ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 05-1413

BRUCE GILMORE, CLAUDIA MCGUIRE, THE GREAT FRAME UP SYSTEMS, INC. AND PESGER, INC. D/B/A/ THE GREAT FRAME UP,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Br.	Petitioners' brief
CMRS	Commercial mobile radio service
FCC or Commission	Respondent Federal Communications Commission
FCC App.	Respondents' appendix
Fee	the corporate account administration fee at issue in this case
Gilmore	used to collectively refer to Petitioners
Gilmore App.	Petitioners' appendix
Order	*Bruce Gilmore, Claudia McGuire, The Great Frame Up Systems, Inc., and Pesger, Inc., d/b/a The Great Frame Up v. Southwestern Bell Mobile Systems, L.L.C., d/b/a Cingular Wireless*, 20 FCC Rcd 15079 (2005)
Title II	Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 201 *et. seq*.

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QUESTIONS PRESENTED

In 1995, commercial mobile telephone carrier Cingular Wireless ("Cingular")[1] provided notice to its Chicago-area corporate account holders that it would begin collecting a $1.50 per-

[1] Cingular is the parent of New Cingular Wireless PCS, LLC, the successor-in-interest to Southwestern Bell Mobile Systems, LLC. *See* Defendant Southwestern Bell Mobile Systems, L.L.C. d/b/a Cingular Wireless's Answer and Affirmative Defenses to Complainants' Complaint ("Answer") at 5 (FCC App. 59); Motion to Intervene of Cingular Wireless LLC and New Cingular Wireless PCS, LLC, *Gilmore v. FCC*, No. 05-1413 (D.C. Cir. filed Nov. 9, 2005). During some of the time period relevant to this case, Southwestern Bell Mobile Systems, LLC did business in Illinois as Cellular One. *See* Answer at 5 (FCC App. 59). For simplicity's sake, this brief will use only "Cingular."

month “corporate account administration fee” on their accounts. Some Cingular employees involved in the decision to collect the Fee have testified that it was an attempt to defray the cost of existing services and features provided to corporate customers. Cingular had the contractual right to impose new fees upon notice to these customers, and they had the right to cancel their service without early-termination penalty upon receiving the notice.

Petitioners here were corporate customers who did not exercise their right to cancel service (and switch carriers) upon receiving notice of the Fee or its increase, but nonetheless challenged it under state and federal law. After receiving a primary jurisdiction referral, the Commission concluded that the Fee was neither unreasonable nor unlawfully discriminatory in violation of the Communications Act. *See Bruce Gilmore, Claudia McGuire, The Great Frame Up Systems, Inc., and Pesger, Inc., d/b/a The Great Frame Up v. Southwestern Bell Mobile Systems, L.L.C., d/b/a Cingular Wireless*, 20 FCC Rcd 15079 (2005); 47 U.S.C. §§ 201(b) & 202(a). In particular, the Commission concluded that the Fee bore a reasonable relationship to Cingular’s costs of providing unique features and services to corporate customers, did not confound customers’ contractual expectations, and was adopted in the context of a highly competitive market in which customers easily could switch carriers.

This petition raises the following questions for review:

Whether the Commission properly exercised its broad discretion in finding that Petitioners had not borne their burden of establishing the unreasonableness of the Fee under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b)?

Whether the Commission properly exercised its broad discretion in finding that Petitioners had not borne their burden of establishing that the Fee unreasonably discriminated against corporate customers in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a)?

JURISDICTION

The *Order* challenged by petitioners was released on September 2, 2005. *See* Gilmore App. 1. Petitioners filed their petition for review on October 31, 2005. This Court has jurisdiction to review the FCC's *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(l). The FCC had jurisdiction over Petitioners' complaint pursuant to 47 U.S.C. §§ 207 & 208.

STATUTES AND REGULATIONS

Relevant statutes appear in Petitioners' brief.

COUNTERSTATEMENT

In order to place the Commission's *Order* in context, it is helpful to understand the recent history of commercial mobile radio services regulation and the specifics of the "corporate account administration fee" at issue here.

A. Regulation of Commercial Mobile Radio Services

1. Market-Oriented Approach

In 1993, Congress established a unique regulatory regime for providers of "commercial mobile service," such as Cingular.[2] First, Congress generally prohibited states from "regulat[ing] the entry of or the rates charged by" commercial mobile service providers.[3] Second, with respect to federal regulation, Congress specified that such providers are common

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[2] A commercial mobile service is a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves" that is offered to the public for a profit and that interconnects with the public switched network. 47 U.S.C. §§ 3(27); 332(d)(1).

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 393 (1993), codified at 47 U.S.C. § 332(c)(3)(A).

carriers presumptively subject to regulation under Title II of the Communications Act, but at the same time authorized the Commission to forbear from applying all Title II provisions, except for the Section 201 prohibition on unreasonable charges, the Section 202(a) prohibition on unreasonable discrimination, and the Section 208 complaint procedures. *See* 47 U.S.C. § 332(c)(1). Any forbearance determination must be supported by a conclusion that enforcement of the provision in question is unnecessary to ensure reasonable, non-discriminatory charges, to protect consumers, or to advance the public interest. *See id.*

In its first exercise of this authority, the Commission decided in 1994 to forbear from applying many provisions of Title II, including the requirement that mobile service providers file tariffs of their charges with the Commission. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994). In doing so, the Commission explained that Congress's statutory scheme "acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace." *Id.* at 1418, ¶ 14. As a result, the Commission adopted "as a principal objective . . . the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees." *Id.* at 1418, ¶ 15.

The key to the Commission's forbearance analysis was its conclusion that the commercial mobile service market was competitive and becoming more so over time. *See id.* at 1478, ¶ 174. As the Commission explained, "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power." *Id.* at 1478, ¶ 173. Although acknowledging that Congress in Section 332 had not authorized the Commission to forbear from enforcement of Sections 201 or

202, the agency noted that in a competitive marketplace, carriers "are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers." *Id.*

In 1998, after Congress amended the Communications Act to allow forbearance from any provision of the Act, the Commission declined to forbear from enforcing Sections 201 and 202 against providers of personal communications services (a subset of commercial mobile service providers). *See Personal Communications Indus. Ass'n's Broadband Personal Communications Servs. Alliance's Petition for Forbearance for Broadband Personal Communications Servs.*, 13 FCC Rcd 16857, 16866, ¶ 18 (1998).[4] The Commission noted that it had never before refrained from applying Sections 201 and 202 to an entire industry and believed it should retain these tools to respond in case a market failure permitted a carrier to engage in an abusive practice. *Id.* at 16865-68, ¶¶ 15, 17, 23. At the same time, the Commission took note of the competitive nature of the commercial mobile service market, *see, e.g.*, *id.* at 16867-68, ¶ 21, and this fact has featured prominently in its subsequent decisions adjudicating Section 201 and 202 complaints against commercial mobile service carriers. *See, e.g.*, *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987, 8995, ¶ 18 (2002) ("Although the Commission declined to forbear from applying sections 201(b) and 202(a) of the Act in the CMRS context, it has considered the existence of robust competition in the CMRS market when determining whether a violation of

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[4] Although Section 332(c)(1)(A) of the Communications Act (discussed above) had not authorized forbearance from Sections 201 or 202 in the CMRS context, Congress in 1996 had added a generally applicable forbearance provision to the Communications Act authorizing the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service." 47 U.S.C. § 160(a); *see Personal Communications Indus. Ass'n*, 13 FCC Rcd at 16865, ¶ 14.

those sections has occurred." (footnote omitted)), *aff'd*, *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004). A brief summary of each of these decisions follows.

