'n*, 14 Cal. 4th at 642; *Collection Bureau of San Jose*, 24 Cal. 4th at 310. Courts examine a statute or regulation "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *State Farm Mutual Automobile Insurance Co. v. Garamendi*, 32 Cal. 4th 1029, 1043 (2004) (citations omitted). Absent a compelling reason to do otherwise, courts also strive to construe each statute or regulation in accordance with its plain language. *Samuels v. Mix*, 22 Cal. 4th 1, 7 (1999). Finally, the Commission's interpretation of the statutes and regulations it is charged with implementing is entitled to a strong presumption of validity, and the Commission's interpretation should not be disturbed unless it fails to bear a reasonable relation to the statutes and regulations at issue. *See, e.g.*, *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal. 2d 406, 410-11 (1968); *Pacific Bell v. Public Utilities Commission*, 79 Cal. App. 4th 269, 283 (2000) (courts will not disturb Commission decisions absent a "manifest abuse of discretion or an unreasonable interpretation of the statutes" at issue); *Yamaha Corporation of America v. State Board of Equalization*, 19 Cal. 4th 1, 7 (1998) (agency interpretations of the meaning and legal effect of statutes and regulations are entitled to consideration and respect by the courts).

1. Alleged Conflict Between Rule 6(g) and P.U Code Section 786

JWC allege that Rule 6(g) impermissibly conflicts with P.U. Code section 786(c) because Rule 6(g) requires all government mandated taxes, surcharges and fees collected from a subscriber and required to be remitted to a government agency to be listed in a separate section of a subscriber's phone bill labeled "Government Fees and Taxes," whereas section 786(c) requires telephone corporations to list any charges imposed in response to FCC rules and regulations in a separate section of a subscriber's phone bill labeled "THIS CHARGE IS, (or THESE CHARGES ARE) IMPOSED BY ACTION OF THE FEDERAL COMMUNICATIONS COMMISSION." JWC App. at 45. Wireline further argues that Rule 6(g) conflicts with section 786 in those instances in which the FCC has imposed mandatory costs on carriers and has authorized, but not required, carriers to recover the costs from subscribers. In such instances, according to Wireline, a particular charge may fall within the purview of section 786(c) because the FCC authorizes the carrier to collect such charge from the subscriber, but may run afoul of Rule 6(g) because whether to impose the charge is within the carrier's discretion and because the carrier may not be required to remit the proceeds of the charge directly to a government agency. Wireline App. at 23-24. These allegations of error lack merit.

Section 786(c)'s requirement that carriers distinguish FCC charges from other charges, and list FCC charges separately from other charges, does not conflict with Rule 6(g). FCC-imposed charges that are required to be remitted to federal, state or local governments may be listed in the "Government Fees and Taxes" section of the billing statement, with an asterisk, or other device or notation, indicating that "THIS CHARGE IS, (or THESE CHARGES ARE) IMPOSED BY ACTION OF THE FEDERAL COMMUNICATIONS COMMISSION." This would comply with both Rule 6(g) and section 786(c). Any fees authorized by the FCC, but not required to be remitted to a federal, state or local government, should be listed separately from the "Government Fees and Taxes" section of the billing statement, and should also carry the proper notation required by section 786(c), indicating that the charges are imposed by action of the FCC. This latter issue should be irrelevant to carriers who do not charge discretionary FCC fees. Thus, we find no conflict between Rule 6(g) and section 786(c).

2. Alleged Conflict Between Rules 2(b)-(c), 3(e) and 6(k) and P.U. Code Section 2890

JWC allege that Rules 2(b)-(c), 3(e) and 6(k) impermissibly conflict with P.U. Code section 2890. JWC App. at 46-47. Rule 2(b) provides that written authorizations for service shall be separate from any solicitation materials and shall not constitute sweepstakes or contest entry forms. Rule 2(c) provides that all terms of such written authorizations or confirmations must be unambiguous, legible, and written in a minimum of 10-point type. Rule 3(e) requires carriers to highlight key rates, terms and conditions of service by printing in larger or contrasting type, underlined, bolded, or some other comparable method. Rule 6(k) requires carriers to include in their bills the address, telephone numbers, and email address of the Commission or FCC, as appropriate. JWC allege that these specific rules impose new, additional or inconsistent requirements to those articulated in section 2890.

Section 2890(b) provides that a written order for a product or service shall be separate from any solicitation materials, and shall not be used as a sweepstakes or contest entry form. Section 2890(b) further states that all written orders and written solicitation materials shall be in a minimum of 10-point type. Section 2890(d)(2)(B) provides that carriers include in their bills the appropriate telephone number of the commission that a subscriber may use to register a complaint. These provisions of section 2890 do not conflict with Rules 2(b)-(c), 3(e) or 6(k). Rather, these specific Rules and section 2890 complement one another in that, taken together, they ensure that written orders, confirmations or service authorizations are separate from solicitation materials, do not take the form of sweepstakes on contest entry forms, are in a type-size likely to be legible to the average consumer, and that consumers are provided with contact information to register complaints with the Commission or the FCC. There is no requirement that Rules 2(b)-(c), 3(e) and 6(k) precisely track the exact language of section 2890, and JWC point to none.

3. Alleged Inconsistency Between Rule 3(b) and P.U. Code Section 2896(a)

JWC assert that Rule 3(b), which requires carriers to provide consumers initiating service with sufficient information to enable them to make informed choices among services, is inconsistent with P.U. Code section 2896(a), which states that a provider need only provide information to its customers on the services which it offers. JWC App. at 47. This allegation of error lacks merit.

