

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6651

Petition for Investigation of Vermont RSA)
Limited Partnership and NYNEX Mobile)
Limited Partnership 1, both d/b/a Verizon)
Wireless, for Compliance with Vermont Law)
Regarding Certificates of Public Good and)
Billing Practices)

Order entered: 7/27/2005

FINDINGS AND ORDER

SUMMARY

This docket concerns line-item charges by two wireless companies, Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 (collectively, "the Companies"). The charges were purportedly imposed to recoup tax payments to the State of Vermont under the Vermont Gross Revenue Tax, 30 V.S.A. § 22. This proposed decision recommends disposition of this matter on motions for summary judgment. It recommends that the Vermont Public Service Board ("Board") permanently enjoin the Companies from recovering the gross revenue tax from customers pursuant to separate line-item charges on bills. It also recommends that the Companies not be required to refund any monies collected through such charges from customers in the years 1997 through 2000 as such line-item charges. Finally, it concludes that a request to enjoin Verizon Wireless from doing business in the State of Vermont is moot.

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I. PROCEDURAL HISTORY

On February 14, 2002, the Vermont Department of Public Service ("Department") filed a petition with the Board requesting an investigation of Vermont RSA Limited Partnership ("VRSALP") and NYNEX Mobile Limited Partnership 1 ("NMLP1"), both d/b/a Verizon Wireless, for compliance with Vermont law regarding billing practices and certificates of public good ("Petition"). More specifically, in its petition, the Department asked the Board to:

1. Order Verizon Wireless to refund, with interest, all monies collected from customers in the years 1997, 1998, 1999, and 2000, pursuant to the line-item charge on customers bills used to recover the gross revenue tax paid by the Companies to the State of Vermont pursuant to 30 V.S.A. § 22;
2. Issue a permanent injunction prohibiting Verizon Wireless from recovering the gross revenue tax from customers pursuant to a separate line-item charge on bills; and
3. Issue a permanent injunction prohibiting the Companies from doing business in the State of Vermont until such time that they are duly issued a Certificate of Public Good ("CPG") from the Board.

After a Prehearing Conference on April 8, 2002, and the opportunity to negotiate, the Department and the Companies proposed a schedule for this investigation. Essentially, they agreed that the legal issues and requests for injunctive relief and refunds should be decided initially and that penalties and any other relief, should be considered, if necessary, in a second phase of this Docket.¹

The Parties have filed cross motions for summary judgment that address legal issues and the Department's requests for injunctive relief and refunds.² They have also filed a statement of stipulated facts.³ I conclude that no genuine issues of material fact exist in this matter, a hearing is not necessary, and judgment on the principal issues may be rendered on the record as it stands.

II. THE COMPANIES' HISTORICAL BILLING PRACTICES

During the years 1997 through 2001, the Companies included in their customers' bills a line-item charge entitled the "VT State Reg Fee Adj." ("the Fee"). The Fee was purportedly designed to recover that customer's share of the company's payment of the state gross receipts tax.⁴ The record includes representative customer bills from the period 1997 through 2001 that were "representative of all bills sent to Vermont customers" by the Companies.⁵

Two bills were submitted for each of the years 1997 through 1999. In each of these years, the earlier bill in each pair predicts that a fee will be charged in a subsequent bill. Likewise, with one exception, the later bill in each pair actually contains the line-item for the Fee. For example, the earlier of the two 1997 bills, dated September 17, 1997, contains the following language:

[T]he Vermont Public Service Board has imposed an annual regulatory fee on wireless carriers. Due to the costs associated with this fee, Vermont customers will be charged an additional \$2.19 which will be collected once per year and will

1. This schedule was adopted by Order of 4/12/02; *see also* Parties' Joint Status Report, April 24, 2002.

2. *See generally*, Memorandum of Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 in Support of Summary Judgment, June 28, 2002 ("Verizon, June 28, 2002"); Department of Public Service Memorandum of Law in Support of Motion for Summary Judgment, June 28, 2002 ("Department, June 28, 2002"); Reply Memorandum of Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 in Support of Summary Judgment, July 19, 2002 ("Verizon, July 19, 2002"); Department Memorandum of Law in Opposition to Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 Motion for Summary Judgment of July 19, 2002 ("Department, July 19, 2002").

3. Stipulation of Facts, June 28, 2002; Supplemental Stipulation of Facts, June 28, 2002 ("SF" and "Supplemental SF," respectively).

4. See Stipulation at ¶¶ 47-54.

5. Scrocca Affidavit at ¶ 5. The Department did not object to the submission of these exhibits, and thus, they are accepted as uncontroverted evidence of the Companies' billing practices for each of those years.

also appear on your November bill. Customers who have tax exempt status are not exempt from these charges.⁶

The second 1997 bill is dated November 17, 1997, and contains a line item entitled, "Fed. Reg. Fee Adj." and a corresponding charge of \$2.19.⁷

The Companies followed the same practice in 1998. In that year, they distributed similarly-worded and conformed bills that provided over 30 days notice of the collection of the Fee.⁸ In 1998, the Companies increased the Fee from \$2.19 to \$2.70.