White. In 2001, the Commission determined that several wireless billing practices – including charging customers for "dead time" and charging for unanswered calls – were not unjust or unreasonable in violation of Section 201. *See Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE*, 16 FCC Rcd 11558, 11558-59, ¶¶ 1-2 (2001). In reaching its conclusion, the Commission considered three factors: "the relationship of carrier costs to billing charges or practices, consumers' expectations based on their wireline experience, and the role of competitive markets." *Id.* at 11560, ¶ 8. These have come to be known as the "*White* factors."

First, the Commission concluded that the charges in question were "related to the costs associated with the network functions that occur even if [a] call is not completed." *Id.* at 11561, ¶ 11. This simple "relat[ionship]" was enough; the Commission did not examine the intent of the carriers in imposing these charges, nor did it require that the associated costs be quantified. *See id.*

Second, the Commission acknowledged that traditional "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." *Id.* at 11562, ¶ 13. This comparison to wireline did not change the analysis, however, because "the practices used there are not necessarily controlling of whether a practice is in violation of Section 201(b)." *Id.*

Finally, the Commission noted that "[w]hen Congress established commercial mobile radio services as a distinct category of common carrier, its general intent was for prices to reflect the competitive market." *Id.* at 11563, ¶ 15. In this case, the market was working because it had "enabled carriers to adopt different types of services and billing practices." *Id.* at 11563, ¶ 17. In particular, the Commission noted that carriers' practices on "dead time" and unanswered calls varied and concluded that "consumers can factor these different practices into their assessment of the total package of services offered by each carrier," making regulatory prescription unnecessary. *Id.*

Kiefer. The Commission used a similar market-oriented analysis a year later in adjudicating another customer complaint about a commercial mobile service billing practice. *See Kiefer v. Paging Network, Inc.*, 16 FCC Rcd 19129 (2001). In that case, a customer challenged as unreasonable under Section 201(b) his carrier's practice of assessing a five-dollar fee on late bill payments that the customer alleged was not related to the carrier's costs. *Id.* at 19131, ¶ 4. The Commission noted that it had chosen to regulate mobile services "through competitive market forces" and had "not imposed specific cost-based rate regulations on CMRS providers." *Id.* at 19131, ¶ 5. In rejecting the claim, the Commission found it dispositive that the relevant market was competitive: if the customer did not like his company's policy on late fees, he had the choice of moving to another provider. *See id.* at 19132, ¶ 7 & 19133, ¶ 10 n.35.

Orloff. In 2002, the Commission denied another customer complaint challenging a commercial mobile service carrier's practice as unreasonable and discriminatory, and it again relied almost exclusively on the competitive nature of the relevant market. *See Orloff*, 17 FCC Rcd 8987. In that case, the consumer challenged her carrier's practice of making customer-specific price concessions to customers who negotiated or "haggled" with the carrier. *See id.* at 8992, ¶ 11.

The Commission rejected the customer's contention "that differences in treatment of consumers purchasing like services must be cost-justified on a transaction-by-transaction basis."

Id. at 8998, ¶ 24. The Commission explained that it had not "impose[d] specific cost-based regulations on CMRS providers" and had instead chosen to "regulate[] CMRS through competitive market forces." *Id.*; *see also id.* at 8997, ¶ 22 n.69. Instead of focusing on costs, as suggested by the complainant, the Commission again found controlling the fact that the relevant market was competitive. *See id.* at 8996, ¶ 20. As a result, carriers would have no incentive to behave in an unreasonable manner because "such conduct would result in a loss of customers." *Id.* at 8996-97, ¶ 20.

In affirming, this Court noted that the Commission had broad discretion in determining whether a practice violated Sections 201(b) and 202(a) and was well within that discretion in deciding not to proscribe the carrier's practice of haggling. *See Orloff*, 352 F.3d at 420-21. The key point for the Court (as it had been for the Commission) was that "[c]ustomers dissatisfied with Verizon's charges or services may simply switch to another provider." *See id.* at 421. The Court rejected the customer's arguments for traditional regulation as "contrary to Congress' clearly articulated policy in favor of competition in telecommunications services." *Id.*

Truth-in-Billing Rules. In 1999, the Commission concluded that several broad "principles" should apply to the billing practices of all telecommunications carriers, including mobile carriers. *See Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7501, ¶ 13 (1999). One of these "principles" was that carriers' bills should "contain full and non-misleading descriptions of charges that appear therein." *Id.* at 7496, ¶ 5. At the same time, the Commission exempted wireless carriers from a specific rule governing the content and format of customer bills. *Id.* at 7501-03, ¶¶ 13-19, 7555; 47 C.F.R. § 64.2401(b).[5]

In 2005, the Commission lifted that exemption, thereby making mobile carriers subject to the requirements of 47 C.F.R. § 64.2401(b) that "billing descriptions be brief, clear, nonmisleading, and in plain language." *Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6456, ¶ 16 (2005), *petitions for review pending*, *NASUCA, et al. v. FCC*., Nos. 05-11682-DD (11th Cir. filed March 28, 2005). In the same order, the Commission rejected a request that it issue a declaratory ruling clarifying that mobile carriers were prohibited from imposing any monthly line-item charges unless they were mandated or authorized by a regulatory agency. *See id.* at 6458, ¶ 23. In doing so, the Commission noted that "[t]here is no general prohibition against the use of line items on telephone bills under our rules or the Act." *Id.* at 6458, ¶ 23; *see also id.* at 6461, ¶ 28 (carriers may recover "costs associated with the business of providing telecommunications service" through either "rates or other line item charges").

2. Benefits of Competition

The generally deregulatory approach to mobile services outlined by Congress and implemented by the Commission has resulted in intense competition in the commercial mobile

[5] 47 C.F.R. § 64.2401(b) (from which mobile carriers were exempted in 1999) provides: "Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged."

service market and substantial benefits to consumers. Prices have declined; [6] wireless penetration continues to accelerate;[7] and average usage is up significantly.[8] An increasing number of consumers have "cut the cord" to traditional wireline service and are using mobile phones exclusively.[9] Consumers are also increasingly using their mobile phones to exchange data, such as text messages, email, and photographs.[10] The intense competition among mobile providers has led to a high rate of customer "churn," with up to three percent of users switching providers each month.[11]

B. This Case

1. Chicago Mobile Market

At the time Cingular began collecting the Fee at issue in this case, the Chicago mobile market (where petitioners reside) was highly competitive. There were at least three other competing providers there in 1995. *Order* ¶ 15 (Gilmore App. 6), citing Amended Joint

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[6] According to the Bureau of Labor Statistics, the annual cellular consumer price index ("CPI") declined 1 percent from 2003 to 2004, while the overall CPI rose 2.7 percent. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Servs.*, Tenth Report, 20 FCC Rcd 15908, 15965-66, ¶ 157 (2005). The cellular CPI has fallen by 34 percent since December 1997, when BLS began tracking it. *See id.*

[7] There were approximately 184.7 million mobile phone subscribers as of December 2004, up from 160.6 million a year before. *See id.* at 15968, ¶ 161. In the preceding three years, there was a 30 percent increase in mobile phone subscribers. *See id.*

[8] In the last quarter of 2004, the typical mobile subscriber used his or her phone for 680 minutes each month, up 80 minutes from the same quarter in 2003. *See id.* at 15970, ¶ 168.

[9] More than five percent of adults report living in a household served only by a wireless phone. *See id.* at 15979-80, ¶ 196. Among 18 to 24 year-olds, that figure is 14 percent. *See id.*

[10] *See id.* at 15970-71, ¶¶ 170-73.