Rule 3(b)'s requirement that carriers must provide consumers with sufficient information to enable them to make informed choices among services is virtually identical to the language contained in section 2896(a). The only difference between the two provisions is that section 2896(a) states that a carrier is only required to provide sufficient information about the services which it offers, whereas Rule 3(b) does not contain this language. However, Rule 3(b) applies only to customers *initiating a service with a carrier*, and thus the most reasonable interpretation of Rule 3(b) is that carriers must provide sufficient information about only those services that it actually offers and that might be selected for initiation by consumers. An interpretation of Rule 3(b) as requiring a carrier to provide information about services it does not even offer is tenuous at best.

4. Alleged Conflict Between Rule 4(c) and Bus. & Prof. Code Section 17538.9:

JWC claim that Rule 4(c) impermissibly shifts the burden of conveying certain information to purchasers of prepaid calling cards from the vendor of calling cards to the carrier. According to JWC, Bus. & Prof. Code section 17538.9 requires vendors of calling cards to conspicuously display certain information related to the calling cards, whereas Rule 4(c) *requires carriers to require vendors to* conspicuously post certain information related to calling cards proximate to the point of sale of the cards. JWC App. at 47. JWC assert that imposing this burden on the carrier impermissibly conflicts with section 17538.9. However, JWC point to no authority preventing the Commission from enacting additional safeguards for consumers of prepaid calling cards, including requiring carriers to ensure that vendors who sell carriers' products provide important consumer information to calling card purchasers. Requiring carriers to take a more active role in protecting consumers of calling cards does not violate section 17538.9; if anything, Rule 4(c) complements and enhances the consumer protections already exiting pursuant to section 17538.9. Thus, this allegation of error lacks merit.

5. Alleged Conflict Between Rule 8(b) and State Common Law Regarding Good Faith Modification to Contracts

JWC allege that Rule 8(b), which prohibits certain contract modifications, conflicts with state law permitting such modifications subject to a duty of good faith. JWC App. at 47. Rule 8(b) prohibits carriers from unilaterally imposing term contract changes on subscribers that result in more restrictive terms or conditions, unless such changes are "otherwise allowed by applicable law" and the change is communicated in writing to the subscriber 25 days prior to the change taking effect. By its express terms, Rule 8(b) permits contract changes, if otherwise allowed by applicable law, as long as proper notice is provided to the subscriber, and as long as such changes do not involve term contract rates or charges. This does not conflict with any provisions of state common law permitting good faith modification of contracts, and the Commission has jurisdiction and authority to ensure that consumers are protected from unilateral changes to essential contract terms and conditions that are not otherwise permitted by applicable law. Thus, this allegation of error lacks merit.

6. Alleged Conflict Between Rule 3(m) and P.U. Code Sections 734-736 and 1702.1

Wireline argues that Rule 3(m) impermissibly conflicts with P.U. Code sections 734-736 and 1702.1 in that Rule 3(m) requires carriers to provide a $25 credit when, under certain circumstances, the carrier fails to meet the four-hour window on scheduled service calls, whereas sections 734-736 and 1702.1 contemplate that complaints concerning a carrier's provision of services, such as missed service appointments, shall proceed by way of complaint, with the complainant bearing the burden of proving entitlement to reparations. Wireline App. at 18-19. This allegation of error lacks merit.

Rule 3(m) complements, but does not conflict with, sections 734-736 and 1702.1. Sections 734-736 and 1702.1 provide customers with the option of filing a complaint with the Commission under certain circumstances. Rule 3(m) simply provides an additional remedy for consumers under very specific circumstances in which all of the following occur: 1) the carrier provides the customer with a four-hour window for repair or installation work; 2) the installation or repair is not commenced during the four-hour window; and

3) failure of the carrier timely to commence the installation or repair is not excused due to force majeure, inability to access premises, or rescheduling of the service appointment two business days prior to the appointment. If all of these criteria are met, Rule 3(m) requires the carrier to provide a $25 credit to the subscriber. This does not conflict with sections 734-736 and 1702.1, and Wireline cites no authority demonstrating that the Commission lacks the jurisdiction to impose this requirement on carriers.

7. Alleged Conflict Between Rules 1(f)-(g) and 2 and P.U. Code Section 728.2

JWC allege that Rule 1(f)-(g) impermissibly conflicts with P.U. Code section 728.2(b)(2), because, according to JWC, section 728.2(b)(2) excludes Commission jurisdiction over advertising contained in the alphabetical and classified directories of telephone corporations. JWC App. at 45-46. JWC and Wireline also argue that Rule 2, which regulates carrier offers and statements about rates and services, could be read to apply to wireless carrier advertisements in yellow pages or alphabetical directories, and thus it conflicts with section 728.2(a). JWC App. at 46; Wireline App. at 12.

Rule 1(f) describes basic information that must be included in alphabetical telephone directories, including emergency telephone numbers, instructions for reaching an operator, basic service rates and information, and a list of area codes. Rule 1(g) states that carriers shall not reduce the level of telecommunications-related information contained in alphabetical telephone directories without first obtaining Commission authorization. Rule 2 prohibits deceptive, untrue, or misleading offers by carriers. These provisions do not conflict with section 728.2(a) or 728.2(b)(2). Section 728.2(a) states that the Commission does not have jurisdiction over the form, content or charges for advertising contained in classified telephone directories or alphabetical telephone directories. Section 728.2(a) thus applies to the advertising a carrier accepts and for which it accepts payment, *i.e.*, the advertising of business entities carried in directories, such as yellow pages directories. In contrast, Rule 2(a) refers to and regulates only offers made by carriers, and does not apply to advertising by other business entities for which carriers charge for publication in their telephone directories.

