Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling on Issues	)	
Contained in Count I of	)	WT Docket No. 00-164
	)	
White v. GTE	)	
	)	
Class Action Complaint	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2001 **Released:** May 25, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a Petition for Declaratory Ruling filed by James J. White, Perry Kranias, Ralph DeLuise and Wall Street Connections, Inc. as Representative Plaintiffs in a class action complaint against GTE Corp. et al.[1] Certain legal issues in Count I of the plaintiffs' third amended complaint were referred to the Commission, under the doctrine of primary jurisdiction, for a declaratory ruling on whether certain GTE billing practices are *per se* "unjust and unreasonable" under Section 201(b) of the Communications Act.[2] Specifically, four practices are at issue: (1) charging customers for dead time[3], (2) charging for unanswered or unconnected calls; (3) measuring the time of a call from the time the "send" button (or other similar button) is pushed; and (4) the practice of "rounding up" any of the foregoing types of charges to the next minute.[4]

2. Based on our review of the record, we deny White's petition and find that the four billing

[1] White v. GTE Corp., No. 97-1859-CIV-T-26C (U.S. District Court, M.D. Fla., Tampa Division, filed July 29, 1997) (White Class Action).

[2] 47 U.S.C. § 201(b).

[3] Parties have not supplied a specific definition for "dead time." For the purposes of this proceeding, we interpret the term to refer to non-communication time associated with neither call initiation nor ringing. For example, dead time might include the time after a signal has faded or time after a called party had terminated the call, but before the wireless subscriber pushes the "end" button.

[4] We note that the use of the term "rounding up" in the White Class Action itself differs significantly from our use of the term. We use the term to refer to charging for a call in the next larger minute increment. In the White Class Action, "rounding up" is used to describe all of the four different billing scenarios listed here.

practices at issue are not *per se* unjust or unreasonable under Section 201. We do not, however, preclude the possibility that in specific cases, in the context of the related contractual services and marketing practices of the CMRS provider, these practices may be found to be in violation of Section 201.

II. BACKGROUND

3. On October 29, 1998, the Representative Plaintiffs filed their Third Amended Complaint in a class action lawsuit against GTE and many of its subsidiaries in the U.S. District Court for the Middle District of Florida, Tampa Division. In addition to General Allegations, the Plaintiffs' Third Amended Complaint included four counts against GTE: (1) violation of 47 U.S.C. 201(b) for "unjust and unreasonable" billing practices; (2) an action for injunctive relief to enjoin and restrain GTE from continuing these practices; (3) breach of contract; and (4) violation of Florida's Unfair and Deceptive Trade Practices Act.[5]

4. On October 21, 1999, the Court issued an Order in response to GTE's Dispositive Motion to Dismiss Plaintiff's Third Amended Complaint, which, among other things, referred certain legal issues relating to Count I to this Commission for decision under the doctrine of primary jurisdiction.[6] The remaining counts were stayed pending the Commission's determination of the issues contained in Count I.[7] All other pending motions, including the motion for class certification, were denied but with leave to refile after the FCC has rendered its decision.[8]

5. On February 2, 2000, the Plaintiffs filed a Petition for Declaratory Ruling on the Issues Contained in Count I of White Class Action. In its petition, White asks the Commission to issue a declaratory ruling that the billing practices at issue in Count I constitute unjust and unreasonable billing practices in violation of Section 201(b).[9] The issues of breach of contract, deceptive or unfair practices due to improper disclosure or the preemptive effect of Section 332 are not at issue here. GTE filed an opposition to the White petition on February 10, 2000. On March 3, 2000, the Plaintiffs moved for acceptance of late-filed comments and submitted a reply to GTE's opposition.

6. In a Public Notice released on September 20, 2000, the Wireless Telecommunications Bureau invited comment on the issues presented, in light our decisions in *SBMS* and *WCA*,[10] the

[5] Third Amended Complaint, Plaintiff's Exhibit A at 8-12.

[6] Order, Plaintiff's Exhibit B, at 7, 10.

[7] *Id.* at 10.

[8] *Id*.

[9] Petition at 2.