[11] *Id.* at 15911-12, ¶ 4. The cost of switching providers was reduced in late 2003 when wireless number portability was introduced. *See id.*

Statement of Stipulated and Disputed Facts and Legal Issues ("Joint Statement") at 3. In 1996 and 1997 (before Cingular increased the Fee), three additional competitors entered the market. *See id.*

2. Cingular's Corporate Account Administration Fee

In April 1995, Cingular gave its Chicago-area corporate account customers notice that it would begin charging them a $1.50 monthly Fee. *Id.* ¶ 3 (Gilmore App. 2).[12] This Fee was disclosed as a separate line item of the customer bills in the "Other Charges and Credits" section and was labeled a "Corporate Account Administration Fee." Joint Statement at 2 (Gilmore App. 12). In March 1998, again after providing notice, Cingular increased this Fee to $2.95 per month. *Order* ¶ 3 (Gilmore App. 2).

Donna Lynn Morrison, Cingular's vice president of sales and marketing for the five-state area including Illinois, recalled the Fee as "an attempt to defray a portion of all of [the] costs" of providing services and features unique to corporate customers. Deposition of Donna Lynn Morrison ("Morrison Dep.") at 54 (Gilmore App. 166); Complaint at 5 (FCC App. 10). Among those services and features were: a dedicated corporate account customer support group comprised of Cingular's best representatives, billing analysis, on-site visits by sales representatives to sign up corporate account holders' employees and deliver equipment post-sale, a corporate account newsletter, and call-waiting, call forwarding, and phone replacement without separate charge. Morrison Dep. at 54-57 (Gilmore App. 166-67). Grace Seymour, vice president for customer service, testified that features such as call waiting and voice mail and a

[12] A corporate account was one that had ten or more lines and that had a corporate name affiliated with it. Deposition of Daniel Patrick Fenwick at 20-21 (Gilmore App. 289-90). Employees and other individuals associated with the corporate account holder were eligible to open corporate accounts as well and receive the discounted corporate rate. *See id.*

dedicated corporate customer support group were provided in exchange for the corporate account administration fee. Deposition of Grace Seymour ("Seymour Dep.") at 36-40 (Gilmore App. 284-85).

The testimony of Daniel Fenwick (on which Petitioners rely) was quite similar. Fenwick, formerly director of corporate sales for Cingular, noted that a number of features and services were offered exclusively to corporate account holders, including in-building wireless systems, free features such as voice mail, and separate customer service. Deposition of Daniel P. Fenwick ("Fenwick Dep.") at 22-24 (Gilmore App. 290). He also noted that the corporate account budget increased throughout the 1990s and acknowledged that the corporate account administration fee "would raise more revenue that would, in part, offset" those increasing expenses. *Id.* at 70 (Gilmore App. 295).

According to Fenwick, the point of the Fee was "to increase revenue from the customers." Statement of Daniel Patrick Fenwick ("Fenwick Statement") at 1 (Gilmore App. 136). A rate increase would have achieved the same goal, but, according to Fenwick, it might have "caus[ed] consumers to switch to another carrier." *Id.* Fenwick also said that Cingular continued to provide its extant "excellent" services to its business customers in exchange for the Fee; it did not offer additional services. *Id.* at 2 (Gilmore App. 137). Cingular waived the Fee for some customers who complained; others apparently switched to competing carriers in response to its imposition. *See id.*

3. The Petitioners

All three petitioners had corporate accounts with Cingular in the Chicago area at the time Cingular imposed the corporate account administration fee in 1995 or increased it in 1998. Each had signed a contract that authorized Cingular to add new charges upon written notice and provided customers the opportunity to cancel service in the event such charges were imposed. *See Order* ¶ 7 (Gilmore App. 3); *id.* ¶ 14 (Gilmore App. 6). None of the petitioners exercised this right to terminate service when the Fee was imposed; instead each paid it monthly. *Order* ¶¶ 4-6 (Gilmore App. 2-3). Under the terms of their contract, this meant that each of them was "'conclusively deemed to have agreed'" to pay the Fee. *Order* ¶ 7 (Gilmore App. 3).

4. Procedural History

Petitioner Gilmore filed a complaint against Cingular in Illinois state court in 2001 on behalf of a putative class of corporate customers that paid the corporate account administration fee. *Order* ¶ 8 (Gilmore App. 3). He challenged the Fee on various state-law grounds, including breach of contract and fraud. *See id.* Cingular removed the case to federal court, which found that it had jurisdiction because several of Gilmore's state-law claims were completely preempted by the Communications Act. *See Gilmore v. Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp.2d 916, 925 (N.D. Ill. 2001).

Gilmore subsequently amended his complaint to add federal Communications Act claims, namely that the Fee was unjust or unreasonable in violation of Section 201(b) of the Act and constituted unreasonable discrimination against corporate account holders in violation of Section 202(a). *See Gilmore v. Southwestern Bell Mobile Sys.*, 210 F.R.D. 212, 216 (N.D. Ill. 2001).

The district court denied class certification because Gilmore had failed to demonstrate that the class was sufficiently numerous to warrant class treatment or that his counsel could adequately represent the class. *See id.* at 218, 219-220 (citing Fed. R. Civ. P. 23). The court also dismissed Gilmore's state-law fraud claims, finding them preempted by the federal Communications Act. *See id.* at 225-26.

The court later determined that Gilmore's complaint should be resolved by the Commission under the doctrine of primary jurisdiction. *See Gilmore v. Southwestern Bell Mobile Sys.*, L.L.C., 224 F. Supp.2d 1172, 1177 (N.D. Ill. 2002). The court noted that Gilmore's claim "directly raises the issue of whether the Fee was unjust or unreasonable because too high," which was "an issue within the expertise of the FCC." *Id.*

5. Order on Review

Gilmore effectuated the primary jurisdiction referral by filing a formal complaint with the Commission challenging Cingular's assessment of the Fee. *See* 47 U.S.C. § 208 (formal complaint procedure). The Commission ultimately rejected Gilmore's Section 201(b) and 202(a) claims.

Section 201(b). The Commission noted that Gilmore pressed two related Section 201(b) claims, and that he bore the burden of proof as to both. *See Order* ¶ 10 (Gilmore App. 4). First, he claimed that the Fee was unlawful "because it is not cost-based but rather designed for the sole purpose of raising revenues without appearing to raise rates." *Id.* Second, he claimed that the Fee was misleading. *See id.*

The Commission noted that Gilmore's complaint was not governed by its truth-in-billing rules, which it had not applied to wireless carriers until after the time period at issue in this case. *See id.* ¶ 11 (Gilmore App. 5); *see also supra* at 8-9 (discussing truth-in-billing rules). Instead, the Commission applied the factors it had considered in *White*, which both parties said should control the outcome. *See id.* Those factors were: "(1) the relationship of carrier costs to billing charges or practices; (2) consumers' expectations based on their wireline experience; and (3) the role of competitive markets." *Id.*; *see also supra* at 6-7 (discussing *White*).

Applying the first *White* factor, the Commission concluded that Gilmore "failed to demonstrate the Fee is not reasonably related to Cingular's costs." *Id.* ¶ 13 (Gilmore App. 5). The Commission took specific note of Gilmore's argument (based on Fenwick's testimony) that "the sole purpose of the Fee was to increase revenue and that the [F]ee was unrelated to costs borne by Cingular for providing service to business customers." *Id.* ¶ 12 & n.32 (Gilmore App. 5) (citing Complaint at 10); *see also* FCC App. 15 (relevant portion of Complaint).