In 1999, the Companies did not provide a 30-day advance notice to their customers of the Fee. The exhibit submitted by Verizon for the year 1999, a bill dated November 17, 1999, contains the same notice as earlier bills, but indicates that the \$2.70 charge would become due on December 13, 1999, slightly less than thirty days later.

The sample bill provided for 2000 provides no notice at all. Instead it contains only a line-item, "Vt. State Reg. Fee Adj." and an associated charge of \$2.70.⁹ In November 2001, VRSALP again billed customers for the Fee. In December, however, they credited their customers who were billed in November for the amount of the Fee.¹⁰

The Fee was originally set at \$2.19 in 1997. In 1998, the Companies increased it to \$2.70¹¹ based on the ratio of gross revenue tax that the two Companies had paid to the State of Vermont divided by the number of their customers.¹² In subsequent years, *i.e.*, 1999, 2000 and 2001, although the Companies paid varying amounts of gross revenue taxes,¹³ they did not change the Fee, and it remained at \$2.70.¹⁴

To summarize: the Companies provided at least 30 days prior notice of the Fee to their customers in years 1997 and 1998, a 26-day notice in 1999, and no notice in 2000 and 2001. The fee varied from \$2.19 to \$2.70 per customer, and in 1999, 2000 and 2001 it appears not to have

6. Exh. 1 at 3.

7. Due to the redaction of customer identifying information, there is no indication that the two bills were sent to the same customer. However, according to the testimony of the Companies' witness, the \$2.19 line item is the same fee of which customers were provided notice in the earlier bill of September of 1997.

8. *See* exhs. 3 and 4.

9. Exh. 1 at 3.

10. Stipulated Facts, at ¶¶ 52, 53.

11. Supplemental SF at ¶¶ 47, 48, 63.

12. *Id.*

13. *See* SF at ¶¶ 39, 40, 41, 44, 45, 46.

14. SF at ¶¶ 49, 50, 52.

been set in relation to the actual tax paid. The Companies agreed to stop the practice in 2001 and refunded the Fee for that year.

III. POSITIONS OF THE PARTIES

The Department argues that during the years 1997 through 2001 the Companies' collection of the Fee violated state law and should be enjoined. According to the Department, the Companies are required to file current terms and conditions of service and also advance notice of changes in terms and conditions, but they have failed to do so.¹⁵ The Department seeks a refund of past charges, with interest.

Second, the Department seeks prospective relief on the ground that Board policy prohibits assessment of a line-item charge on customers bills to recover the amount of gross revenue taxes paid to the State of Vermont pursuant to 30 V.S.A. § 22.¹⁶ The Department contends that the Board:

has determined that the gross revenue tax imposed on regulated utilities pursuant to 30 V.S.A. § 22 is not a tax on the transaction between the company and the customer and must be embedded in rates and not separately itemized on customer bills.¹⁷

The Department also argues that such a line-item charge is misleading, "making it difficult for customers to compare rates" and thereby impairs competition.¹⁸

The Companies argue that any regulation of CMRS providers' rates is prohibited under federal law. They also deny that they violated filing requirements by adding a fee to customer bills without filing advance notice with the Board. They contend that, in 1997 when they first charged the Fee, they were not subject to advance filing requirements. Instead, they assert, they were subject to the Board's May 11, 1995, Order in Docket 5808, which states that NMLP1 "may not file price information due to the provisions of the Omnibus Budget Reconciliation Act of 1993" ¹⁹ Accordingly, they contend that they were not subject to a narrower requirement to

15. Department, June 28, 2002 at 9-12. The Department cites to 30 V.S.A. § 225 and Docket 5454, Orders of 1/8/92, and 2/10/92, *i.e.*, the conditions in place prior to the Board's Orders in Docket 5808, 5916 and 6317, discussed below.

16. *Id.* at 10-11.

17. *Id.* at 10, citing to Docket 5464, Order of 3/8/91; Dockets 6101/6223, Order of 4/28/00 at 146-148.

18. *Id.* at 13.

19. Verizon Wireless, June 28, 2002, at 18, citing to Docket 5808, Order of 5/11/95 at Finding No. 26.

file price information in the form of advance notices.²⁰ Second, the Companies contend that including the Fee on customers' bills does not violate Board policy because that policy has never been applied to telecommunications or wireless carriers.

IV. DISCUSSION

A. Refunds and Historical Violations

I recommend that summary judgment be awarded to the Companies on the question of whether they should be required to refund "all monies collected from customers in the years 1997, 1998, 1999, and 2000, pursuant to the line-item charge on customers' bills used to recover the gross revenue tax paid by the Companies to the State of Vermont pursuant to 30 V.S.A. § 22." I reach this recommendation for two independent reasons: the charges were not in violation of state law at the time they were levied; and any such relief has been preempted by federal law.

