

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

In the matter of
Kenneth Kiefer,
Complainant,
v.
Paging Network, Inc. d/b/a/ PageNet,
Defendant.
File No. EB-00-TC-F-002

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 2001

Released: October 18, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a formal complaint filed by Kenneth Kiefer against Paging Network, Inc. (PageNet) pursuant to section 208 of the Communications Act of 1934, as amended (the Act). The United States District Court for the Eastern District of Michigan, Southern Division (District Court) referred this case to the Commission under the doctrine of primary jurisdiction. We find that Mr. Kiefer has not demonstrated that PageNet's assessment of a late payment fee violates section 201(b) and deny the complaint with prejudice.

II. BACKGROUND

2. In November 1991, Mr. Kiefer entered into a Service/Lease Agreement with PageNet-Michigan to receive paging services in Michigan. PageNet subsequently notified Mr. Kiefer via a billing

1 Paging Network, Inc. provides paging services to subscribers in the United States, U.S. territories and Canada. PageNet, Inc. is the parent and holding company of PageNet Michigan.

2 47 U.S.C. § 208.

3 Section 201(b) states in pertinent part: "All charges, practices, classifications, and regulations for and in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . ." 47 U.S.C. § 201(b). Mr. Kiefer also argues that the late fee at issue here should be considered a "term and condition" under section 332 of the Act. In construing the scope of the complaint before us we note that although it is not entirely clear, the Court appears to have addressed Mr. Kiefer's claim under section 332. Kenneth Kiefer v. Paging Network Inc., 50 F.Supp. 2d 681, 685 (E.D. Mich. 1999) ("District Court Order"). At the same time, the District Court's primary jurisdiction referral is limited to a determination of the late fee's lawfulness under Section 201(b) of the Act. "Regardless of the semantic label Plaintiff uses to dress his Section 201(b) claims, he cannot disguise the fact that they question the reasonableness of Defendant's uniform late payment charges, and the Sixth Circuit has determined that such questions should be determined, in the first instance, by the FCC." District Court Order, 50 F.Supp. 2d 681, 685-6 (1999). Given these circumstances, we find it appropriate to exercise our authority to address the complaint before us by limiting our ruling to the issues raised under section 201(b) of the Act.

invoice that he would be subject to a late fee of \$5 or 1.5% of the past due balance for payment received beyond the due date.⁴ After failing to pay his paging bill by the specified due date, Mr. Kiefer was charged a \$5.00 late fee.⁵ On August 28, 1998, Mr. Kiefer filed a class action lawsuit against PageNet in Michigan State Court that sought recovery of the late fee charges that he and other subscribers had incurred. PageNet subsequently removed Mr. Kiefer's complaint to the United States District Court for the Eastern District of Michigan, Southern Division.⁶ The District Court thereafter granted PageNet's request to refer the case to the Commission based on the doctrine of primary jurisdiction,⁷ determining that Mr. Kiefer's complaint asserted issues of reasonableness under section 201(b) of the Act that are within the Commission's jurisdiction. The District Court stayed its proceedings and denied PageNet's request to dismiss Mr. Kiefer's suit without prejudice.⁸

III. DISCUSSION

3. In the above-captioned complaint, filed on April 5, 2000, Mr. Kiefer argues that PageNet's assessment of the \$5.00 late fee is an unreasonable charge because it is excessive, "bear[s] no relationship to its actual losses resulting from late payments and does not represent a reasonable estimate of such losses."⁹ Mr. Kiefer states that the time period within which subscribers must pay their bills is unreasonably short.¹⁰ Additionally, Mr. Kiefer asserts that PageNet's practice of assessing a late fee if payment is not received within "ten days of the billing date indicated on a typical billing statement is an unreasonable practice, because its truncated billing period is designed to induce late payments whereby PageNet's customers will incur unreasonably high late fees."¹¹ PageNet responds that its business practices are the product of competitive market forces and are not unreasonable and that customers are provided with a grace period before a late fee is assessed.¹² Mr. Kiefer also alleges in his complaint that PageNet's assessment of a \$5.00 late fee violated section 201(b) of the Act, which requires that all charges must be just and reasonable. Mr. Kiefer claims that PageNet's late fees were assessed after an unreasonably truncated billing period, are unlawful penalties, constitute liquidated damages that are "disproportionate to the estimated probable loss or harm caused to PageNet by the late receipt of a monthly payment,"¹³ and contravene state law.¹⁴

⁴ Joint Statement at 3.

⁵ Mr. Kiefer does not specify the number of occasions for which he was charged and paid a late fee. PageNet states that Kiefer was assessed a late fee on six occasions. See Reply at 2.