But the Commission also noted that it was "undisputed that additional services were in fact provided" to corporate customers by Cingular. *Id.* ¶ 13 (Gilmore App. 5). These services included: Cingular's willingness to travel to corporate account-holders' premises to make employee sign-up more convenient; receipt of features such as call waiting and call forwarding without separate charges for them; eligibility for an in-building wireless system that makes mobile phone use within a building possible; and a dedicated corporate account newsletter. *See id.*; *see also id.* ¶ 25 (Gilmore App. 9). The Commission also noted witness testimony that "there were additional costs associated with these special services." *Id.* ¶ 13 (Gilmore App. 5). Because Gilmore had not come forward with evidence sufficiently "persuasive" or "specific" showing that the Fee was not "'reasonably related'" to the cost of providing these additional services to corporate customers, the Commission concluded that he had not carried his burden under the first *White* factor. *See id.*

Turning to *White*'s second factor, the Commission found that imposition of the Fee did not conflict with "consumer expectations." *Id.* ¶ 14 (Gilmore App. 6). The relevant contracts "specifically contemplated rate increases and changes in the terms and conditions of service," and allowed customers to cancel their service upon notice of the new charge without incurring an early termination fee. *See id.*

Finally, the Commission noted that at least three other carriers were offering mobile service in Chicago at the beginning of the relevant time period and six at its end. *See id.* ¶ 15 (Gilmore App. 6). The market was therefore "competitive." Accordingly, Gilmore did not carry his burden on the third *White* factor to show that "there was insufficient competition in the Chicago-area market to allow [him] the opportunity to select another CMRS provider if [he was] unhappy with Cingular's service." *Id.* ¶ 16 (Gilmore App. 6).

The Commission also rejected Gilmore's contention that the Fee was "misleading and deceptive" because it was a "disguised" rate increase rather than a charge for "unique and additional corporate account administrative services"; that it was "hid[den]" so as "to avoid detection and minimize scrutiny"; and that it "hindered competition by making it difficult for customers to compare their rates with those of their competitors." *Order* ¶ 17 (Gilmore App. 6).

The Commission found that "nothing in the record indicates that Cingular withheld the type of basic information necessary for consumers to make an educated decision about their service provider." *Id.* ¶ 18 (Gilmore App. 7). In addition, Cingular did not attempt to hide the Fee by printing it in small type; try to mislead the customer about the amount of the Fee; or suggest that it was a mandatory regulatory charge. *See id.* ¶ 19 (Gilmore App. 7). Moreover, Cingular provided customers with the notice required under the contract when it imposed the Fee. *See id.* ¶ 19 & n.44 (Gilmore App. 7). Finally, the Commission noted again the record evidence "that corporate customers received additional services, and that the costs of administering those services were increasing over time," as acknowledged by Fenwick. *See id.*; *see also* Fenwick Dep. at 70 (Gilmore App. 295) (Ex. 4 to Answer).

Section 202(a). The Commission next addressed Gilmore's claim that the Fee constituted unlawful discrimination against corporate customers. The agency routinely applies a three-step inquiry to determine whether a service provider is engaged in unlawful discrimination. *See id.* ¶ 24 (Gilmore App. 8). It asks (1) whether the relevant services are "like"; (2) assuming they are, whether there are different terms and conditions accompanying them; and (3) if so, whether those differences are reasonable. *See id.* In this case, Gilmore did not carry his burden on the first step.

To determine whether services were "like," the Commission assessed whether they were "functionally equivalent," an inquiry that turned in part on "customer perception." *Id.* ¶ 25 (Gilmore App. 9). In this case, there were a number of differences in the features and services offered corporate and non-corporate customers, so Gilmore did not carry his burden of establishing that the two offerings were "like." *Id.* (listing corporate-only services and features). The services and features offered to corporate customers "were clearly tailored to the specific needs and expectations of corporate customers." *Id.*

In the alternative, the Commission found that since each corporate contract was "individually negotiated," there could be no finding of "likeness" between any of them and any other contract. *Id.* (citing *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993)).

SUMMARY OF ARGUMENT

1. Gilmore has not shown that the Commission's rejection of his Section 201(b) claim was arbitrary or capricious. Gilmore's principal attack on the Commission's decision is that it did not sufficiently take account of his contention that the Fee was not based on Cingular's costs of providing services to its corporate customers. That contention is based on a misunderstanding of the Commission's precedents and a misreading of its *Order*.

Although the Commission has in some of its Section 201(b) decisions involving mobile carriers examined whether there was a reasonable relationship between the charge in question and the carrier's costs, these decisions make clear that no strict cost-based analysis is required. Under the Commission's precedents (as affirmed by this Court), it is the presence of a competitive market, rather than a cost-based justification for a charge, that is of paramount importance in determining whether a mobile carrier's fee is unreasonable. In a competitive market, a dissatisfied customer may switch carriers, and the market itself polices unreasonable charges and practices. In this case, Gilmore does not challenge the Commission's finding that the relevant market was competitive, and, in fact, Fenwick, the witness on whose testimony he relies, testified that some customers left Cingular because of the Fee.

Gilmore also is wrong that there was an insufficient connection between Cingular's corporate customer costs and the Fee. Corporate customers received a number of services and features not made available to non-corporate customers, and Cingular's vice president of sales and marketing testified that the Fee was an attempt to recoup their costs. There is no requirement that this connection be quantified or that *new* services be offered in return for the Fee. Moreover, under this Court's precedents, Gilmore's contention that the Commission overlooked supposedly contrary testimony by Fenwick is waived because Gilmore did not raise the contention before the Commission. In all events, review of the *Order* reveals that the Commission did in fact consider this evidence, but was not persuaded by it. That is not surprising, given that Fenwick himself testified that corporate customers received several features and services unavailable to other customers and that the Fee had the effect of offsetting the rising costs of the corporate account department.

Gilmore contends that the burden shifted to Cingular once he had introduced “some” evidence in support of his position. That theory of burden-shifting is waived, however, because Gilmore never raised it with the Commission and is, in all events, meritless. It is well established that the complainant in a Section 208 proceeding bears the burden of proving his Section 201(b) claim at all times. Especially when shorn of this erroneous burden-shifting theory, Gilmore’s attempt to show that the costs of providing corporate-only services and features were entirely illusory collapses. Gilmore fails to substantiate his contentions with citations to the record, and it was entirely reasonable for the Commission to conclude that these services and features did have costs.

Gilmore fares no better in attacking the other elements of the Commission’s Section 201(b) analysis. The Commission concluded that the Fee did not conflict with consumer expectations because Cingular’s contract expressly preserved Cingular’s ability to impose new fees, while at the same time giving customers the ability to cancel service without penalty in response. Gilmore claims that it was inappropriate for the Commission to consider the contract and that it instead could examine only consumers’ wireline experience. The Commission has said, however, that wireline practices are not dispositive in the wireless context, and it was sensible for the agency to look to a consumer’s contract when assessing his expectations. In addition, Gilmore’s contention that the Fee hindered competition is belied by the testimony of his oft-cited witness (Fenwick), who said that numerous customers called to inquire about the Fee and that some of them switched carriers rather than pay it.

2. Gilmore’s attempt to show that the Commission’s rejection of his discrimination claim was arbitrary and capricious likewise fails. Gilmore fails to challenge one of the two independent bases for the Commission’s rejection of this claim: that there can be no discrimination when contracts are individually negotiated. That (unchallenged) basis is sufficient by itself to support the Commission's conclusion. In all events, Gilmore fails to demonstrate that corporate and non-corporate customers received functionally equivalent ("like") service – a predicate to a finding of discrimination – given the ample evidence in the record about features and services provided exclusively to corporate customers.

ARGUMENT

I. Standard of Review

The standard articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governs judicial review of the Commission's interpretations of the Communications Act of 1934, including sections 201 and 202. *See, e.g.*, *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

Under *Chevron*, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843 n.9, 842. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

This Court has held that the terms "'just,' 'unjust,' 'reasonable,' and 'unreasonable' [in Section 201(b)] are ambiguous statutory terms" and that this Court accordingly "owes substantial deference to the interpretation the Commission accords them." *Capital Network Sys.*, 28 F.3d at 204 (citing *Chevron*, 467 U.S. 837).