In addition, there is no basis for interpreting section 728.2(b)(2) to preclude the Commission's authority to require basic information such as emergency telephone numbers and area codes to be included in telephone directories. This in no way affects any advertising contained in such directories. Rather, it merely ensures that consumers have access to critical factual information in their telephone directories. Finally, there is no basis for interpreting section 728.2(a) or section 728.2(b)(2) to limit the Commission's residual authority to ensure that regulated entities refrain from utilizing deceptive, untrue or misleading advertising practices, or that carriers include basic information such as emergency telephone numbers and instructions for reaching an operator in their telephone directories. *See, e.g.,* P.U. Code §§ 701, 761, and Article XII of the California Constitution; *see also Southern California Edison Co. v. Peevey,* 31 Cal. 4th 781, 792-93 (2003). Thus, these allegations of error lack merit, and no further discussion of the Carriers' allegations of conflicts with State law is required.

8. Wireline's Arguments Regarding Rule 8(b) and General Order 96-A

Rule 8(b) imposes certain requirements regarding when and how carriers can alter term contracts with subscribers. Wireline raises several objections to the Rule, none of which has merit.

Wireline first complains that the Rule is ambiguous, alleging that it is unclear whether the Rule applies to contracts for tariffed services, for non-tariffed services, or both. Wireline App. at 25. Rule 8(b), on its face, however, does not distinguish between tariffed and non-tariffed services. It is not ambiguous; it applies to both sorts of services. Wireline's suggestion that the heading to Rule 8, which refers not only to "contracts," but also to "tariffs," somehow creates an ambiguity is not well-taken. Parts of Rule 8 do relate to tariffed services, so use of the word "tariffs" in the heading is neither misleading, nor creates an ambiguity in Rule 8(b). Consequently, there appears to be no need for the "clarification" that Wireline requests.

Next, Wireline argues that if Rule 8(b) applies to tariffed services, it conflicts with G.O. 96-A, and "would require carriers to comply with two disparate rules." Wireline App. at 25. This contention, too, lacks merit. Section 10 of G.O. 96-A specifies certain requirements and procedures that must be followed should a utility want to modify a contract for a tariffed service by filing an advice letter. Rule 8(b) imposes certain *additional* requirements and limitations that pertain to when and how a telecommunications carrier can alter term contracts with subscribers. But these requirements do not conflict with the requirements of G.O. 96-A, and nothing would prevent a carrier from complying with the requirements of both the General Order and the Rule. Wireline's conclusory assertion that the rules are "disparate," implying that it would be impossible to comply with both the General Order and the Rule, has no basis in fact.

Next, Wireline argues that Rule 8(b) "directly and substantively alter[s] General Order 96-A, as appended, without protecting the due process rights of all interested parties," because parties lacked notice that Rule 8(b) would modify the General Order. Wireline App. at 25. This argument is flawed in several respects. Fundamentally, as discussed above, Rule 8(b) does not alter or modify G.O. 96-A. It simply supplements it. Consider, for example, Wireline's statement that Rule 8(b) "directly and substantively alters the carrier rights set forth in General Order 96-A, as appended, by prohibiting carriers from modifying or amending ICB term contracts in any manner that would change the rates." Wireline App. at 26. This statement is untrue. Nothing in the General Order even speaks to the question whether carriers can modify contracts in a way that can change rates, and there is nothing in the General Order that can even arguably be said to create a right in carriers to alter contract rates at will. The General Order is silent on the issue. Rule 8(b) imposes this prohibition, regardless of the other procedures that G.O. 96-A mandates.

Moreover, even if the Rule *did* somehow substantially alter G.O. 96-A, Wireline's contention that parties' due process rights thereby were violated, because parties lacked notice that Rule 8(b) would alter the G.O., is spurious. Wireline argues:

> [I]n D.02-01-038, the *Commission stated that it would only be addressing* "customer notice and other procedural requirements pertaining to formal applications . . . as appropriate, in R.00-02-004." Parties that relied on that "notice" of the intent and scope of this rulemaking were mislead, as General Order 168, Rule 8(b) now makes clear that the Commission intended to substantively alter carrier and consumer rights as set forth in General Order 96-A in this proceeding. As a result, the Commission failed to provide adequate notice and an opportunity to be heard to the interested parties in the General Order 96-A rulemaking.

Wireline App. at 27 (emphasis added).

The defect in this argument is that the Commission did *not* say in the cited decision that it would "only" be addressing these issues. The Commission merely said that these specific issues would be addressed, as appropriate, in R.00-02-004. Specifically, the Commission said only, "Today's decision does not address customer notice and other procedural requirements pertaining to formal applications. These requirements go beyond the purview of this rulemaking to revise GO 96-A; however, we expect to deal with them, as appropriate, in R.00-02-004." D.02-01-038, 2002 Cal. PUC LEXIS 34, at *3. No party could reasonably rely on this statement as indicating that Rule 8(b) would not address requirements regarding when and how carriers could alter term contracts for tariffed services. In any event, the full scope and content of what was contemplated in Rule 8(b) was evident to any interested person in the form of its earlier drafts, and the numerous draft decisions issued in this proceeding prior to its final promulgation.

Finally, Wireline argues that Rule 8(b) is fatally flawed in that it "violates the carriers and consumers rights to due process and to enter and modify private contracts to prohibit them from modifying the rates in their term agreements." Wireline App. p. 28. We are aware of no authority, and Wireline cites none, that carriers have a due process right to modify contracts at will.

9. Public Utilities Code Section 1705/Sufficiency of the Record

JWC raise general claims about a lack of sufficient record to justify adoption of the new Rules and claim the Commission has failed to make necessary findings in violation of Public Utilities Code section 1705. However, JWC provide almost no analysis in backing up its conclusory remarks on these issues. According to JWC, the record in this case consists of a relatively small number of consumer complaints that are four years old. However, as AG/ORA point out, the Carriers' claims ignore numerous comments filed which demonstrate the need for consumer protections for both wireline and wireless customers. These comments include consumer complaint statistics, studies of customer satisfaction with the wireless industry, evidence of the use of hidden fees, and comments outlining the various legal actions taken to stop carriers' unlawful and deceptive conduct. In addition, while JWC complain that the Commission failed to make necessary findings of fact that are material to the decision, they point to only two specific aspects of the decision which allegedly lack sufficient findings:[2] (1) there are no findings supporting the feasibility of the 180 day implementation period for most Rules; and (2) there are no findings that the economic burdens the final Rules

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[2] Since the Carriers fail to describe with any particularity how the Decision violates Section 1705, the applications fail to meet the requirement of Public Utilities Code Section 1732, which requires applications to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful…." Rule 86.1 of the Commission's Rules of Practice and Procedure additionally caution applicants that "vague assertions as the record or the law, without citation, may be accorded little attention."

impose on carriers are outweighed by the benefits to consumers. The first issue is addressed more fully below in Part F. The second issue is addressed below.