(1) Preemption

I conclude that the Board is preempted from granting the Department's request to require the Companies to refund monies for past charges. Section 332 of the Communications Act of 1934, as amended by OBRA,²¹ prohibits the Board from regulating "the entry of or the rates charged by any commercial mobile service or any private mobile service."²² No Party here disagrees that the revenues collected by the Companies through the line-item designated "gross receipts tax" constitute part of their charges for cellular service. Charges for service are "rates" within the plain meaning of Section 332.

This conclusion is not affected by whether the Companies choose to "break out" this element of their overall charges, as they have. Whether they bundle it in with other charges or break it out, the amount is still part of their "rates." Thus, for the Board to order the Companies to refund the amounts collected would constitute rate regulation. That is proscribed under Section 332.

(2) Historical Requirement Regarding Notice and Line-Item Billing

20. *Id.* at 19.

21. 47 U.S.C. § 151 *et seq.* Section 6002(b)(2) of OBRA amends § 332(c) and (d) of the Communications Act of 1934, and the amended 47 U.S.C. § 332 contains the provisions regarding preemption. The Telecommunications Act of 1996 did not amend 47 U.S.C. § 332.

22. *See*, 47 U.S.C. § 332(c)(3)(A).

The Department has argued that the Companies were required during the relevant periods, from 1997 through 2001, to file current terms and conditions of service, and also to give advance notice of changes to those terms and conditions. The Department cites both to statute and to a prior Board decision.²³ According to the Department, the imposition of the Fee was "in fact an increase in the rate the customer pays for the contracted service without the required advance notice filing with the Board."²⁴ The Companies argue that they were not required to file advance notice of price changes at the time in question.²⁵ Instead, according to the Companies, they were required only to file their terms and conditions of service with the Board, which the Companies maintain they did.

I conclude that, during the relevant period, the Board had refrained from imposing on NMLP1, and to a degree, on VRSALP, what were otherwise typical regulatory requirements at the time. Because of this, as explained below, I find that the Companies did not violate regulatory requirements between 1997 and 2001.

Prior to 1995, the Companies's predecessors (NYNEX Mobile of Vermont, Inc. and Contel) held Certificates of Public Good ("CPGs"). These certificates each included conditions requiring the Companies to provide 30 days' notice of an increase in the price of any existing service.²⁶ However, the passage of the Omnibus Budget Reconciliation Act of 1993 ("OBRA")²⁷ substantially reduced the authority of state utility commissions over cellular providers by restricting entry and rate regulation,²⁸ and the Board did not immediately consider the effect on the notice requirement.

The Board first considered the effect of OBRA in May of 1995. In Docket 5808, the Board reviewed a petition, pursuant to 30 V.S.A. § 107, to approve a transfer of control of

23. The Department cites to 30 V.S.A. § 225 and Docket 5454.

24. Department 6/28/02 at 13.

25. Verizon, June 28, 2002, at 18-19.

26. Contel was initially certified in Docket 5311, Order of 2/1/89. VRSALP was granted CPG # 89, Order of 11/25/91. Pursuant to Docket 5454, Order of 1/8/92, both companies' CPGs were subsequently modified: Docket 5311, Order of 2/16/94 (Contel), and CPG #89, Order of 2/16/94. Later in 1994, Contel was renamed "NYNEX Mobile of Vermont, Inc." In accordance with Contel's CPG, NYNEX Mobile of Vermont, Inc., petitioned the Board to amend Contel's CPG to reflect this name change. The CPG was amended in Docket 5790, Order of 2/1/95.

27. Pub. L. No. 103-66, Title VI, § 6002(b)(2)(B), 107 Stat. 312, 393 (1993); *codified as* 47 U.S.C. § 332(c)(3)(A).

28. I.e., "[N]o State or local Government shall have authority to regulate the entry of or the rates charged by any commercial mobile service" (Emphasis added). *Id.*

NYNEX Mobile of Vermont, Inc. to NMLP1.²⁹ The Board ultimately approved the transfer, but the Order was unusual in two respects. First, the Board did not grant a CPG to NMLP1 even though NMLP1 clearly would be providing telecommunications services.³⁰ Second, instead of instructing NMLP1 to maintain the status quo, the Order directed NMLP1 to "continue to file tariffs to describe the terms and conditions of its service offerings," but not to file "price information due to the provisions of the Omnibus Budget Reconciliation Act of 1993."³¹

OBRA was clearly one reason, possibly among others, for the Board's relaxation of the price information filing requirement. By relinquishing the requirement to file price information, the Board effectively ruled that these parties could change rates without complying with 30 V.S.A. § 225.³² Furthermore, by implicitly waiving the CPG requirement for the new provider, the Board effectively repealed any requirements that were contained in prior CPGs. Docket 5808 therefore had the effect of eliminating both of the requirements that the Department alleges were violated here, beginning in 1997.