⁶ *Kenneth Kiefer v. Paging Network of Michigan, Inc. et al.*, Case No. 98-008669-CP (Mich. Cir. Ct., Oakland County).

⁷ Citing *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952), the District Court stated that the doctrine of primary jurisdiction "is properly invoked when enforcement of a claim in court would require resolution of issues that have already been placed within the special competence of an administrative body." *District Court Order*, 50 F.Supp. 2d at 683.

⁸ *Id.* at 682.

⁹ Complaint at 16.

¹⁰ *Id.* at 15-16.

¹¹ *Id.* at 7.

¹² Answer, Tab D, at 14-16.

¹³ Complaint at 7.

¹⁴ The District Court stayed its proceedings and will address these issues after the Commission rules on the reasonableness of PageNet's \$5.00 late fee. *District Court Order*, 50 F.Supp. 2d at 682.

1. Whether PageNet's Late Fee Is Unjust and Unreasonable

4. Under section 201(b) of the Act, "all charges, practices, classifications and regulations for and in connection with" communication services offered by common carriers must be just and reasonable.¹⁵ Mr. Kiefer argues that PageNet's assessment of a late fee violates section 201(b) of the Act because the fee is not cost-based, does not reflect actual losses resulting from late payments, and does not represent a reasonable estimate of such losses. PageNet argues that its late fee policy was implemented to offset expenses due to customers' late payments.¹⁶ Additionally, PageNet states that it provided Mr. Kiefer with a grace period and did not assess a late fee unless payment was not received by the end of its billing cycle.¹⁷ PageNet further states that it mailed billing statements to Mr. Kiefer prior to the invoice date and that Keifer was notified in October 1994 that a late fee would be assessed for late payments.¹⁸ PageNet also argues that the paging market is highly competitive and that "market forces ensure that a carrier's rates, terms and conditions are reasonable."¹⁹

5. At the outset, we note that the Commission has regulated CMRS, such as those offered by PageNet, through competitive market forces. In doing so, the Commission has not imposed specific cost-based rate regulations on CMRS providers. This does not mean, however, that section 201(b) has no meaning. If a charge is unjust or unreasonable, even in an unregulated market, we will find a violation. In this case, however, beyond his bald assertions, we find that Mr. Kiefer has failed to cite any authority or present any evidence requiring PageNet's late fee to be based on an estimate of its actual losses. Mr. Kiefer has also failed to persuade us that PageNet has violated any specific Commission regulation regarding its assessment of a late fee.

6. In *Southwestern Bell Mobile Systems, Inc.*, the Commission stated its general preference that the competitive market, rather than government regulation, govern the Commercial Mobile Radio Service (CMRS) industry.²⁰ There, Southwestern Bell Mobile Systems ("Southwestern") had asked the Commission to issue six specific declaratory rulings that would assist in the resolution of numerous class action suits filed in state and federal courts. Among other things, Southwestern requested that we declare that the Commission's general preference is that competitive forces instead of governmental regulations govern the CMRS marketplace.²¹ The Commission granted Southwestern's first requested ruling and stated that congressional policy also favored competition over regulation. The Commission noted that it

¹⁵ 47 U.S.C. § 201(b).

¹⁶ Answer, Tab D, at 5.

¹⁷ *Id.* at 5-7.

¹⁸ *Id.*

¹⁹ *Id.* at 12.

²⁰ *Southwestern Bell Mobile Systems, Inc.*, Petition for a Declaratory Ruling regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 (1999) ("SBMS").

²¹ Southwestern also requested that we declare that: (1) that charging for CMRS calls in whole-minute increments and charging for incoming calls were not unjust or unreasonable practices in violation of section 201(b) of the Act; (2) the term "call initiation" in the CMRS industry refers to a cellular customer activating his or her phone both to place an outgoing call and to accept an incoming call; (3) the definition of the term "rates charged" in Section 332(c)(3) of the Communications Act, includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for these services; (4) challenges to the "rates charged" to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law under section 332(c)(3) of the Communications Act; and (5) state-law claims directly or indirectly challenging the "rates charged" by CMRS providers are barred by Section 332(c)(3).

is directed by the Act to forbear from applying any regulation or provision of the Act where the enforcement of the regulation is not required to protect the public and is inconsistent with the public interest. The Commission further noted that in considering whether forbearance is within the public interest, it is required to determine whether forbearance will promote competitive market forces.²²

7. We adhere to the views expressed by the Commission in *SBMS* and other proceedings,²³ that market forces should generally govern the rates and charges assessed by CMRS providers. We note however, that in a competitive market, certain industry practices will not necessarily “be lawful under Section 201(b) of the Act and without regard to other contractual, service, and marketing practices of the CMRS provider.”²⁴ Nonetheless, we find that the existence of a competitive market should be considered in determining the existence of a section 201(b) violation.²⁵ We further note that late fees have been routinely used by other industries regulated by the Commission.²⁶ In this instance, the facts do not warrant that we find that the \$5.00 late fee violates section 201(b).

