

ATM Fee Backlash: Local Rebellions Against Unfair Surcharge Spread

An ATM Surcharge White Paper by The State PIRGs--March 2000

Four years ago, on April 1, 1996, the national ATM networks, Plus and Cirrus, first allowed their member banks to impose a second double fee, called a surcharge, on non-customers using their ATMs. Before 1996, ATM owners in shared ATM networks had always been compensated by receiving part of the so-called "foreign fee" that most banks already charged their own accountholders who used an ATM owned by another bank. The part sent to the ATM owner is called an "interchange fee." Even in those circumstances where a bank didn't impose a foreign fee on its own accountholders using others' machines, the ATM owner always received an interchange fee, which is a bank-to-bank payment. The network itself also receives a fee from the consumer's bank, called a "switch" fee.

That second fee now received by ATM owners, the ATM surcharge, has more than doubled the cost to consumers for using foreign ATMs and isn't shared with anyone. The surcharge contributes dramatically to the profits of ATM owners, lessens the benefit to consumers of shared ATM networks and encourages the growth of bigger banks. According to both the Federal Reserve Board's Annual Reports to Congress and PIRG studies, bigger banks charge bigger fees, across the board. Not only is ATM surcharging unfair to consumers, since it is charging them twice for one transaction, it is also anti-competitive, since it encourages consumers to switch their accounts to bigger, higher-fee banks, ultimately limiting consumer choice.

In response to the unfair, anti-competitive surcharge, the Congress and more than half the states sought, unsuccessfully, to ban surcharges between 1996-98. Not surprisingly, the powerful bank lobby was able to stymie these surcharge repeal efforts. Advocates came closest in Massachusetts, where a surcharge ban passed the Senate unanimously and had a majority of House co-sponsors, but was not brought up for a vote by the House Speaker. Two state Banking Commissioners, in Iowa and Connecticut, did use existing authority to impose administrative bans on surcharges. **Meanwhile, the cost of using foreign ATMs rose from 1995's \$1, to 1999's \$2.50 or more.**

Cost of "Convenience"			
COST OF USING FOREIGN ATM			
MORE THAN DOUBLES			
1995-1999 Rise = 151%			
	1995	1999	
Foreign Fee	\$1.00	\$1.14	
Surcharge	\$0.00	\$1.37	
TOTAL	\$1.00	\$2.51	
Data: USPIRG			

It appeared in the summer of 1999 that efforts to repeal the surcharge were dead. The courts had overturned the Iowa ban and the banks expected a similar decision in Connecticut. State legislative action was stalled. Then, however, the rebellion over unfair fees spread to the local level. Taking a page from the book of tobacco control and campaign finance reform advocates, opponents turned their attention to city surcharge bans. In October 1999, the City Council of Santa Monica, California voted to ban surcharges. On Election Day, November 2, 1999, San Francisco voters banned surcharges by a margin of 66-34%. Since then, several major cities, including New York and Chicago, began

taking the first steps toward banning surcharges. On February 15, 2000, the town of Woodbridge, NJ banned surcharges, by a 9-0 vote. Meanwhile, in a little-noticed filing, the Pentagon proposed banning surcharges on all military bases. That decision is pending.

Following the victories by the California cities, the banks, aided by federal regulators, immediately obtained court injunctions against enforcement of the local laws, arguing that the National Bank Act preempts both state and local action over national banks. The cities, the states and consumer groups argue instead that the federal Electronic Funds Transfer Act clearly gives them authority over ATM fees.

Now, the two California cities are fighting to reinstate their bans in the Ninth Circuit Court of Appeals. The state of Iowa has asked the U.S. Supreme Court to reinstate its ban. Connecticut's attorney general is fighting a

legislative campaign to reenact that state's ban, which was eliminated not by federal courts, but by a state court holding only that the Banking Commissioner misinterpreted his authority.

Throughout the battle, the banks have primarily made three arguments. First, they have argued that consumers got a free lunch before surcharges (and that surcharges are somehow not a second, double fee). Second, nationally-chartered banks and federal regulators have argued that the National Bank Act preempts any authority over them by either states or localities. Finally, banks have argued that the marketplace should decide the level of ATM fees, not lawmakers.

This paper attempts to do two things. First, it summarizes the status of ATM surcharge ban proposals across the country. Second, it examines, and provides evidence to dismiss, each of the banker's arguments.