A subsequent tariff filing further supports the position of the Companies here. NMLP1 filed a compliance tariff on July 25, 1995, on behalf of itself and VRSALP.³³ That tariff explicitly provided for recovery of state taxes in the form of customer charges, although it was ambiguous about whether these charges would appear as separate line items on customer bills.³⁴ In the section entitled "General Regulations," paragraph 2.5 (G) of the Companies' tariff reads:

It shall be the obligation of the company's customers to pay any amounts resulting from excise taxes or end user taxes, fees, or exactions imposed by or for the United States, the State of Vermont, any municipal corporation or other political

29. Docket 5808, Order of 5/11/95.

30. The Board found that, "[f]or a period following the Proposed Transaction, NMLP1 will continue to do business under the NMVT name, providing service to Vermont customers." Docket 5808, Order of 5/11/95, at Finding No. 22.

31. *Id.* at Finding No. 26. The Board also found that, as a result of the transaction, there would be no changes in (a) the terms and conditions of service offered to Vermont customers, or (b) in the deposit and disconnection provisions of the existing tariff. *Id.* at Findings Nos. 24 and 25.

32. The Department has argued that the imposition of the Fee constitutes an increase in the rate the customer pays for contracted services without the required advance notice filing by statute. Department filing, June 28, 2002, at 13. Section 225, however, applies only to a "company subject to the provisions of this chapter." If the unanswered question following the 1995 passage of OBRA was whether the Companies were, in fact, subject to Title 30 requirements, arguing about the specific requirements of that statute is of little use here.

33. Stipulated Facts at ¶ 32; exh. 2.

34. The Department contends that, since NMLP1 did not have a CPG at the time, and was not authorized to do business in the State of Vermont "the filing has no effect." Department, 6/28/02 at 11.

subdivision or agency of government against the Company, its property or its operations. Such amounts shall be billed by the Company to its Customers.³⁵

No party appears to have opposed this compliance tariff or any of its provisions.³⁶

In summary, by mid-1995, the Board had ruled that NMLP1 was no longer required to file rate changes in tariffs, or to give customers advance notice of rate changes. Moreover, the Companies had in effect a tariff stating that they could impose charges to recover state taxes.

Over the next several years, the Board declined two more opportunities to further clarify the precise effect of OBRA. In Docket 5916, wireless petitioners sought a declaration that OBRA preempted the requirements of section 107 and that advance approval was not required for a transfer of control. The petitioners argued that enforcement of section 107 would have amounted to a preempted regulation of "entry" of cellular carriers into the Vermont market.³⁷ At a status conference, the petitioners suggested that the Board might approve the proposed transfer under 30 V.S.A. § 107 "without necessarily making any pronouncements on jurisdiction".³⁸ In March of 1997, the Board accepted that invitation. The Board's Order declined to reach the OBRA question, thereby leaving the 1995 requirements undisturbed.

In 1999, the Board once again was presented with a petition requesting approval under section 107 for a transfer of control affecting a parent of the Companies. In its Order in Docket 6317, the Board again refrained from making a jurisdictional determination regarding OBRA.³⁹ It did, however, find that the Companies would "continue to operate in all respects as they currently operate, pursuant to their present operating authority" and that there would be no

35. *Id.*

36. It was in this compliance filing that the Companies explicitly raised the CPG issue. NMLP1 filed a tariff for itself and VRSALP. With that filing, NMLP1 filed a letter with the Board, dated August 22, 1995, stating that:

[I]t is NMLP1's view that CPGs are no longer required for cellular carriers. The Omnibus Budget Reconciliation Act of 1993 ["OBRA"] preempted the states from regulating the entry of cellular carriers. 47 U.S.C. § 332(c)(3)(A). Therefore, NMLP1 believes that it would be inappropriate for the Board to require NMLP1 to obtain a CPG prior to entering the Vermont cellular market.

The Department did not respond to the issue until March 6, 1996; the issue was not settled until the Board issued a further order in Docket 5808 in March of 2000. *See* Docket 5808, Order of 3/1/00. *See also* notes 41-45 below and accompanying text.

37. Docket 5916, Order of 3/28/97 at 1.

38. *Id.*

39. Docket 6317, Order of 12/20/99, at Finding No. 8.

change to "terms, plans, policies and conditions of service."⁴⁰ Once again, it appears that the Board in 1999 left undisturbed the requirements that previously had been established in 1995.