2. Whether PageNet’s Bill Payment Period Is Unreasonably Short

8. Mr. Kiefer states that PageNet’s billing period is unreasonably short and therefore violates section 201(b).²⁷ Mr. Kiefer asserts that PageNet mailed its billing statement on the first of the month, specified that payment was due on the 10th day of the month and reminded subscribers to allow 5 to 7 days for mailing.²⁸ Mr. Kiefer specifically states that “from the date PageNet mailed its billing statements, subscribers were generally provided at most, five (5) days within which to make payment and ensure its receipt by PageNet, without incurring the unreasonably high late fee penalty.”²⁹

9. PageNet argues that its billing period policy is reasonable under Section 201(b) of the Act.³⁰ PageNet states that the time period within which subscribers are required to pay their bill is not unreasonably short because the billing date is the first day of the service month with payment due by the 10th of the month and that subscribers are given a grace period to pay their bills without incurring a late fee.³¹ PageNet states that this grace period is 10-13 days long, “running from the 11th of the current billing month through the printing of the next billing cycle.”³² PageNet further argues that Mr. Kiefer subscribed to its services for over eight years, was given notice of the late fee and billing policy, and agreed in writing to the subscription agreement. PageNet notes that Mr. Kiefer chose to continue

²² *SBMS*, 14 FCC Rcd at 19902 n.17.

²³ *Id.* at 19902 (Competitive market forces best govern the relationship between CMRS providers and their customers).

²⁴ *Id.* at 19905; *see also* Petition for Declaratory Ruling On Issues Contained In Count I of *White v. GTE*, *Memorandum Opinion and Order*, WT Docket No. 00-164, 20001 WL 561271 (May 25, 2001) (“*White*”).

²⁵ The factors that are considered in assessing a section 201(b) violation include “the relationship of carrier costs to billing charges or practices, consumers’ expectation based on their wireline experience, and the role of competitive markets.” *White*, WT Docket No. 00-164, 20001 WL 561271 at 5 (May 25, 2001).

²⁶ *See Falcon Cablevision*, *Memorandum Opinion and Order*, 11 FCC Rcd 1051, 10525 (1996).

²⁷ Complaint at 15-16.

²⁸ Complaint at 5.

²⁹ *Id.*

³⁰ Answer, Tab D, at 16-18.

³¹ *Id.*

³² *Id.* at 15-16.

subscribing to PageNet's services even after being assessed the late fees.³³

10. Mr. Kiefer has failed to demonstrate that the time period during which PageNet's subscribers are required to pay their bill is unreasonably short. Mr. Kiefer was given notice of the 10-day billing period in his signed 1991 and 1995 Service/Lease Agreements with PageNet. Furthermore, customers are given an additional 10-13 day grace period before a late fee is assessed. Mr. Kiefer further received billing statements indicating when payment was due. Mr. Kiefer further acknowledges that he received notice of the late fee on billing statements.³⁴ In this context, we decline to find that PageNet's late fee is unjust and unreasonable under section 201(b) of the Act.³⁵

IV. CONCLUSION

11. We find that Mr. Kiefer has not demonstrated that PageNet's assessment of the \$5.00 late fee violates section 201(b) of the Act. We therefore deny with prejudice the instant formal complaint filed by Kenneth Kiefer against Paging Network, Inc.

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), and 208, that the complaint filed by Kenneth Kiefer is DENIED.

13. IT IS FURTHER ORDERED that Kenneth Kiefer's request for waiver of section 1.721(a)(8) of the Commission's rules, 47 C.F.R. § 1.721(a)(8), is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

³³ PageNet states that Mr. Kiefer was only assessed a late fee for six of his fifty late payments. PageNet claims that the sum of these six late fees amounts to \$30.00. *Id.* at 18-20.

³⁴ Complaint at 5.

³⁵ In addition, we note that Mr. Kiefer had the option to discontinue his relationship with PageNet and subscribe to paging service from other providers in Michigan. PageNet states that from 1991 through 2000, there were an average of over 90 companies providing paging services in Kiefer's billing area. Answer, Tab D, at 24.