[10] Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State initiation Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-356, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 (1999) (*SBMS Order*). Wireless Consumers Alliance, Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) (continued….)

latter of which was released August 14, 2000. Eleven comments were received. In addition, four reply comments were filed.[11] Industry commenters take the position that all four practices under discussion are neither unjust nor unreasonable.[12] In support of their position, they contend that these practices reflect competitive market conditions and these charges are reasonably related to the cost of providing service.[13] They also argue that in a market as competitive as that among CMRS providers, if a consumer is not happy with one company's service agreement, the consumer can choose a different plan offered by another provider.[14]

7. Petitioners and other consumer commenters assert that it is both unjust and unreasonable to charge for non-communication time and the injury is further compounded by permitting those charges to be rounded up.[15] Some commenters contend that customers do not have a reasonable expectation that they would be billed for such time based on their wireline experience,[16] and that allowing CMRS carriers to bill for such time rewards poor service.[17]

III. DISCUSSION

8. In this Memorandum Opinion and Order, we examine, as requested by the court, whether or not the billing practices described in Count I of Plaintiffs' Third Amended Complaint are *per se* unjust or unreasonable under Section 201(b). The factors we consider include the relationship of carrier costs to billing charges or practices, consumers' expectations based on their wireline experience, and the role of competitive markets. From our examination of these factors, we deny the Plaintiffs' petition.

9. Several commenters argue that this Commission has already decided in its *SBMS Order* that

(Continued from previous page)
Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, *Memorandum Opinion and Order*, FCC 00-292, 15 FCC Rcd 17021 (2000) (*WCA Order*).

[11] A list of comments and reply comments is attached in the Appendix.

[12] *See* AT&T Comments at 2; Alloy Comments at 6; Excel Comments at 7; CTIA Comments at 4; Nextel Comments at 4; STPCS Comments at 6; Sprint Comments at 8; U.S. Cellular Comments at 3-4; Verizon Comments at 3, 10; Verizon Reply at 2.

[13] *See* Alloy Comments at 6; CTIA Comments at 3; Excel Comments at 6; Nextel Comments at 4-8; STPCS Comments 3-8; U.S. Cellular Comments at 3-4; Verizon Comments at 3, 11-13; Verizon Reply at 2-3.

[14] *See* Alloy Comments at 3, 5; Nextel Comments at 3; Sprint Comments at 6-8, 14; Verizon Comments at 3, 9; Verizon Reply at 2.

[15] *See* Fontana Comments at 1 (unpaginated); Waring Comments at 1 (unpaginated); WCA Reply at 5-6.

[16] WCA Reply at 3-5; Newcomb at 1 (unpaginated) ("none of these practices is unjust or unreasonable, *per se* . . . failure to clearly and completely inform the consumer of practices to which they are accustomed in the wireline industry can, under some circumstances become unjust and unreasonable, in aggregate.").

[17] Fontana Comments at 1 (unpaginated); Waring Comments at 1 (unpaginated).

practices at issue in this petition are not in violation of Section 201.[18] We disagree. Instead, we agree with WCA's narrower interpretation of the *SBMS Order*, where we held that for completed CMRS calls, neither "rounding up" nor charging for in-coming calls were *per se* violations of Section 201.[19] The *SBMS Order* addressed only certain charging practices,[20] but not the issues raised by White regarding charges for time from the moment the "send" button is pushed, for dead time, or for unanswered or unconnected calls. Thus these issues are properly before this Commission in the context of this request for declaratory ruling. In other words, we conclude that the *SBMS Order* addressed only the rounding up of communication time for completed calls, while White presents the issue of billing for non-communication time for both completed and uncompleted calls and the rounding-up of any calls that include non-communication time in their time measurement.

A. Charging for dead time, unanswered or unconnected calls, and charging from the time the "send" button is pushed.

10. We begin by addressing the first three practices -- charging for dead time, charging for unanswered or unconnected calls, and charging from the time the "send" button is pushed -- because they involve similar legal issues. Section 201(b) of the Communications Act provides: "All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . ."[21] In the *SBMS Order*, we analyzed the specific practices at issue in terms of whether they reasonably reflect a carrier's cost, whether the practices were common for interexchange services as well as for CMRS services, and whether the practices reflect competitive market conditions.[22]

11. *Costs*. Carriers assert that these charges are derived from both the direct costs of using the network and the opportunity costs that become significant due to nature of CMRS operations. We concur with carriers that charging for the time a network is engaged but no actual conversation occurs is related to the costs associated with the network functions that occur even if call is not completed.[23] These include costs for: seizing a channel, setting up the trunk, interconnecting with the LEC, establishing in-band or out-of-band signaling, providing answer supervision, and recording detail information for all attempted and completed calls, as well as costs related to switching the voice channel to another available channel as a caller moves from cell to cell.[24] Nextel states that billing for unanswered calls is just and reasonable because, from the moment the send button is

[18] STPCS Comments at 3-4; USCC Comments at 3; Sprint Comments at 4, 8-9; CTIA at 2.