10. P.U. Code Section 321.1

Section 321.1 of the Public Utilities Code provides, in relevant part:

> It is the intent of the Legislature that the commission assess the economic effects or consequences of its decisions as part of each ratemaking, rulemaking, or other proceeding, and that this be accomplished using existing resources and within existing commission structures.

The Carriers argue that the Commission failed adequately to comply with this provision. This argument lacks merit. The Commission did exactly what the statute requires, and assessed the economic consequences of the Rules.

The Commission considered evidence and comments regarding the economic effects of the Rules as proposed and revised over the course of this proceeding, and there is no question that the Carriers had ample opportunity to present their case regarding the economic effects of the proposed Rules. As the Decision notes:

> Stakeholders have now been afforded numerous opportunities to submit comments and/or replies to comments on the proposed new consumer protection rules overall or various subsets of them during the more than four-year course of this proceeding. The Assigned Commissioner issued his first draft decision in June 2002 following nine opportunities for parties to submit comments and/or replies to comments. There followed comments on that draft, four days of workshops involving the entire industry, further comments and recommendations by a joint industry-consumer working group, and consolidated reply comments on the first draft decision and the working group's recommendations. With that extensive and fully developed record in hand, the Assigned Commissioner issued for comments a revised draft decision with proposed rules in July 2003, and the final round of comments and replies on it were to have been received by September 4, 2003.

Decision at 131; see also *id*. at 131-40. The evidence considered included studies and papers prepared both for consumer groups and for the Carriers. *See id*. at 133 n.78 and accompanying text. And the Commission fully considered these comments and evidence, balancing the costs and benefits of the proposed rules, and concluding that, "the rules adopted in this decision represent a balancing of the need to protect consumers with the various interests presented by the industry, including issues of cost and economic effects." *Id.* at 133; *see also id*. at 138-40.

Section 321.1 does not appear to require more, and the Carriers cite no authority to support a contrary conclusion. Instead, the Carriers complain that despite the exhaustive process summarized above, the Commission erred by failing to give them sufficient time to submit still another round of evidence and comments after the Interim Decision was circulated. *See, e.g.,* JWC App. at 50. This complaint lacks merit. The differences between the Rules embodied in the Interim Decision and earlier versions are due, in part, to the fact that the Commission took seriously the Carriers' earlier comments, and modified many Rules to mitigate the Carriers' concerns regarding their economic effects. *See* Decision at 136-37. Thus the Carriers' view that they are entitled to another full round of comments, submission of more evidence, and so forth, if adopted, would result in a virtually endless cycle. According to the Carriers' view, every time the Commission takes seriously comments on the Rules and modifies them, the Commission must allow another exhaustive round of comments and evidence. No decision ever could issue.

The Carriers' complaint might have some force if they had identified specific Rules that had changed between the last draft decision and the interim decision at issue here, and explained why those changes likely would have a significant effect on the economic assessment required by section 321.1. In that circumstance, there may have been a compelling reason to entertain another extended round of comments and the submission of new evidence to address these demonstrably changed circumstances. The rehearing requests, however, are devoid of any such specificity, and even if they contained such specificity, this would not alleviate the legitimate concern regarding endless rounds of comments and the Commission's resulting inability to ever conclude Commission proceedings. The requests thus provide no basis to conclude that the Commission should grant rehearing on this issue, consider further comments and evidence, and ultimately revise the Rules.

E. PROCEDURAL DUE PROCESS ISSUES

Nextel raises a host of alleged procedural due process violations in its application, including allegations that the Commission (1) denied the right to request an evidentiary hearing, (2) denied the right to be heard regarding the alternate draft decision, and (3) failed to consider comments on the implementation period. Nextel also argues that in disposing of the applications for rehearing, the Commission should take the opportunity "to declare that comments on a draft decision are not part of the record and do not constitute a record on which a decision may be based." As to this last point, Nextel claims that as a consequence of Commission Rule of Practice and Procedure 77.3, which bars the submission of new information in comments on draft decisions, the Carriers were deprived of the opportunity to submit new information and therefore were deprived of a meaningful opportunity to develop the record. JWC also make similar allegations concerning due process violations in their application for rehearing.

The Order Instituting Rulemaking (OIR) in R.00-02-004 required parties to make offers of proof with their opening comments for any matters for which they believe evidentiary hearings were required, and specified that failure to do so would waive the parties' right to hearing. According to Nextel, the "staff report" attached to the February 2000 OIR bore no resemblance to the Rules proposed by Commissioner Wood in his June 2002 Draft Decision. Nextel claims that there was a "massive change in the thrust and direction of this proceeding when the 2002 Draft Decision was released (long after the right to request an evidentiary hearing had supposedly been ’waived’).” JWC also claim (in a footnote) that the finding that the Carriers waived their right to evidentiary hearing is an abuse of discretion and a violation of due process as the parties had no reasonable notice of the scope and details of the Proposed Rules that were ultimately issued. Accordingly, Nextel claims that the Commission failed to give the Carriers a proper opportunity to exercise their right to request an evidentiary hearing on the Rules the Commission was actually going to consider.