To the extent that Gilmore challenges the reasonableness of the Commission's action, the Court may reverse its determination only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This highly deferential standard "presumes the validity of agency action" and permits the court to determine only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *MCI WorldCom Network Servs., Inc. v. FCC*, 274 F.3d 542, 546-47 (D.C. Cir. 2001) (quotation marks and alterations omitted).

In the context of applying Sections 201(b) and 202(a) of the Communications Act, this Court has noted that "the generality of the[] terms [used in those provisions] – unfair, undue, unreasonable, unjust – opens a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act." *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) (Section 201(b)); *see Orloff*, 352 F.3d at 420 (Section 202(a)).

Finally, the Court "must defer to an agency's reasonable application of its own precedents." *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 658 (D.C. Cir. 2004); *see also CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1034 (D.C. Cir. 1986) ("It is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.").

II. The Commission Reasonably Denied Gilmore's Section 201(b) Claim.

The Commission carefully examined the three factors specified in *White* for assessment of a claim that a mobile carrier's charge or practice is unjust under Section 201(b) – its relationship to cost, consumer expectations, and the competitiveness of the market – and concluded that none favored Gilmore's claim. *See Vernal Enters.*, 355 F.3d at 658 (discussing deference owed to agency's interpretation of its own precedent). In doing so, the Commission correctly noted that it is "well settled that the burden of pleading and proving a violation of section 201 of the Act is on the complainant." *Order* ¶ 10 & n.28 (Gilmore App. 4); *see infra* Section II.A.2 (discussing burden).

Contrary to Gilmore's claim, the first *White* factor, carrier cost, is not the "cornerstone" of the analysis. *Contra* Br. at 9. The Commission has not imposed cost-based regulation on mobile carriers, and has explicitly rejected any suggestion that a carrier defending an unreasonable charge claim must establish a strict quantitative link between its costs and the charge in question. *See, e.g.*, *Kiefer*, 16 FCC Rcd at 19131, ¶ 5; *Orloff*, 17 FCC Rcd at 8998, ¶ 24. Instead, review of the Commission's past decisions involving the application of Section 201(b) to mobile carriers makes clear that the *third White* factor – the presence of a competitive market – is far and away the most important. *See supra* at 6-8. And, critically, Gilmore does not here challenge the Commission's conclusion that the relevant market for mobile services was highly competitive. This means that any customer unhappy with the Fee could switch to another carrier, as some apparently did. *See Order* ¶ 16 (Gilmore App. 6); Fenwick Statement at 2 (Gilmore App. 137).

So central is market competition to assessing the reasonableness of a carrier's charge that the Commission in *Orloff* relied on it exclusively in rejecting a Section 201(b) claim against a wireless carrier. This Court affirmed that approach, holding that "[i]n considering whether Verizon justified its sales concession practices as reasonable, the Commission was 'entitled to value the free market, the benefits of which are well-established.'" *Orloff*, 352 F.3d at 421; *see also id.* (noting that "[c]ustomers dissatisfied with [the carrier's] charges or service may simply switch to another provider").

In this case, it was not necessary for the Commission to consider whether *Orloff* and its exclusive focus on market competitiveness had supplanted *White* because neither party suggested that it had and because Gilmore's claim failed under either approach. But it is clear that at the very least *Orloff* and the Commission's past treatment of Section 201(b) claims against mobile carriers mean that the presence of market competition in the relevant market is of paramount importance to the analysis. Here, analysis of that factor (along with the others specified in *White*) properly led the Commission to reject Gilmore's claim. We address Gilmore's contentions regarding the Commission's handling of each *White* factor below.

A. The Commission Properly Concluded That Gilmore Failed To Establish That There Was No Reasonable Connection Between The Fee And Cingular's Costs.

1. Gilmore's Claims That The Commission Failed To Consider Record Evidence Are Waived And, In All Events, Are Meritless.

Gilmore claims that "the FCC failed to consider the unrefuted testimony of Cingular's director of corporate sales, Daniel Fenwick, who testified that there was no relationship between the Fee and any cost associated with corporate accounts, and described how the Fee was conceived and implemented." Br. at 10. This contention is both jurisdictionally barred and meritless.

Because Gilmore did not file a petition for reconsideration asserting that the Commission had overlooked Fenwick's testimony, Gilmore is jurisdictionally barred from raising this failure-to-consider claim now. Section 405(a) of the Communications Act specifies that filing for reconsideration with the Commission is not a prerequisite to seeking judicial review "*except* where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a) (emphasis added). This Court has held that "[i]f a party to an FCC proceeding believes that the Commission has failed to address certain record evidence, § 405 requires that the party bring the matter to the attention of the agency before proceeding to court." *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997). If the party does not raise the oversight claim with the agency by means of a reconsideration petition, its claim is waived. *See id.*; *accord Time Warner Enm't Co. v. FCC,* 144 F.3d 75, 80-81 (D.C. Cir. 1998) (when petitioner alleges "procedural oversight," such as claim that FCC "ignored certain record evidence," it must seek agency reconsideration as a prerequisite to judicial review of its oversight claim). Because Gilmore did not afford the Commission the opportunity to pass on his claim that it had failed to address the Fenwick testimony, his claim is waived.

In all events, Gilmore's claim that the Commission failed to consider the passage from Fenwick's testimony that he highlights is simply wrong. The Commission expressly took note of Gilmore's contention "that the sole purpose of the Fee was to increase revenue and that the [F]ee was unrelated to costs borne by Cingular for providing service to business customers" and cited the very page of Gilmore's complaint that quoted Fenwick's testimony in detail. *Order* ¶ 12 & n.32 (Gilmore App. 5); *see also* Complaint at 10 (FCC App. 15). While the Commission did not actually *quote* Fenwick's testimony, Gilmore cites no authority for the proposition that an agency cannot paraphrase record evidence. What matters is that the *Order* clearly demonstrates that the Commission considered the substance of Gilmore's claim regarding Cingular's costs – along with Gilmore's burden to put forth evidence to prove his case – and found it unpersuasive.

Although not entirely clear, Gilmore may also be contending that the Commission gave insufficient weight to Fenwick's testimony and that if it had evaluated it differently, the Commission would have come to a different conclusion on the first *White* factor. To the extent that Gilmore asserts this contention, it fails in light of the substantial deference owed the agency's evaluation of the record evidence before it. *See Indiana Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995) (as long as agency engaged in "reasoned decisionmaking," court will not reweigh arguably conflicting evidence).

Contrary to Gilmore's repeated contentions, there was evidence in the record reasonably linking the corporate account administration fee to Cingular's costs of providing services and features to its corporate customers. For example, the record included the following exchange from the deposition of Donna Morrison, who (along with Fenwick and others) was at the executive staff meeting where the Fee was first discussed:

> Q: You said that during that meeting there was a long list of services that business customers received. How did that discussion relate, if at all, to the corporate administration fee?
>
> A: We were discussing the list of services that business customers received in the same meeting where we were discussing the corporate administrative fee.
>
> Q: During that meeting, was there any discussion that having provided these services to your business customers, that was a basis or a grounds to impose a corporate administration fee on the corporate customers?
>
> A: The discussion was there was a cost of providing these services to these customers.
>
> Q: And the big corporate administration fee was going to be an attempt to defray a portion of all of those costs?
>
> A: Yes.

Morrison Dep. at 53-54 (Gilmore App. 166). Morrison went on to list the corporate-only features and services to which she had alluded, including a corporate account customer service group comprised of Cingular's best representatives, billing analysis, on-site visits to sign up employees, voice mail, call waiting, call forwarding, phone replacement, and a corporate account news letter. *See id.* at 54-57 (Gilmore App. 166-67).[13]

Fenwick himself acknowledged that numerous services and features were offered to corporate account holders but not to others, including in-building wireless systems, and free features such as voice mail, call waiting, call forwarding, and three-way calling. See Fenwick Dep. at 23-24 (Gilmore App. 290). He also testified that the corporate account department budget had increased throughout the 1990s and acknowledged that the Fee "would raise more revenue that would, in part, offset increasing corporate account department expenses." *Id.* at 70 (Gilmore App. 295), *cited in Order* ¶ 13 n.34 (Gilmore App. 5); *see also* Seymour Dep. at 36-40 (Gilmore App. 284-85) (discussing the features and services provided "in exchange" for Fee).