In March of 2000, the Board did act to clarify the effect of OBRA by issuing a further order in Docket 5808.⁴¹ It established a "registration" system to replace the traditional CPG procedure, concluding that this new mechanism was a "sensible resolution that reaches a fair balance between the needs of CMRS providers and those of the State of Vermont."⁴² The Hearing Officer had recommended requiring wireless carriers to file "information-only" tariffs regarding rates.⁴³ The Board disagreed, and it directed NMLP1, "[i]n lieu of providing the Board with tariff filings," to "provide the Board all current terms and conditions of service through the regular submission of applicable contract forms."⁴⁴ Later, on October 30, 2002, the Board issued a CPG to NMLP1.⁴⁵

The Board's Orders in 2000 and 2002 finally clarified the general obligations of wireless carriers in Vermont and also NMLP1's obligations. First, the Board concluded that requiring CMRS providers to obtain a CPG is not prohibited entry regulation under OBRA.⁴⁶ Second, NMLP1's CPG (CPG No. 698-CM), requires NMLP1 to "provide the Board all current terms and conditions of service through the regular submission of applicable contract forms," although there is nothing in these orders that requires advance notice to customers of proposed rate changes.⁴⁷ Third, however, in the case where NMLP1 changes other terms and conditions of service, the Board concluded that "it is NMLP1's duty and responsibility to file notice of such changes at least 45 days prior to the effective date of the changes."⁴⁸

After considering this history, I conclude that, during the relevant period, the Board retained some oversight of the Companies, but not in ways that allow me to conclude that the

40. *Id.* at Finding No. 7.

41. Docket 5808, Order of 3/1/00.

42. *Id.* at 9, 11.

43. *Id.* at 9.

44. *Id.* at 14.

45. The Board ruled that NMLP1 "will be deemed to have met the tariff filing requirement by providing the Board with applicable contract forms containing all terms and conditions of service." *Id.* at 11-12.

46. *Id.* at 4-5.

47. CPG 698-CM, 10/30/02 at ¶ 2.

48. However, in the case where NMLP1 changes other terms and conditions of service, the Board concluded that "it is NMLP1's duty and responsibility to file notice of such changes at least 45 days prior to the effective date of the changes." *Id.* at 12.

Department should be granted summary judgment here. In 1995, the Board eliminated the previous requirement that the Companies notify customers in advance of any rate changes. Moreover, in a related tariff filing, the Companies went unopposed in claiming the right to charge customers a reimbursement charge for state taxes imposed on the Companies. For these reasons, I cannot agree with the Department's contention that the Companies were in non-compliance from 1997 on.

(3) Conclusion

For the reasons stated above, I recommend that the Board deny the Department's request to Order Verizon Wireless to refund, with interest, all monies collected pursuant to the Fee from customers in the years 1997, 1998, 1999, and 2000. Accordingly, the Companies' motion for summary judgment regarding past violations should be granted.

B. Prospective Relief

According to the Companies, federal law preempts the Board from prospectively prohibiting the Companies from collecting costs associated with the gross revenue tax through a separate line-item charge. I disagree, and for the reasons explained below, I recommend that the Board prospectively enjoin the Companies from continuing to issue separate line-item charges to recover Vermont gross revenue tax payments.

(1) Preemption

As noted above, OBRA explicitly proscribes state authority to regulate the "entry and rates" of CMRS providers. At the same time, however, state authority is preserved in important ways. The statute provides in pertinent part:

[N]o State or local Government shall have authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other *terms and conditions* of commercial mobile services.⁴⁹

In its Order of March 1, 2000, in Docket 5808, the Board concluded that the "terms and conditions" language did not prohibit the State of Vermont from requiring CMRS providers to obtain a CPG in order to operate in this state.⁵⁰ More generally, the Board also found in the same Order that Congress intended to preserve considerable state authority over CMRS services.⁵¹ For instance, the House of Representatives Committee on Energy and Commerce ("Committee"), reporting on the House bill that was incorporated into the amended section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services:

By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."⁵²

Given this framework, the challenge here is to clarify the line between preempted rate and entry regulation and retained state authority over "terms and conditions." This determination must be made regarding two things: (1) money collected pursuant to an explicit line item; and (2) the billing format itself.

No Party here disagrees that the revenues collected by the Companies through the line-item designated "gross receipts tax" constitute part of their charges for cellular service. Charges for service therefore are "rates" within the plain meaning of Section 332. Whether the Companies "break out" this element of their overall charges, as they have, or bundle it in with the

49. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

50. Docket 5808, Order of 3/1/00.

51. *Id.* at 3-4.

52. *Id.*

other charges on its bill, as the Department recommends, the amount is still part of their "rates." Thus, for the Board to prohibit the Companies from collecting the monies pursuant to this charge would constitute rate regulation and is proscribed under Section 332. I conclude that the Board is preempted from doing so.

I reach the opposite conclusion, however, with respect to OBRA's effect on the manner in which the Companies represent those rates to their customers. The Board can order the Companies to exclude from its bill a line item designated "gross receipts tax" without precluding the Companies from recovering that cost (or any other cost) in their rates. Since Vermont retains authority to regulate other terms and conditions of service, this could include authority to determine the propriety of various line items and other features of company bills. Questions concerning billing format fall into the category of "other terms and conditions" over which a state may exercise jurisdiction.

(2) Board Policy

The Department has also argued that the Companies' practice of assessing the Fee as a line-item charge on customers' bills is contrary to Board policy, as articulated in Dockets 5464, and 6101/6223, and that the policy determinations in those Dockets should apply here.⁵³ The Department also argues that the Company's practice is misleading.⁵⁴ The Companies maintain that Board precedent regarding cable providers should not apply here because historically cable television has been, and continues to be, extensively regulated while, to the contrary, cellular service has not. For the reasons explained below, I conclude that the billing practice does violate Board policy and is misleading.