Nextel also argues that the one week allowance for the preparation of comments on the Alternate Draft Decision of Commission Brown was arbitrary and capricious, and did not provide the parties with a meaningful opportunity to be heard regarding the economic impact of those Rules as required by Public Utilities Code section 321.1. JWC also complain that the version of the Rules ultimately adopted was only first presented for comment two weeks before their issuance, and that Carriers were not provided with sufficient opportunity to comment on the latest version of the Rules.

Nextel also complains that the Commission did not consider comments on the implementation period, and should reopen the record for receipt of new information regarding the appropriate period of time needed to implement the Rules in G.O. 168.

These claims are without merit. The OIR complied with the Commission’s own procedures, and specifically identified the areas on which the Commission requested input and on which it intended to promulgate Rules. The proposed Rules attached to the OIR did not limit the Commission’s ability to promulgate different Rules. In fact, the Carriers were put on notice that the Commission would consider not only the Rules included in the staff report, but also additional Rules that might be proposed by interested parties.

In addition, Public Utilities Code section 1708.5(f) and Rule 6(c)(2) of the Commission’s Rules of Practice and Procedure do not require evidentiary hearings for rulemaking proceedings. Nonetheless, parties were given the opportunity to comment on the categorization of the proceeding as quasi-legislative, as well as the determination not to hold hearings. No carrier sought an evidentiary hearing on the consumer protection Rules, and in fact the wireless carriers association ("CCAC") stated that it had no objection to the preliminary scoping memo or the categorization of the proceeding. CCAC also concurred that formal evidentiary hearings were not necessary, and that workshops would be useful as a mechanism to obtain parties' input on proposed Rules. *See* CCAC Opening Comments filed April 17, 2000.

Carriers were also able to participate in 18 rounds of comments, attend 20 public participation hearings held throughout the State, participate in numerous workshops and all-party meetings, and engage in negotiations with consumer groups. The time allowed to comment on the alternate proposed decision was in accord with the Commission's Rules of Practice and Procedure. Despite the claim that this timeframe was too narrow, Carriers were able to file extensive comments. Thus, we find the Carriers' due process claims unavailing.

F. TIMING AND IMPLEMENTATION ISSUES

Wireline filed an application for rehearing solely alleging that the implementation deadlines are arbitrary and unreasonable, lacking in supporting evidence, and cannot be cured by the request for extension procedure. JWC also raise these arguments in its application. Arguments concerning implementation deadlines have been raised by the Carriers in many contexts. These include the motions for stay, applications for rehearing, and Rule 48(b) requests for extensions filed with the Executive Director. The Carriers allege that the Commission ignored unrefuted evidence they presented that they would not be able to implement a number of the requirements of the G.O. in the 180-day and 14-month time period. They also argue that the deadlines imposed by the Commission have no evidentiary basis.

We do not find that the implementation deadlines imposed by the Decision constitute legal error. Although the Carriers presented evidence in the proceeding that they would not be able to complete implementation within the required time, the evidence is conclusory. It does not explain specifically why it is impossible to meet the implementation deadlines. (*e.g.*, "process of modifying Sprint's billing system . . . will require from 13 to 18 months," Wireline Motion n.3.) In short, although the Carriers presented evidence on the implementation hardships, the Commission did not find that evidence convincing.

Moreover, contrary to the Carriers' implications, the Commission did not conclude definitively that the Carriers would be able to implement all the provisions according to the schedule. On the contrary, the Decision specifically states:

> The Commission recognizes that there may be difficulties in implementing certain aspects of these rules. . . . Should it be necessary our Rules of Practice and Procedure provide a procedure in Rule 48(b) for parties to seek an extension of time to comply with a Commission order by sending a letter to the Executive Director . . . .[3]

Decision, at 149. Therefore, although the Decision sets an implementation schedule, it also makes allowances for the fact that it is possible that not all the Carriers will be able to comply with the deadlines. In fact, the Executive Director has granted several such Rule 48(b) requests concerning tariff

[3] The Commission also outlined certain requirements that must be met for an extension request to be granted:

> We would expect any such extensions to be granted only where the carrier has demonstrated the delay was unavoidable, has tailored the request as narrowly as possible to encompass only that part of the order and general order for which it is truly needed, has submitted a reasonable plan and timetable for achieving compliance within the requested time extension, has taken all feasible steps to lessen the effects on customers of the requested delay, and is able to demonstrate good faith compliance with all other parts of the order and general order.

Decision at 149. The Decision also provides that if many requests are filed the Commission may convert them into a petition to modify. *Id.*

filings, the first step in complying with the Decision. These requests followed the requirements outlined in the Decision.[4]

Wireline contends that the Rule 48(b) procedure is inadequate and does not cure the problems with the implementation deadlines. According to Wireline, converting the requests to petitions to modify would prevent them from being resolved in a timely fashion. Wireline's arguments that resolution of requests could take months, or fail to provide needed relief, are speculative. There is no reason to believe that the Carriers would not be able to obtain relief through this procedure and, indeed, some have already obtained such relief. If an urgent request were presented, there is no requirement that it must be converted to a petition. However, it bears emphasis that, as required in the Decision, these requests would need to be narrowly tailored, and meet the other outlined requirements.

For these reasons, there is no merit to the arguments that the implementation schedule as set forth in the Decision is unlawful.

III. CONCLUSION

For the reasons discussed above, we find that the applications for rehearing of D.04-05-057 do not demonstrate legal error in the Decision, and we accordingly deny rehearing.