Although Fenwick testified that no *new* services or features were offered in exchange for the Fee, Fenwick Statement at 2 (Gilmore App. 137), *White* does not require this kind of linkage. All that test requires is that the charge "reasonably reflect a carrier's cost," *White*, 16 FCC Rcd at 11561, ¶ 10, whether new or pre-existing. The Commission reasonably concluded that the relationship was there and that Cingular permissibly decided to use the Fee to recoup the cost of existing features and services. This analysis is unchanged by Fenwick's testimony that the Fee was intended to increase revenue. *See* Fenwick Statement at 1 (Gilmore App. 136). *Any* new fee would increase revenue.

In all events, Fenwick testified that the final decision to begin collecting the Fee was made not at the staff meeting he discusses but rather at "headquarters" in Dallas. *Id.* Yet

[13] The *Order* cited Cingular's contention that "[t]he Fee was imposed as an attempt to defray a portion of the costs of providing various services to corporate customers" and cited a passage from Cingular's answer which in turn cited Morrison's testimony. *Order* ¶ 12 & n.33 (Gilmore App. 5); *see also* Answer at 40 (FCC App. 94).

Gilmore cites to no evidence in the record on the intent of the decisionmakers there regarding imposition of the Fee.

Gilmore claims that "[t]he FCC also failed to consider the undisputed fact that Cingular never tracked the costs of providing any special services to corporate customers." Br. at 11. This failure-to-consider claim also is barred by Section 405 because it was not put before the Commission in a reconsideration petition. *See supra* at 23-24. In all events, this contention rests on a misunderstanding of the role of costs in the *White* test. This is best illustrated by the Commission's decision in *Kiefer*. At issue there was a carrier's imposition of a $5 late fee on bill payments. The carrier said the fee "was implemented to offset expenses due to customers' late payments." *Kiefer*, 16 FCC Rcd at 19131, ¶ 4. The complainant, like Gilmore here, argued that this assertion was not good enough; according to the complainant, the carrier had to show that the fee "reflect[ed] actual losses resulting from late payments" or was at least "a reasonable estimate of such losses." *Id.* The Commission squarely rejected his claim, noting that it had not imposed any "specific cost-based rate regulations on CMRS providers" and that the complainant "failed to cite any authority or present any evidence requiring [the carrier's] late fee to be based on an estimate of its actual losses." *Id.* at 19131, ¶ 5.

All that *White*'s first factor requires is a reasonable relationship between the Fee and costs; it does not require that this relationship be quantified in the way Gilmore insists is necessary. *See also Orloff*, 17 FCC Rcd at 8998, ¶ 24 (rejecting contention that carrier's charges must be "cost-justified on a transaction-by-transaction basis").

2. Gilmore's Theory Of Burden-Shifting Is Waived And, In All Events, Is Inapplicable To Communications Act Claims.

Gilmore contends that because he "produced ***some*** evidence to support [his] claim that the Fee is unrelated to the costs of providing 'corporate' service, . . . the burden of production shifted to Cingular to rebut [Gilmore's] evidence." Br. at 11. This contention is waived, since Gilmore never raised it with the agency. *See* 47 U.S.C. § 405(a). [14]

In all events, Gilmore's novel burden-shifting argument fails on the merits. In support of his theory, Gilmore cites a Fifth Circuit decision involving the intent element in an illegal discharge claim under the National Labor Relations Act and a Court of International Trade decision involving duties imposed under the "vessel repair statute," 19 U.S.C. § 1466. *See* Br. at 11 (citing *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 339 (5th Cir. 1980) and *American Ship Mgmt., LLC v. United States*, 162 F. Supp.2d 671, 675 n.3 (Ct Int'l Trade 2001)). Gilmore is compelled to venture far afield in support of his burden-shifting contention because the Commission and this Court have consistently held that a Section 208 complainant at all times bears the burden of establishing his claim that a charge or practice is unreasonable.[15] Gilmore's

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[14] Before the Commission, Gilmore contended that Cingular bore the burden *throughout* the proceedings of proving that "the Fee is warranted by related corporate account administrative costs or is otherwise reasonable or just." Complaint at 23 (FCC App. 28). (For this erroneous proposition, Gilmore cited a decision involving challenges to a tariff, not a Section 208 complaint. *See Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (explaining that burden of proof rests with carrier in tariff challenge but with complainant in Section 208 case).) That is different from his contention now that the burden shifted to Cingular after Gilmore produced "some" evidence in support of his position.

[15] *See, e.g., Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, 22615, ¶ 291 (1997) ("[I]n a formal complaint proceeding the complainant generally has the burden of establishing, by a preponderance of the evidence, that a common carrier has violated the Act or a Commission rule or order. Ordinarily, this burden of proof does not, at any time in the proceeding, shift to the defendant carrier." (footnote omitted)); *Hi-Tech Furnace Sys.*, 224 F.3d at 787 ("[w]ell-established" FCC and D.C. Circuit precedent "imposes the burden of proof on the complainant in section 208 proceedings" (citing cases)).

erroneous burden-shifting theory permeates his brief, *see, e.g.*, Br. at 6, 11, 13, 14, 15, and seriously undermines his claims before the Court.

3. Gilmore's Claim That The Corporate Expenses Were Illusory Is Unsubstantiated.

Gilmore also claims that the Commission "failed to consider substantial evidence showing that the 'corporate' services identified by Cingular were illusory." Br. at 12 (capitalization altered). This four-page section of Gilmore's brief includes not one citation to any such "evidence."[16]

In fact, the only relevant evidence in the record shows that Cingular did in fact incur costs in providing these services. Indeed, before the Commission, Gilmore stipulated that the services provided to corporate account holders were of "high quality." Joint Statement at 3 (Gilmore App. 13). For example, Donna Morison testified that "[t]here was a cost to providing the long list of services to the corporate account customer." Morrison Dep. at 48 (Gilmore App. 164); *see also Order* ¶ 12 & n.33 (Gilmore App. 5) (citing Cingular Answer's discussion of Morrison's testimony). She went on to state that these costs were discussed at the meeting in which the decision was made to impose the Fee. *See id.* at 54 (Gilmore App. 166). She then agreed that the "corporate administration fee was going to be an attempt to defray a portion of all of those costs." *Id.* Fenwick testified that the budget for the corporate account department

[16] Equally unavailing is Gilmore's passing claim that it was illegitimate for Cingular to recover the cost of these services because none was "administrative in nature." Br. at 12. The word "administrative" is a variant of "administer," which means "to direct or superintend the execution, use, or conduct of" and "to manage the affairs of." *Webster's Third New International Dictionary* 27 (1993). This is a general term, amply broad enough to encompass the cost of providing services unique to corporate accounts. *See* Seymour Dep. at 73 (Gilmore App. 148) (vice president for customer service testifying that her understanding of "administration" encompassed "[w]hat it takes to handle and administer the account," including support and features).

increased throughout the 1990s and that the Fee had the effect of partially defraying those costs. *See* Fenwick Dep. at 69-70 (Gilmore App. 295).

Gilmore provides no support for his claim that there were *no* costs to Cingular in providing these services and features. Given the record evidence on Cingular's side and the lack of it in support of Gilmore, the Commission reasonably concluded that there were indeed costs to providing these services and features.[17]

Rather than citing evidence on the purported lack of costs, Gilmore's brief features a number of wholly unsupported contentions. Since these contentions are not supported by record evidence before the Commission – and since Gilmore bore the burden of establishing every element of his claim – they provide no basis for reversing the Commission's determination.