Docket No. 5464 involved a declaratory ruling concerning the applicability of 30 V.S.A. § 22 to cable television companies. In a 1991 Order, the Board determined that the gross receipts tax should be embedded in rates and not "assessed as a surcharge."⁵⁵ According to the Order:

Under Vermont tax law, gross revenue taxes have consistently been determined to be embedded cost items.⁵⁶

53. See e.g., Dockets 6101/6223, Order of 4/28/00 at 152; Docket 5464, Order of 3/8/91 at 5.

54. Department, 6/28/02 at 15, note 6.

55. Docket No. 5464, Order of 3/8/91 at 5.

56. *Id.*

The Order went on to explain that the gross receipts tax:

is an element of each company's overall cost of service. Unlike the sales tax, which is a tax on a transaction and is therefore separately itemized, taxes contributing to general cost of service are not itemized on customer statements. This decision is consistent with general business practice; other elements of cost of service, such as the cost of capital or labor, are similarly not itemized on customer statements, but instead included as part of the overall cost of service.⁵⁷

The rationale articulated in Docket 5464 applies equally here. There is no material difference between a customer bill from a cable television company and a customer bill from a cellular service provider. The question does not relate to the type of company doing the billing. Rather, it relates to the bill itself, and how clear that bill is to the customer.

On the basis of the record evidence in this Docket, I conclude that the Companies' billing practices have, in fact, been misleading. First, according to the record, the Companies' bills stated that the "Public Service Board has imposed an annual regulatory fee on wireless carriers." This is incorrect. The gross receipts tax was passed by the Vermont General Assembly. It applies to all regulated utilities, not just "wireless carriers."⁵⁸ Had the Companies been accurate in their representation, they might have, at the very least, indicated that customers are being charged an amount to help the Companies recover certain corporate taxes.

Second, the record reflects that the amounts charged by NMLP1 and VRSALP in several years do not correspond to the amount of gross receipts taxes that they paid in those years. In 1998, the total amount of the line item fee billed to customers was approximately equal to the total amount of tax the Companies paid in 1998, based on their 1997 revenues. In subsequent years, i.e., 1999, 2000 and 2001, while the Companies paid varying amounts of gross revenue taxes,⁵⁹ they did not change the Fee. Thus, the \$2.70 charge in those years either under- or over-represented a customer's purported pro-rata share of the Companies' gross receipts tax payments.⁶⁰ To claim that the line-item amount represents certain costs associated with the annual regulatory fee imposed by the Board, if not a patent misrepresentation, is certainly vague and misleading.

57. *Id.* at 6.

58. The tax proceeds are used to support the activities of the Department of Public Service and the Board.
30 V.S.A. § 22.

59. See SF at ¶¶ 39, 40, 41, 44, 45, 46.

60. SF at ¶¶ 49, 50, 52.

More generally, even if disclosures are accurate, underlying problems remain. Consumers in any market, including Vermont's market for cellular services, must be able to readily understand the price they pay for a service. A clear price signal helps a consumer understand the value of a service as well as how much to use. A clear price signal also guides a person's decision to stay with a company or, after making a comparison, to go elsewhere.

Consequently, for a company to extract from its total cost of doing business one kind of corporate tax and then to bill that cost separately is potentially misleading. It is reasonable to conclude that this could give a customer an inaccurate impression of a low price because the stated price for the service does not include all of the amounts that the customer must actually pay to the company. It is reasonable to conclude that, left uncorrected, these practices compromise consumer understanding of the actual price of wireless service, and, in turn, effectively impede a customer's ability to choose appropriate usage levels of a service or whether one provider's service offering is preferable over another.

The Board in Docket 5464 emphasized that the gross receipt tax is neither a surcharge nor a tax on a specific transaction. If that were the case here, then either of those two reasons might justify "unbundling" this amount on a bill.⁶¹ However, the Fee here is neither a surcharge nor a tax on a specific transaction. Instead, the Vermont Gross Revenue Tax is simply one of the many costs of doing business in Vermont. There is no more justification for billing this charge separately on a line item than it would be to bill separately for other state requirements such as the corporate income tax or the state electrical code, or for more general costs such as the cost of labor or capital.⁶²

61. See exh. 1 at 3.

62. Presumably Verizon Wireless had this distinction in mind when it included the following language in its bills: "Customers who have tax exempt status are not exempt from these charges." Exh. 1 at 3.

(3) Conclusion

For the reasons set out above, I recommend that the Board grant the Department's motion for summary judgment regarding prospective relief. I recommend that the Board permanently enjoin the Companies from recovering the gross revenue tax from customers pursuant to a separate line-item charge on bills.