Therefore, **IT IS ORDERED** that:

1. Decision 04-05-057 shall be modified as follows:
    a. The word "Quotations" in the last sentence of the last paragraph on page 38 (continuing to page 39) of the decision shall be changed to "Statements."
    b. The following phrase shall be deleted from the last sentence of the last paragraph of page 38: "The term 'solicitation' as

[4] We note that parties may not file a Rule 48(b) extension request with regard to deadlines that have already passed. The appropriate course in that circumstance would be to file a petition to modify.

used in this Rule and elsewhere is now defined as an ‘offer’ with the intent to sell . . . .” That sentence shall now read: “However, the term “telecommunications” is absent because of the need to address occurrences of bundling non-telecommunications services with telecommunications services.”

c. The following sentence shall be added at the end of Rule 8(b) and Rule 1(h) in Part 1: "This provision does not prohibit carriers from collecting the actual amount of any increase in mandated government charges that carriers are authorized to collect from subscribers for the following federal programs: Universal Service Fund (47 C.F.R. § 54.712(a)), Enhanced 911 service (47 C.F.R. § 20.18(d)-(j)), Number Pooling (47 C.F.R. § 52.20), Local Number Portability (47 C.F.R. § 52.31), Telecommunications Relay Service (47 C.F.R. § 64.603), and North American Numbering Plan Administration (47 C.F.R. § 52.17).”

2. The Applications for Rehearing of D.04-05-057 filed by Joint Wireless Carriers, Nextel of California, Inc., and The Wireline Group are denied.

This Order is effective today.

Dated October 7, 2004, at San Francisco, California.

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
Commissioners

I reserve the right to file a dissent.

/s/ SUSAN P. KENNEDY
Commissioner

I reserve the right to join Commissioner Kennedy's dissent.

/s/ MICHAEL R. PEEVEY
President

Commissioners Susan P. Kennedy and Michael R. Peevey, dissenting:

Both legal and policy reasons compel us to dissent from the opinion of today's majority.

First, today's order proposes for California a massive expansion in the scope of authority over the regulation of wireless carriers, in clear contravention of Federal law and regulation. Second, today's order lets stand the confusing, vague and contradictory rules adopted in D.04-05-057, and thus fails to correct the legal errors of D.04-05-057. Third, today's order renders meaninglessness those state statutes that require the CPUC to consider the economic consequences of its actions. Moreover, the failure to conduct such an analysis helps the CPUC to ignore the fact that the proposed regulations are so pervasive as to undermine the federal scheme for regulating wireless carriers. Fourth, today's order fails to reverse the arbitrary and capricious implementation schedule adopted in the underlying order, thereby ensuring that carriers will be unable to comply with its requirements.

As a result, today's order and the underlying D.04-05-057 constitute an unlawful expansion of the CPUC's authority to regulate wireless carriers in defiance of Federal law and regulation, a willful and unlawful decision to ignore the constraints of state law, and an arbitrary and capricious disregard for the administrative burdens that the CPUC imposes on those telecommunications utilities subject to its requirements.

For these reasons, both today's order and D.04-05-057 warrant judicial reversal.

The legal errors in today's order and D.04-05-057 are extensive and it is not possible to address them all within the customary limits of a formal dissent. For that reason, this dissent focuses on only the most egregious violations of law.

Section 332(c)(3)(A) of the Federal Communications Act explicitly prohibits state regulation of "the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). As a result, a state may not regulate wireless carriers' rates unless it petitions the FCC and receives authority to engage in such regulation. The CPUC previously petitioned the FCC for such regulatory authority on behalf of California, and the FCC denied the petition. *In re Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates* ("CPUC Preemption Order), 10 F.C.C.R. 7486 (1995). By imposing rules on the wireless industry clearly aimed at regulating the rates charged by those carriers, the CPUC is now ignoring both Federal law and administrative rulings.

The examples of D.04-05-057's imposition of rate regulation are numerous; however, given the time constraints of filing this statement, this dissent will focus on only a few:

1. Rule 1(h) provides that if formulae are used to "establish a rate in a term contract, that rate shall not change during the duration of the

contract." This absolute prohibition on "rate" changes impermissibly intrudes on carriers' decisions about rates, directly violating the CPUC Preemption Order and other statutes and regulations placing rate regulation of wireless carriers in the hands of the FCC.

2. Rule 3(f) regulates the rates charged by wireless carriers by limiting the enforceability of termination fees that most carriers include as part of their rate structures. The use of an early termination fee is a component of carriers' term-contract rate structure, and this is therefore unquestionably a "rate" under section 332(c)(3)(A) of the Telecommunications Act. See *In re Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R 19898 ¶¶ 20, 23). In a July 2002 opinion in *Consumer Justice Foundation v. Pacific Bell Wireless* (Case #BC 214544) the California Superior Court for the County of Los Angeles held that "the early termination charge is a critical component of the overall rate structure" of a wireless carrier for federal preemption analysis. The effect of Rule 3(f) is to force wireless carrier to recoup costs of acquiring new customers, including handset subsidies, through another rate element – as some carriers do, for example, by offering month-to-month service or no handset subsidy. Thus, Rule 3(f) would directly affect wireless carriers' rate structures. Once again, this constitutes impermissible rate regulation of wireless carriers under 47 U.S.C. § 332.

3. Rule 7(a) prohibits the imposition of late payment charges if payment is received within 22 days after the date the bill was mailed, and restricts the amount of late payment charges to 1.5% per month on the overdue balance. The Commission clearly lacks authority to regulate wireless carriers' late payment charges under section 332 of the Telecommunications Act. See *Ball v. GTE Mobilnet of California,* 81 Cal. App. 4th 529, 538 (2000). The CPUC itself recognized that a late fee is part of a carriers' rate structure in *Toward Utility Rate Normalization v. Pacific Bell,* D,93-05-062, (1993) (late payment charges are "part and parcel" of the rates charged for telephone services"). Thus, the express cap on the amount of late fees that can be charged constitutes direct rate regulation, while the limitation on the time period controls rates by limiting the amount of late fees that could be collected. Once again, this constitutes rate regulation of wireless carriers.