[19] WCA Reply at 2-3.

[20] *SBMS Order*, 14 FCC Rcd at 19905-6 (para. 17).

[21] 47 U.S.C. § 201(b).

[22] *SBMS Order*, 14 FCC Rcd at 19904 (para. 14).

[23] Verizon Reply at 2 and n. 6; Alloy at 6; Nextel at 5; STPCS at 4.

[24] Verizon Comments at 12. *See also* STPCS Comments at 4-5; USCC Comments at 3.

pressed, there are "costs of running the network and processing that phone call."[25] Such use of system hardware and software should be considered operating costs.[26] We acknowledge, as WCA points out, that interexchange carriers also incur network costs for uncompleted calls, yet they do not charge for such calls.[27] The difference in billing practice does not imply, however, that the charges are unrelated to actual costs.

12. *Interexchange services and consumer expectations.* Petitioners and other consumer commenters argue that we should consider the expectation of consumers based on their wireline telephone experience in determining whether the charges in question are unjust or unreasonable. In deciding in the *SBMS Order* that rounding up for CMRS calls was not *per se* unjust or unreasonable, we noted that wireline calls have historically been billed on a rounded up, whole minute basis.[28] In contrast, WCA argues, consumers would find it to be an unreasonable expectation to be charged for dead air time based on their wireline experience.[29]

13. We recognize that wireline carriers generally do not charge for unconnected calls (where the line is busy or unanswered), nor do they charge for set-up time for a call even though wireline services also use system and plant for unconnected calls. In contrast, in the case of wireless service, charges typically begin at the time the "send" button is pressed. Although we look to wireline service for historical perspective, the practices used there are not necessarily controlling of whether a practice is in violation of Section 201(b). For example, even though wireline customers are not billed for incoming calls, we did not find in the *SBMS Order* that this rendered charging for incoming calls to CMRS phones a *per se* violation of Section 201.[30]

14. It should be understood, however, that we conclude only that these rate structures are not in themselves "unjust or unreasonable" in violation of Section 201(b) of the Act. Thus, as we stated in the *SBMS Order*, "[w]e do not conclude that the implementation of these industry practices by CMRS providers will necessarily be lawful under Section 201(b) of the Act in all circumstances and without regard to other contractual, service and marketing practices of the CMRS provider."[31] Section 201, as well as consumer protection laws, prohibit deceptive practices that constitute unjust or unreasonable practices.[32] If a carrier employs unreasonable practices, the carrier may be found to

[25] Nextel Comments at 6.

[26] Nextel Comments at 5.

[27] WCA Reply at 5.

[28] *See SBMS Order*, 14 FCC Rcd at 19905 (para. 15).

[29] WCA Reply at 3 and n. 8 (citing comment by Newcomb).

[30] *SBMS Order*, 14 FCC Rcd at 19904-05 (paras. 14-15).

[31] *Id.* at 19905 (para. 15).

[32] *See* Business Discount Plan, Inc., Apparent Liability for Forfeiture, File No. ENF 98-02, *Order of Forfeiture*, 15 FCC Rcd 14461, 14468-70, 14472 and n.65 (paras. 14-18, 24) (2000), *aff'd on recon.*, 15 FCC Rcd 24396, 24398-400, and n.46 (paras. 5-9); *see also*, *WCA Order*, 15 FCC Rcd at 17039-40 (para 35); *SBMS Order*, 14 FCC Rcd at 19904-05 (para. 15).

be in violation of Section 201(b) or consumer protection laws, even if the rates and rate structures themselves are not unreasonable.[33]

15. *Competitive market conditions*. When Congress established commercial mobile radio services as a distinct category of common carrier, its general intent was for prices to reflect the competitive market.[34] The Representative Plaintiffs do not object to allowing a competitive market to operate in setting CMRS prices. However, they view the Commission's role as enforcing Section 201(b) in a manner that prevents unjust or unreasonable practices from influencing the market.[35] From their viewpoint, the argument put forth by carriers that competition is better than regulation concerning pricing is irrelevant to the particular billing practices contained in Count I.