C. Operating Without a CPG

The Department contends that NMLP1 and VRSALP have been doing business in Vermont without a CPG, and that this violates Vermont law.⁶³ The Department asked that the two companies be enjoined from operating until certified. The Department also indicated, however, that it would withdraw its request for injunctive relief if the Board were to issue a CPG based on the Companies' then-pending CMRS filing.

On October 30, 2002, the Board issued a CPG to NMLP1.⁶⁴ I conclude that the Department's request is moot and that summary judgment should be granted to the Companies. I further conclude that, at this point, I need not reach the merits of any of the related defenses that have been raised by the Companies.⁶⁵ They can be considered, if necessary, at a later time.⁶⁶

D. Next Steps

The Parties agreed that it might be appropriate to organize this investigation into two phases, and that the second phase would consider the appropriateness of penalties, if necessary, and any remaining relief sought by the Department. I ask the Parties to address these issues in their comments.

The foregoing is reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

The Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

63. Department Memorandum of June 28, 2002, at 5.

64. See note 24 and accompanying discussion below.

65. See Verizon, June 28, 2002, and Verizon, July 19, 2002.

66. Parties have agreed that the questions of penalties and other relief being sought by the Department, should be considered in a second phase of this Docket.

Dated at Montpelier, Vermont, this 11th day of July, 2005.

s/David Farnsworth
David Farnsworth, Esq.
Hearing Officer

V. BOARD DISCUSSION

We commend the Hearing Officer and the parties for their thorough development of the facts and issues in this docket. We have carefully examined the Department and the Companies' comments upon the Proposal for Decision ("PFD"), and reach the following conclusions.

Authority to Regulate Billing Practices

The Companies support the Hearing Officer's PFD, with one exception. They assert that Section 332 of OBRA preempts states from regulating the manner in which CMRS providers set out line items on their bills. Citing a recent Federal Communication's Commission ("FCC") Order, the Companies maintain that "state authorities are preempted from prohibiting CMRS providers from charging a separate line item on their bills because such a prohibition would constitute impermissible rate regulation."⁶⁷

The FCC ruling upon which the Companies have asked us to rely has been appealed. We conclude that there is a strong likelihood that the FCC will be reversed. Until the legal uncertainty associated with that order is resolved, we will interpret the plain language of Section 332. We, therefore, cannot agree with the Companies' position because, in pertinent part, the statute reads:

this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.⁶⁸

As we have found in prior Orders, the plain language of Section 332 reserves to states the authority over terms and conditions while explicitly proscribing state authority to regulate entry and rates.⁶⁹ We have further noted that in addition to the statutory language, the statute's legislative history compels the same conclusion. Reporting on the House bill that was incorporated into the amended Section 332, the House of Representatives Committee on Energy

67. Comments of Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1, May 23, 2005, at 2, citing to *Truth-in-Billing and Billing Format/National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, CG Docket No. 04-208, FCC No. 05-55 (March 18, 2005) ("TIB Order"), ("Companies' Comments").

68. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

69. See Docket 5808, Order of 3/1/00 at 3, citing to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(there exists a presumption against Federal preemption, particularly in areas of historic state authority such as public utility regulation).

and Commerce noted that, even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services:

By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."⁷⁰

In the TIB Order, in which the FCC prohibits states from regulating line items in bills because this would constitute impermissible rate regulation, the FCC notes that Congress did not specifically define "rates," "entry," or other key terms in section 332(c)(3)(A).⁷¹ While we recognize that section 332 contains no definitions, we note that state regulation of customer billing practices – including the appropriate use of line items – in no way involves any of the commonly recognized indicia of rate regulation, e.g., the prescription, setting or fixing of rates, or the establishment of rate levels, structures or elements.⁷² We see nothing, therefore, in the FCC's TIB Order that compels us to change our conclusions about the plain language of section 332. We hereby affirm the Hearing Officer's conclusions of law on this question

Authority to Order Refunds

The Department disagrees with the Hearing Officer's PFD on a number of issues. First is the question of whether the Board is preempted from ordering relief such as refunds where a company is found to have imposed misleading charges. Citing to *Wireless Consumers Alliance*, an FCC decision on the issue, the Department states that "[a]n order of monetary relief against the Companies for misleading billing practices does not constitute prohibited rate regulation."⁷³ In the TIB Order, the FCC also acknowledges that in its *Wireless Consumers Alliance* decision it

70. *Id.* at 3-4 citing to H.R. Rep. No. 111, 103 Cong., 1st Sess. 2 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

71. TIB Order at ¶ 30.

72. *See id.*

73. Comments of the Department of Public Service, May 2, 2005, at 4 ("Department Comments"), citing to *Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling*, 15 FCC Rcd 17021 at ¶¶ 12, 27 (2000).

found that state court damage awards do not necessarily implicate rates within the meaning of section 332(c)(3)(A):

there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior.⁷⁴

On this question, the Hearing Officer determined that any decision that we might make that would affect the Companies' charges would constitute rate regulation that is proscribed by Section 332. While the determination appears reasonable, it fails to recognize the fact that the FCC has distinguished a judgment for monetary relief with establishment of a regulatory rate requirement. We thus find the Department's argument compelling and hereby overrule the Hearing Officer's determination on this question. The Board is not preempted by section 332 from ordering relief – including refunding monies for past charges – where charges are found to have been misleading.