4. Rule 7(b) regulates the rates charged by CMRS carriers by prohibiting wireless carriers from charging subscribers for (i) "intrastate service" furnished more than three months before the charge is billed; (ii) roaming services furnished on a system other than the subscriber's home system more than four months before the charge is billed; and (iii) collect, third-party and calling card calls completed more than five months before the charge is billed. The rule thus prescribes a rate of zero under these circumstances. Once again, this constitutes rate regulation of wireless carriers.

5. Rule 7(d) states that delays in billing must not result in higher total charges. This rule would prohibit wireless carriers from applying roaming minutes in a month after the call is made if the delay would cause the subscriber to pay at a higher rate. Once again, this constitutes rate regulation of wireless carriers.

6. Rule 8(b), although now amended to permit wireless carriers to pass through federally mandated increases, still forbids any other increases in term contract rates for the duration of the contract term and prohibits the imposition of an early termination fee if a subscriber chooses to terminate the contract in response to a carrier-initiated charge. Not only is this provision a solution in search of a problem, is also another example of regulation that due to its sweep and inflexibility constitutes rate regulation. Existing California law already requires that, in the event a party modifies the terms of its contracts, it do so reasonably and consistent with the implied covenant of good faith and fair dealing. In fact, it is a well-established common practice among carriers that in the event that any material change is made to the terms of an agreement, the customer will be notified in advance and may cancel the service within a specified time period with no termination fee. To prevent a carrier from collecting an early termination fee when a customer cancels service for reasons other than a material change in the agreement, as defined under existing laws and good faith practices,

directly controls the carriers rate structure and thus constitutes impermissible rate regulation of wireless carriers.

D.04-05-057 clearly imposes rate regulation on the wireless industry in contravention of federal regulations. Today's order attempts to disguise this fact with verbal gymnastics arguing that a rate is not really a rate and that the CPUC does not mean what it says. D.04-05-057 clearly defines "rate" as "Any amounts requested to be paid by the user of a telecommunications service by whatever name, including charges, surcharges and fees, over which a carrier has discretion to charge." In today's order, the CPUC now claims that "The meaning of 'rates charged' for preemption purposes is not based on a state's definition of rates, but on how the term has been interpreted under the Act." Apparently, our regulations count as rate regulation for state purposes, but not for federal purposes. This redefinition of the term "rate" is a transparent attempt to avoid the federal prohibition on rate regulation. Yet, the fact remains that a rate is a rate and D.04-05-057 clearly warrants reversal by the reviewing court.

The order also errs when it finds that "none of these rules purport to directly and explicitly regulate rates, and therefore are not preempted." Once again, this finding suffers from poor reasoning and legal error. From a legal perspective, it is error to rely on what the rules "purport" to do instead of what they actually do. The rules directly control rates – and the intention of the CPUC does not matter. Furthermore, it is disingenuous to even suggest that the rules purport to affect only "terms and conditions" rather than rates. Over and over, the rules make it clear that the intention is to regulate "charges, surcharges and fees, over which a carrier has discretion to charge." For example, Rule 3(f) states:

> Subscribers may cancel without **termination fees** or **penalties** any new tariffed service or any new contract for service within 30 days after the new service is initiated. This Rule does not relieve the subscriber from payment for per use and normal recurring charges applicable to the service incurred before canceling, or for the reasonable cost of work done on the customer's premises (such as wiring or equipment installation) before the subscriber canceled. [emphasis added]

Thus, today's order is wrong when it claims that the rules do not regulate rates and wrong again when it finds that the rules do not "purport" to regulate rates.

Turning to the second legal concern – despite the reasoning in today's order, the rules adopted in D.04-05-057 are so vague as to be unworkable and unconstitutional. Rule 1(b), for example, requires that carriers include "key rates, terms, and conditions" of their offerings on their internet site, and Rule 3(e) requires such terms to be highlighted in contracts. The quoted phrase is defined in the rules as "***[a]ny*** provision imposed by a carrier to which a subscriber is bound (through, e.g., the carrier's tariffs, service agreements, contracts, operating practices, billing practices, system limitations, etc.) that **may** result in or increase a charge on a subscriber's bill or limit a subscriber's use of the product or service." (emphasis added).

It is difficult to think of **any** provision of a contract that does not have the potential to increase a charge or limit the subscriber's use. Consistent with this observation, the General Order's definition provides a long list of terms and conditions that it would consider key, but provides no example of any condition that it would not consider key. The use of sweeping terms such as "any" and "may" in the underlying decision, despite voluminous warnings by carriers and fellow commissioners, is a conscious effort on the part of the majority to eliminate any safe harbor from litigation or from consumer complaint as a result of these rules. This deliberate vagueness is most onerous in light of the express intent of the rules to construe any ambiguities against the carriers. Rule 3(d) and (e) specifically spell out for carriers the consequences of guessing wrong as to which terms and conditions a customer might find "key" in making their decision with the following warning: "Ambiguities in any agreement will be construed against the carrier."

Today's opinion finds that the given "examples are sufficiently specific so as to put the Carriers on notices as to what constitutes 'key rates, terms, and conditions.'" However, merely providing **examples** of what the definition **covers** explains nothing, and provides no legitimate notice to any carrier.

In summary, the rules are so vague as to constitute legal error in D.04-05-057. The examples of vagueness provided by those petitioning for rehearing are too numerous to list, and are not restricted to the wireless carriers. The failure to correct these problems in today's order constitutes further legal error.

Turning to the third area – today's order directly contravenes state law because it fails to comport with Section 321.1 of the Public Utilities code, which requires that the CPUC "assess the economic effects or consequences of its decisions as part of each ratemaking, rulemaking, or other proceeding." The rules adopted in D.04-05-057 were published in their current form only two weeks before adoption, and the CPUC did not receive any economic studies concerning the costs or benefits of implementing these rules. Moreover, the rules were modified so significantly from earlier draft rules that the failure of the Commission to provide parties with a meaningful opportunity to submit economic data on these particular rules not only violated Section 321.1, but also violated the carriers' due process rights.