Signing up customers on-site. Gilmore contends that this service "is performed before an individual becomes a Cingular customer, so it cannot defray the costs of administering the customer's account later." Br. at 13. First, Gilmore's factual premise is incorrect, since Cingular also conducted such on-site visits after a corporate customer signed a contract in order to deliver equipment. *See* Morrison Dep. at 56 (Gilmore App. 166). In all events, this argument is again premised on a mistaken view of the first element of *White*. Gilmore believes that to be reasonable a charge must have a direct, mathematical, and temporal connection to costs as they are incurred. But he cites no authority for that strict reading of the test, and in fact *Kiefer* explicitly rejects it. *See* 16 FCC Rcd at 19131, ¶ 5. Thus, even if *arguendo* all of these costs are

[17] Gilmore advised the Commission that he did not require additional discovery and was content resting on the record compiled by the parties in the district court. *See* Complaint at 5 (FCC App. 10).

incurred prior to initiation of the contract, it is permissible to recover them later.[18] Gilmore fares no better by guessing that – "[i]n all likelihood" – Cingular spends more money signing up customers in its regular stores than at a customer's location. *See* Br. at 13. Not only is this wholly unsupported speculation, but it also misses the point: on-site employee sign-up was a benefit unique to the corporate customer, and that benefit cost something. Whether it cost more or less than maintaining Cingular's brick-and-mortar stores is irrelevant.

Phone features. Gilmore claims that Cingular could not recover the cost of features such as voice mail by means of the Fee because "once Cingular enticed corporate customers to sign contracts by offering these features free of charge, it lost the right to subsequently impose new charges for these same features." Br. at 14. This contention fails in light of the fact that the contract each of these customers signed gave Cingular the right to raise rates and fees (and customers the corresponding right to cancel service upon notice of the increase). *See supra* at 13. Cingular most certainly did not "lo[se] the right" to begin charging for these features at a later date; it expressly reserved it.

In-building wireless system. Gilmore says that "making a customer 'eligible' to purchase an additional product costs nothing" and that the cost of offering corporate customers an in-building wireless system was illusory. Br. at 14. Again, Gilmore provides only argument and cites no record evidence in support of this contention, nor does he support his view that this benefit was limited to eligibility to purchase as opposed to eligibility to install without additional

[18] Gilmore's complaint that the Fee is impermissible because "it does not cost Cingular more money to sign-up a customer to a two-year contract than it costs the company to sign-up a customer to a one-year contract, but the customer with the two-year contract will pay twice as much," Br. at 13, is based on the same mistaken view that there must be a strict mathematical correlation between costs and the cost-recovery mechanism, something the Commission's precedents simply do not require.

charge. *Cf.* Complaint at 29 (FCC App. 34) (Gilmore acknowledging that he had not adduced evidence of "whether or not there was some separate charge to put such a system in place."). He also complains that "no evidence" shows that Cingular would not have also conferred this benefit on non-corporate customers. But this complaint presumes that the burden of production shifted to Cingular, when in fact it resided with Gilmore at all times. *See supra* at 28-29. If there is "no evidence" regarding one of Gilmore's contentions, that means that Cingular – not Gilmore – prevails on it.

Corporate Account Newsletter. Gilmore faults Cingular for "fail[ing] to even produce a copy of any corporate account newsletter . . . or any evidence suggesting what it cost to publish such a newsletter," and suggests that "[i]f it actually cost Cingular $1 million to $3 million per month to publish a corporate account newsletter as it contended before the FCC, surely the company would have financial records reflecting this substantial cost." Br. at 14-15. But Cingular never alleged that it cost it $1 million to $3 million per month to publish the corporate account newsletter. That was the entire amount collected by means of the Fee each month, and Cingular simply showed that there was a reasonable relationship between that amount of money and *all* the services and features it offered corporate customers, not just the newsletter. In addition, Gilmore, not Cingular, bore the burden of production as to the elements of his claim, so the absence of evidence does not further his cause.

B. The Commission Reasonably Concluded That Gilmore Failed To Establish That The Fee Confounded Consumer Expectations.

Gilmore claims that the Commission's application of the second *White* factor – "consumer expectations based on their wireline experience" – was "flawed in three ways." Br. at 15. None of his objections has merit.

Gilmore first complains that the Commission erroneously examined corporate account customers' contracts with Cingular when assessing their expectations, rather than looking exclusively at their wireline experience. *See id.* Gilmore is correct that *White* referred specifically to customers' "wireline" telephone experience for historical perspective, but *White* also makes clear that it is important to consider the broader context in determining the reasonableness of a rate or practice, including "'other contractual . . . practices of the CMRS provider.'" 16 FCC Rcd at 11562, ¶ 14. Moreover, Gilmore fails to note that the Commission has since *White* consulted other sources to determine whether a given charge or practice would conflict with consumer expectations generally. *See Vernal Enters.*, 355 F.3d at 658 (deference owed to agency's interpretation of its own precedent). For example, in *Kiefer* the Commission assessed consumer expectations by looking at the practices of "other industries regulated by the Commission" – not just wireline telecommunications carriers – and cited in particular an order dealing with cable television. *Kiefer*, 16 FCC Rcd at 19132, ¶ 7 & n.26 (citing *Falcon Cablevision*, 11 FCC Rcd 10511, 10525 (1996)); *see also Orloff*, 352 F.3d at 421 (referring to comparable practices in "competitive markets" generally, not just wireless or wireline).

It is manifest that a consumer's contract with his wireless carrier is highly relevant when assessing his expectations regarding this commercial relationship. And where, as here, that contract expressly reserves the carrier's right to increase rates and fees upon notice – with a corresponding right in the consumer to cancel service – then a carrier's exercise of that right cannot be said to conflict with consumer expectations.

Gilmore's rejoinder is that the contract "did not contemplate rate increases disguised as 'administrative fees' or new charges for telephone features that were advertised as free of charge." Br. at 15-16. But this is just Gilmore's cost argument pressed into service again. As before, it ignores the record evidence supporting the Commission's conclusion that there was a reasonable relationship between the Fee and services and features provided to corporate account holders. It also ignores the Commission's conclusion (unchallenged by Gilmore) that customers could cancel without early termination penalty upon receipt of the contractually-required notice. *See Orloff*, 352 F.3d at 421 (dissatisfied customers "may simply switch to another provider").

Finally, Gilmore acknowledges that the Commission's Truth-in-Billing rules did not apply to Cingular during the relevant time period but nonetheless tries to smuggle them into the analysis. According to Gilmore, those rules *did* apply to wireline carriers at the relevant time and would have barred them from imposing such a fee, so customers' expectations based on their wireline experience was that no such fee was permissible. Br. at 16. As an initial matter, this argument is waived because Gilmore did not raise it with the Commission. *See* 47 U.S.C. § 405(a).