16. Although CMRS carriers are free to operate in a deregulated (i.e., non-tariffed), competitive market environment, the mere fact that CMRS providers engage in a particular practice does not make it just and reasonable under Section 201. Section 201 and consumer protection laws exist to prohibit deceptive, unfair, and unreasonable practices. These laws are applicable in competitive markets. While we may examine the effect a competitive market appears to have with respect to particular practices, it is just one factor to consider in determining if a practice is in violation of Section 201.

17. It appears that in this instance, a competitive, deregulated market has enabled carriers to adopt different types of services and billing practices. With regard to the practice of determining at what point a call is initiated for purposes of starting charging, of the four companies mentioned by Verizon, three charge from the time the "send" button is pressed while one charges from the time a voice channel is seized.[36] As for billing for ring time on busy or unanswered calls, we are aware of at least four different billing practices ranging from no charge for uncompleted calls, to no charge for calls lasting less than one minute, to no charge for completed calls lasting less than 2 seconds.[37] In this market, consumers can factor these different practices into their assessment of the total package of services offered by each carrier, provided these practices are fully disclosed to the consumer.

18. *Conclusion.* Upon consideration of the relationship with carrier costs, consumer expectations, and the effect of the competitive market, we hold that these three billing practices are not in themselves *per se* "unjust nor unreasonable" in violation of Section 201(b). Consistent with our conclusions in the *SBMS Order* however, we do not conclude that the implementation of these practices "will necessarily be lawful under Section 201(b) of the Act in all circumstances and without regard to other contractual, service, and marketing practices of the CMRS provider."[38]

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[33] *See SBMS Order*, 14 FCC Rcd at 19905 (para. 15).

[34] *See* H.R. Conf. Rep. No. 103-213 at 490-491 (1993).

[35] White Reply at 6.

[36] Verizon Comments at 8.

[37] Verizon Comments at 8-9; Nextel Comments at 5.

[38] *See SBMS Order*, 14 FCC Rcd at 19905 (para. 15).

B. Rounding up.

19. The Representative Plaintiffs also allege that the practice of rounding up the time for a call that includes any above three practices is unjust and unreasonable under Section 201.[39] In this Order, we have determined that the practice of charging for these three practices time is not *per se* a violation of Section 201. In addition, the Commission has already found that the practice of rounding up rates to the next minute for completed calls is not *per se* an unjust or unreasonable practice.[40] In *SBMS* we acknowledged that charging on a whole minute basis "is a simplified method on which to base charges which still reflect general costs."[41] We also noted that interexchange services have historically been billed on a rounded-up, whole minute basis and that this is still the most common billing practice for both CMRS and interexchange carriers.[42] Nothing has been presented in this proceeding, with respect to the practices here complained of, that would lead us to conclude rounding up in conjunction with these practices is inherently unjust or unreasonable. We therefore conclude that rounding up of calls that include non-communication time is not a *per se* violation of Section 201. However, as with the other practices discussed in this order, we do not preclude the possibility that in the context of related contractual, service, and marketing practices of the CMRS provider, this practice may be found to be in violation of Section 201 in specific cases.

IV. ORDERING CLAUSE

20. Accordingly, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 154 (j), Section 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, IT IS ORDERED, that the Petition for Declaratory Ruling filed by White et al. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[39] Petition at 2.

[40] *SBMS Order*, 14 FCC Rcd at 19904-05 (paras. 14-15).

[41] *Id.* at 19904 (para. 14).

[42] *Id.*

APPENDIX

Comments

Alloy LLC	Alloy
AT&T Wireless Services	AT&T
Cellular Telecommunications Industry Ass'n	CTIA
Excel Communications	Excel
Fontana, Thomas	Fontana
Newcomb, Donald	Newcomb
Nextel Communications, Inc.	Nextel
Sprint PCS	Sprint
STPCS Joint Venture, LLC	STPCS
Verizon Wireless	Verizon
Waring, Malcolm	Waring

Late-Filed Comments

U.S. Cellular Corporation	U.S. Cellular

Reply Comments

Staack, Simms & Hernandez, P.A.	White
Verizon Wireless	
Wireless Consumers Alliance	WCA