1. STATUS OF ATM SURCHARGE BAN PROPOSALS [ALSO SEE APPENDIX]

The year 1999 saw a resurgence of efforts to ban unfair ATM surcharges that has continued in 2000. The attached chart summarizes the status of ATM surcharge ban efforts by cities, states, the Congress and the Pentagon. Military spokespersons point out that soldiers often earn low wages while serving their country and can ill afford to pay up to \$3.50 just to withdraw \$20 of their own money. The chart¹ makes a compelling case that the rebellion against unfair ATM surcharges is spreading:

- Three cities, Santa Monica, San Francisco, and Woodbridge, NJ, have banned surcharges.
- Three major cities, New York, Chicago and Los Angeles, among others, are considering bans. The New York ban is sponsored by the Speaker of the City Council and has a majority of council members co-sponsoring.
- Connecticut's Attorney General, Richard Blumenthal, is pushing hard to reinstate his state's ban, after a state court held only that the Banking Commissioner had misinterpreted his authority when he banned surcharges in 1995. Ban proposals are before at least five other legislatures, as the chart shows.
- The military is so concerned about the effect of ATM surcharging on the morale of its personnel, that it too is far along in considering a ban.²

The local officials in California who took on the surcharge battle at the request of CALPIRG deserve great credit. They had the perseverance to take on an unfair bank practice that state and national legislators had failed to address. They also had the vision to try to solve what others perceived as a problem for Congress at the local level. Ideally, their efforts, which built on local strategies first used by the tobacco control and campaign finance reform movements, will serve as models for other cities seeking to force big banks to end unfair practices.

First, credit goes to San Francisco's Tom Ammiano, President of the Board of Supervisors. He first attempted to enact a surcharge ban by ordinance, but his proposed amendment was blocked in February 1999 by the efforts of Wells Fargo and Bank of America, two powerful corporate players, even at the local level. Ammiano

¹ For ongoing coverage of ATM surcharge ban efforts, see the state PIRG website <http://www.stopatmfees.com>. Also, subscribe to the free email ATM Surcharge Bulletin of the New Rules Project of the Institute for Local Self Reliance <http://www.newrules.org>.

² Pentagon officials have also been instrumental in allowing base commanders in Florida and other states to join local efforts by consumer, low-income and religious groups against high-cost auto-title pawn and payday lenders that have targeted military personnel for their deceptively marketed, tripled-digit loan products. See discussion in Section (3) of how the chief national bank regulator, the Office of the Comptroller of the Currency (OCC), encourages banks to partner with these usurious firms.

then worked to develop a broad-based coalition that ultimately included numerous consumer, labor and good government groups, to qualify the citizen's initiative to ban double ATM surcharges, Proposition F, for the November ballot. Members of the Campaign To End Extra ATM Fees ranged from CALPIRG and the United Steelworkers to AARP, Consumers Union, Consumer Action, and numerous local political clubs. It is estimated that the California Bankers Association spent \$500,000 in attempts to defeat the initiative, including direct mail and television and radio buys. The citizens' campaign spent about \$15,000.

Second, two progressive members of the Santa Monica City Council, Kevin McKeown and Michael Feinstein, deserve credit for enacting the nation's first ATM surcharge ban ordinance, in October 1999. Working with CALPIRG, they were able to win in the City Council and didn't need to go to the ballot.

2. ATM Surcharges Are Double Fees. Charging Consumers Twice Is Unfair

"No business should be expected to provide free service to non-customers," said Gene Taylor, president of the bank's Western Region. "Bank of America built the nation's largest ATM network for people who choose to do business with us, and we think it's reasonable to charge non-customers for the optional convenience of this service."

--Bank of America press release announcing it was blocking ATM access to non-customers in Santa Monica to protest new ordinance, 10 November 1999

Blocking ATM access in the city is an attempt by Wells Fargo and Bank of America to "punish consumers for being in a community willing to protect them."

-- Santa Monica City Attorney Adam Radinsky, in reply.

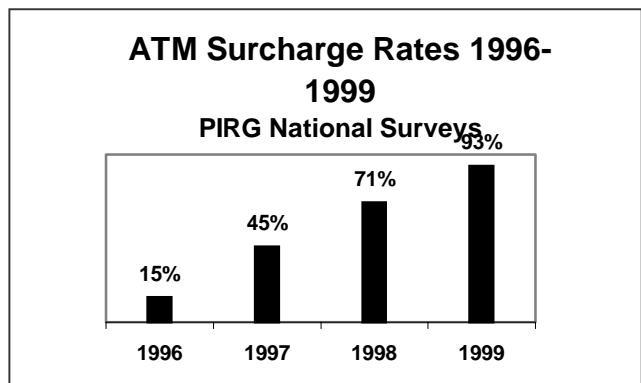
A. Consumers Don't Get A Free Lunch. Consumers Pay Twice For Lunch.

Over the last few years, bank public relations firms have worked hard in an attempt to re-define their own industry term "ATM surcharge" to the softer, more benign-sounding terms "access fee" or "convenience fee." Their not so transparent effort is more sophisticated than it seems-- it is part of a larger effort to confuse consumers, the media, and policymakers into the mistaken belief that ATM owners were not compensated by non-customers before national surcharging began in 1996. Incredibly, they have claimed, "there is no such thing as a free lunch" or "who could expect banks to give away our services for free?"