In all events, this assertion is flawed on the merits for several reasons. First, as just discussed, the Commission's inquiry into consumer expectations is not as limited as Gilmore suggests, and requires consultation of other expectation-forming sources, such as consumer contracts. So the wireline experience is not by itself dispositive. *See White*, 16 FCC Rcd at 11562, ¶ 13 ("the practices used [by wireline carriers] are not necessarily controlling of whether a [mobile carrier's] practice is in violation of Section 201(b)"). Additionally, Gilmore is wrong that the Commission acknowledged "that the outcome of this particular case would have been different if the Truth-in-Billing Rules applied." Br. at 16 (citing *Order* ¶ 22). The paragraph from the *Order* he cites in support of this claim says no such thing, and the Commission was agnostic on this question, saying only that "the outcome of cases like this in the future could be different." *Order* ¶ 2 (Gilmore App. 2). Indeed, the Commission went on to note that "the

Truth-in-Billing rules cited by [Gilmore] highlight[] the Commission's commitment to ensure that all consumers are provided with the basic information they need to make informed choices in a competitive telecommunications marketplace" and stress that "nothing in the record indicates that Cingular withheld the type of basic information necessary for consumers to make an educated decision about their service." *Id.* ¶ 18 (Gilmore App. 6-7). Finally, Gilmore is wrong that the Commission's "Truth-in-Billing Rules . . . were applicable to wireline carriers during the relevant time." Br. at 16. Those rules became effective with respect to wireline carriers in 1999 and 2000, years after Cingular began collecting the Fee in 1995.[19]

C. The Commission Reasonably Concluded That Gilmore Failed To Establish There Was Insufficient Competition To Allow Gilmore To Select Other Alternatives.

Critically, Gilmore does not dispute the Commission's core finding that "there were three to six carriers throughout the period at issue in the relevant market for the relevant services and that the market was competitive." *Order* ¶ 15 (Gilmore App. 6). This finding was highly significant, for it meant that any customer that did not want to pay the Fee could simply switch to another carrier. *See id.* ¶ 16 (Gilmore App. 6). The ability of customers to switch carriers in a competitive market greatly lessens the need for regulation. Under such circumstances, the market, rather than a regulator, is typically the best judge of what is unreasonable. *See generally Orloff*, 17 FCC Rcd at 8995, ¶ 18 (discussing central role of market competition to Commission's analysis of Section 201(b) claims against wireless carriers).

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[19] *See* Federal Communications Commission, *Truth-in-Billing and Billing Format*, 64 Fed. Reg. 55163 (1999); Order on Reconsideration, *Truth-in-Billing and Billing Format*, 15 FCC Rcd 6023, 6029, ¶ 14 (2000); Federal Communications Commission, *Truth-in-Billing and Billing Format*, 65 Fed. Reg. 52048 (2000).

Rather than taking on the Commission's central finding of market competitiveness, Gilmore contends that the Commission failed to consider "how the Fee affected competitive markets." Br. at 17 (emphasis omitted). Gilmore posits that the Fee was "conceived to undermine competitive market forces" by disguising a rate increase and thus tricking consumers who otherwise might have switched carriers into staying with Cingular. *See id.* As noted previously, there is ample evidence in the record to support the Commission's conclusion that the Fee was in fact an attempt to recover the cost of providing unique corporate features and services and not merely a rate increase in disguise. The fact that a purpose and effect of the Fee was to raise revenue is hardly surprising – the same would be true of *any* fee, even one that was strictly cost-based in the way that Gilmore (mistakenly) believes is required. And the Commission has made clear that carriers may legitimately recover their costs through their rates *or* through line items. *See Truth-in-Billing*, 20 FCC Rcd at 6461, ¶ 28.

Gilmore's claim about the effect on competition is refuted by the witness he frequently cites, Fenwick, who testified that fully 25 percent of corporate customers called to complain about the Fee. Fenwick Statement at 2 (Gilmore App. 137). This sizeable response is hardly consistent with Gilmore's claim that the Fee was somehow "hidden." Even more significant is Fenwick's testimony that Cingular "likely lost customers over this fee." *Id.* This shows that the market worked. Those customers who were unhappy about the Fee were not hindered in their ability to compare Cingular's offering with those of other carriers, and a number of them switched carriers as a result. *See id.*; *see also Implementation of Sections 3(n) and 332*, 9 FCC Rcd at 1478 ¶ 173 (noting that mobile carrier is unlikely to engage in unreasonable practices in violation of Section 201(b) because such behavior would result in loss of business).

III. The Commission Reasonably Denied Gilmore's Section 202(a) Claim.

Gilmore's tacked-on Section 202(a) claim – that Cingular unreasonably discriminated against corporate account holders and in favor of non-corporate account holders – fares no better.

As an initial matter, Gilmore's claim fails because the Commission's rejection of his Section 202(a) claim rested on two independent bases, but he challenges only one before the Court. The Commission rejected the discrimination claim because it found (i) that the services and features offered to corporate customers were different from those offered non-corporate customers and, in the alternative, (ii) that "each contract was individually negotiated, which, under existing case law, often prevents a finding of 'likeness.'" *Order* ¶ 25 (Gilmore App. 9) (citing *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993)).

Gilmore challenges the first conclusion, but ignores the second. Since the Commission's rejection of his Section 202(a) claim could stand on this unchallenged basis alone, Gilmore's petition for review of the Commission's Section 202(a) decision should be denied. *See Students Against Genocide v. Department of State*, 257 F.3d 828, 835 (D.C. Cir. 2001) (argument not raised in opening brief is waived); *cf. United States v. Hatchett*, 245 F.3d 625, 644-45 (7th Cir. 2001) ("In situations in which there is one or more alternative holdings on an issue, . . . failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue." (quotation marks and alteration omitted)).

In all events, Gilmore's challenge to the Commission's first ground for rejecting his Section 202(a) claim fails. To prevail before the Commission, Gilmore had to show (at a minimum) that the services provided corporate and non-corporate customers were functionally equivalent. *See Order* ¶¶ 24-25 (Gilmore App. 8-9).[20] The Commission reasonably concluded that Gilmore did not carry this burden because, as discussed previously, corporate customers received a number of special features and services. *See id.* ¶ 25 (Gilmore App. 9). Contrary to Gilmore's wholly unsupported contention, those services and features were not "illusory," and it was reasonable for Cingular to establish differential pricing because of them. *See supra* at 29-32.[21]

Finally, Gilmore's discrimination contention is impossible to square with this Court's decision in *Orloff*, which he never cites. In that decision, customers receiving an *identical* bundle of services and features paid different prices, depending on the result of any haggling they did with Verizon, their mobile carrier. *See Orloff*, 352 F.3d at 419. Yet this Court nonetheless affirmed the Commission's finding that Section 202(a) had not been violated. Because the relevant market was competitive, "[c]ustomers dissatisfied with Verizon's charges or service may simply switch to another provider." *Id.* at 421. This case presents a weaker discrimination claim because the supposed victims – corporate account holders – are sophisticated customers who should be particularly well-equipped to engage in comparison shopping in the highly competitive market for mobile services. Additionally, these customers paid *lower* airtime rates than non-corporate customers, further undercutting Gilmore's contention

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[20] Gilmore bore the burden of showing that the services in question were functionally equivalent and then that the terms and conditions offered to the two groups of customers were different. *See Orloff*, 17 FCC Rcd at 8994, ¶ 14. If he had discharged that obligation, under a rule unique to Section 202(a) discrimination claims, the burden would have shifted to Cingular to show that the differential treatment was reasonable. *See id.*

[21] Gilmore contends that the corporate account newsletter was "functionally equivalent" to a "'non-corporate account newsletter,'" Br. at 19, but he cites nothing in the record indicating that there was such a non-corporate account newsletter.

that they were the victims of discrimination. Deposition of James Moen at 38 (Gilmore App. 188).[22]

CONCLUSION

For these reasons, the petition for review should be denied.

Respectfully submitted,

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[22] Before the Commission, Gilmore additionally claimed that Cingular's policy of waiving the Fee for customers who complained violated Section 202(a). That contention is squarely foreclosed by *Orloff*, *see Order* ¶ 26 (Gilmore App. 9-10), and Gilmore has sensibly abandoned it on appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRUCE GILMORE, CLAUDIA MCGUIRE, THE GREAT FRAME UP SYSTEMS, INC. AND PESGER, INC. D/B/A/ THE GREAT FRAME UP, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	CASE NO. 05-1413

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 11,586 words.

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