Applicable Regulatory Requirements

For several reasons, the Department disagrees with the Hearing Officer's conclusions in Sections IV. A and IV. B.

First, the Department indicates that "the PFD reaches what appears to be inconsistent results on the issue of whether the Companies lawfully imposed the Fee on its customers."⁷⁵ The Department cites to language in Section IV.A. stating that these "charges were not in violation of state law at the time they were levied," and then to Section IV. B where the charges are referred to as "vague and misleading." According to the Department, they cannot be both. We agree with the Department's observation. However, upon review of the accompanying discussion, we find no inconsistency. The offending language of Section IV. A could be replaced by the phrase "not in violation of any specific Board directive" and be acceptable.

The Department also asks us to overrule the Hearing Officer's conclusion in Section IV.A in which he determines that:

74. TIB Order at ¶ 34.

75. Department Comments at 2.

during the relevant period, the Board retained some oversight of the Companies, but not in ways that allow me to conclude that the Department should be granted summary judgment here.

We conclude that the Hearing Officer made the correct decision here, and hereby affirm his determination. During the relevant period in question, the Board refrained from imposing the typical regulatory requirements on the Companies. Thus, to now hold them to those standards would neither be fair nor reasonable.

Injunctive Relief

In Section IV.B, the Hearing Office concludes that the record in this Docket demonstrates that the Companies' use of a line item in their bills was misleading. We agree.

First, in 1997, the Companies bill read as follows:

[T]he Vermont Public Service Board has imposed an annual regulatory fee on wireless carriers. Due to the costs associated with this fee, Vermont customers will be charged an additional \$2.19 which will be collected once per year and will also appear on your November bill. Customers who have tax exempt status are not exempt from these charges.⁷⁶

As noted in the PFD, the statement in the first sentence is incorrect. The gross receipts tax ("GRT") was passed by the Vermont General Assembly and is found in Vermont Statutes. We must emphasize that precision is important here; Vermont utility customers should expect to be provided with correct information on their bills. We are thus not encouraged by the Companies' comments on this issue:

In fact, the Companies' billing practices were not misleading. The bill message was mistaken in stating that the Board, rather than the Vermont General Assembly, imposed the GRT to finance the activities of the Board and the Department, but such a mistake does not detract from the fact that the GRT is a government-imposed tax on wireless carriers and other utility providers.⁷⁷

Second, we conclude that the Hearing Officer correctly determined that the Companies' billing information was misleading. The record shows that, with the exception of the year 1998, there does not appear to have been a clear correspondence between the line item charge and the

76. Exh. 1 at 3.

77. Companies' Comments at 7-8.

actual tax paid by the Companies. In other words, the GRT Fees contained in bills issued in 1999, 2000, and 2001 do not appear to have been set in relation to actual taxes paid as they purport to do. Given the record in this Docket, we affirm the Hearing Officer's conclusions that this practice should be stopped and that prospective injunctive relief is in order here.

Request for a Stay

As we noted above, we are not convinced that the plain language of Section 332 provides the FCC with the authority to regulate CMRS billing practices. This is an historical state regulatory activity that Congress has preserved for the states. This question, of course, will soon be addressed by the Eleventh Circuit Court of Appeals in a case in which the State of Vermont has joined. Because the scope and substance of the FCC rule will be resolved by a decision from the Eleventh Circuit Court of Appeals, we, consequently, conclude that a stay of our Order in this Docket pending the final resolution of the State of Vermont's appeal is appropriate.

Further Proceedings

Finally, until we hear from parties as to the resolution of the appeal, we shall refrain from ordering a status conference to schedule further proceedings. The Department and the Companies are invited to submit a request for a status conference when they choose.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings of fact and conclusions of the Hearing Officer are adopted, except as modified in the Board Discussion, above.

2. The Motion for Summary Judgment of Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 is granted regarding the Department of Public Service's request to order Verizon Wireless to refund, with interest, all monies collected pursuant to the Fee from customers in the years 1997, 1998, 1999, and 2000.

3. The Motion for Summary Judgment of the Department of Public Service is granted with regard to prospective relief. Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 are permanently enjoined from recovering the Vermont Gross Revenue Tax from customers pursuant to a separate line-item charge on bills.

4. The controversy surrounding the issuance of Certificates of Public Good to Vermont RSA Limited Partnership and NYNEX Mobile Limited Partnership 1 is moot. Motion for Summary Judgment is granted to the Companies.

Dated at Montpelier, Vermont, this 27th day of July, 2005.

_____)	
)	PUBLIC SERVICE
)	
s/David C. Coen)	BOARD
)	
)	OF VERMONT
s/John D. Burke)	

OFFICE OF THE CLERK

FILED: July 27, 2005

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.