This violation of the due process rights of carriers is well illustrated in the CPUC's decision to reject the request of the wireless carriers for evidentiary hearings on the scope and costs of the rules. Despite the fact that this proceeding lasted over four years, the CPUC found no time to hold such hearings. This is a sharp departure from standard practices of the CPUC and is legally indefensible.

Today's opinion argues that the CPUC "fully considered" the costs and benefits of its regulations. In reaching this conclusion, it can only cite assertions in D.04-05-057 that the CPUC had done so. It cannot demonstrate from the record that the CPUC provided the opportunity for affected parties to present evidence on this matter or to show that the CPUC seriously considered real costs and real benefits.

Moreover, had today's decision ordered the CPUC to consider costs and benefits, such a consideration would expose the underlying legal error of the CPUC's effort to expand regulation to the wireless industry. First, a consideration of the costs and benefits of wireless regulations adopted in D.04-05-057 would have found that in today's competitive wireless market, these regulations do not prevent marketing abuses, but merely add costs to those providing wireless telecommunications services. As a result, they produce no consumer benefits, only costs.

Second, an analysis of these regulations would show that, although vague as to scope, they are so detailed as to requirements that they undermine the functioning of the national competitive market for wireless services that has grown over the period consumed by this proceeding. Indeed, an examination would show that many regulations are so detailed and inflexible that they disrupt the federal regulatory scheme for the wireless industry and hamper competition by creating barriers to entry for small carriers. For example, consider Rule 1(e)(2), which states:

> Timeliness in providing responses is particularly important for responses to be useful. Under most circumstances, carriers must be able to provide real-time responses with Rule 1(c)(2), Rule 1(c)(3), and Rule 1(d)(3) information, and send within three business days responses for Rule 1(c)(1) inquiries relating to pending bills, and Rule 1(d)(1), Rule 1(d)(2), and Rule 1(d)(4) information.

It is important to note that these requirements for timely response apply to **all** public inquiries, not just those by subscribers of a particular company. These regulations constitute a burden and an unlawful barrier to entry that California alone imposes on wireless carriers. Considerations like this would have led inevitably to the conclusion that California's rules conflict with, and are therefore preempted by, the comprehensive federal regulatory scheme and policies for wireless telecommunications that seek to establish an open and competitive national market.

The fourth and last argument[5] that the order is unlawful arises from the unreasonable implementation schedule of the rules of D.04-05-057. The implementation schedule provided to the carriers is so unreasonable that its adoption constitutes arbitrary and capricious action by the CPUC and should overturned. The record is clear on this matter. Part 2 of General Order No. 168 contains 13 separate rules with more than 75 subparts, yet D.04-05-057 provides only 180 days to implement these complex rules. Such a timetable is without precedent in Commission history. Parties pointed out the impossibility of this timetable at many times throughout this proceeding.

Perhaps because D.04-05-057 understood that under normal circumstances the CPUC would grant waivers and extensions of the implementation process under the normal Rule 48(b) process, the decision took unprecedented steps to constrain this normal process for giving

[5] Once again, there are further examples of legal error, but providing a comprehensive list in this dissent is not practical.

reasonable waivers to implement our rules. In particular, D.04-05-057 states:

> Should it be necessary, our Rules of Practice and Procedure provide a procedure in Rule 48(b) for parties to seek an extension of time to comply with a Commission order by sending a letter to the Executive Director, with copies to all other parties. *We would expect any such extensions to be granted only where the carrier has demonstrated that the delay was unavoidable, has tailored the request as narrowly as possible to encompass only that part of the order and general order for which it is truly needed, has submitted a reasonable plan and timetable for achieving compliance within the requested time extension, has taken all feasible steps to lessen the effects on customers of the requested delay, and is able to demonstrate good faith compliance with all other parts of the order and general order*. The Executive Director is specifically instructed to use his audit powers if he suspects that requests for extension are not proffered in good faith.
>
> We are also concerned that the Rule 48 exemptions could result in great variation in applicability of rules among carriers. *If several carriers request an extension of time to implement the same rule, the Commission shall consider consolidating and treating these extension requests as a petition to modify this decision, and require a Commission vote before the requests may be approved in full or in part.* [emphasis added]

Today's order and the underlying decision both fail to explain what justifies the departures from CPUC practices on this important matter emphasized in the section above. After all, it is not outside the administrative competence of the executive director to assure uniformity in the grant of extensions.

Moreover, the consideration of requests for an extension through a petition, as advised in D.04-05-057, requires a lengthy review that would render the request for an extension moot. Thus, this requirement is clearly arbitrary and capricious. Today's order appears to concede this point, noting that "if an urgent request were presented, there is no requirement that it must be converted to a petition." Today's order fails to justify the arbitrary and exceptional restrictions on Rule 48(b) procedures; instead, it simply notes that the traditional procedure is still possible, albeit now limited. This argument is not a justification, it is simply a diversion.

Given the serious legal issues raised in this rehearing, the decision to deny a stay of these rules (D.04-08-056) in combination with the unprecedented provisions of D.04-05-057 restricting the use of Rule 48(b) constitute arbitrary action and legal error. The failure of today's order to address this issue in a serious matter or to justify the departure from standard CPUC practice underlines the fact that the implementation schedule is arbitrary and capricious, unlawful, and indefensible.

In summary, today's order, D.04-05-057 and D.04-08-056 suffer from serious legal errors. This dissent is only a partial recitation of the most egregious errors. Nevertheless, it provides the reasons why we must respectfully dissent from the opinion of today's majority. We look for reversal or stay of these unlawful orders by a court of competent jurisdiction.

_/s/ SUSAN P. KENNEDY	_/s/ MICHAEL R. PEEVEY
Susan P. Kennedy Commissioner	Michael R. Peevey Commissioner