In fact, since banks first formed shared ATM networks, and allowed other banks' customers to use their ATMs, ATM owners have been compensated by a customer's own bank, through a fee known as the interchange fee. According to numerous studies, the interchange fee, set by the ATM network member-owners and paid by the customer's bank to the ATM owner, averages between 40-60 cents per transaction. The customer's bank compensates the network itself with a "switch" fee of between 2-12 cents.

Where does the "interchange fee" and "switch fee" payment come from? That's up to the consumer's bank. However, most banks now pass it along by imposing a foreign fee on their own customers that use other banks' machines, although some may waive this fee for high-balance customers. According to the 1999 Federal Reserve Board Annual Report to Congress, in 1998, 82% of multi-state banks and 73% of local banks imposed foreign fees. The Fed noted that, for a two year period following the imposition of national surcharging, the number of banks charging foreign fees had dropped, but that in 1998 the incidence of foreign fees "increased significantly and sharply."

In PIRG's most recent bank fee report, "Big Banks, Bigger Fees," released in October, all banks nationally imposed average foreign fees of \$1.14. Big banks imposed higher fees, averaging \$1.27, while small banks charged foreign fees averaging \$1.03.³ PIRG's most recent report on surcharging, released one year ago, found that for 1999, the average ATM surcharge increased to \$1.37 in 1999, up from \$1.23 in PIRG's 1998 survey. Big banks imposed average 1999 surcharges of \$1.42 and small bank surcharges averaged \$1.30. Credit union surcharges averaged \$0.98. Fully 93% of all banks surcharged, with big banks surcharging at a rate of 95%, small banks at a rate of 91% and credit unions at a rate of 42%.



Adding PIRG's 1999 average surcharge of \$1.37 to PIRG's average foreign fee of \$1.14 gives a combined cost to most consumers who use foreign ATMs totaling \$2.51. In PIRG's 1995 bank fee survey, foreign fees averaged \$1.01. Since national surcharging began in 1996, the full cost of most foreign transactions has gone up about 166% in the past five years. If competition were working, fees would decline, or at least remain stable. Surcharge income would offset the need for higher foreign fees, resulting in an equilibrium. Competition isn't working.

B. How The ATM Fee Structure Works

This chart, based on a 1998 Congressional Budget Office report to Congress, shows the relationship between the different ATM fees paid by a consumer and paid by a consumer's bank. It shows who pays, and who receives, each fee.

Who Pays Which ATM Fees? Who Receives Which ATM Fees?				
Type of Fee	Who Pays It?	Who Receives It?	Who Sets It?	Amount
Network Membership (a)	Consumer's Bank	Network	Network	\$0-125,000/yr
Switch (b)	Consumer's bank	Network	Network	2.5-12 cents
Interchange(b)	Consumer's bank	ATM owner	Network	20-60 cents (c)
Foreign Fee (b)	Consumer	Consumer's bank	Consumer's Bank	\$0-2.50
Surcharge(b)	Consumer	ATM owner	ATM owner	\$0-3.00

Adapted from "Competition in ATM Markets: Are ATMs Money Machines?", Congressional Budget Office , July 1998, prepared for Senate Banking Committee. SOURCE: Congressional Budget Office based on the Debit Card Directory, 1998 Edition (New York: Faulkner & Gray, 1997), and General Accounting Office, Automated Teller Machines: Survey Results Indicate Banks' Surcharge Fees Have Increased (April 1998).

a. The membership fee is usually paid either monthly or annually.

b. This fee is paid per transaction.

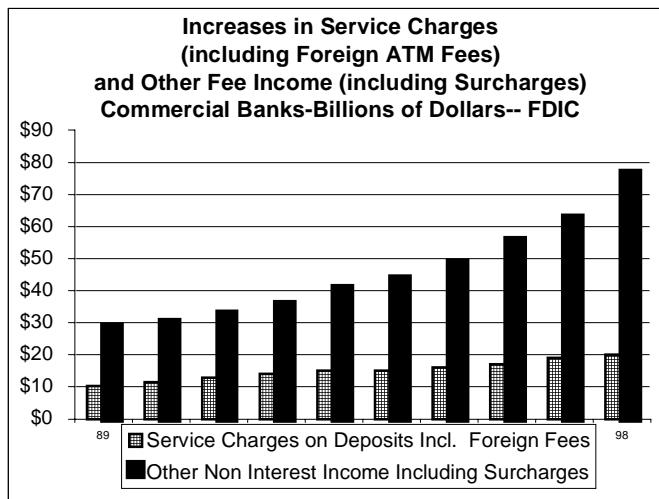
c. The range stated is for a cash withdrawal. Interchange fees vary for different types of transactions. For example, the interchange fee is usually higher for a deposit transaction than for a balance inquiry.

³ PIRG surveys compare the 300 largest banks by deposits(big banks) to all other banks and finds that big banks charge bigger fees. The Fed compares multi-state to one-state banks and finds that multi-state banks charge higher fees. The methodologies are different, yet yield nearly identical fee results.

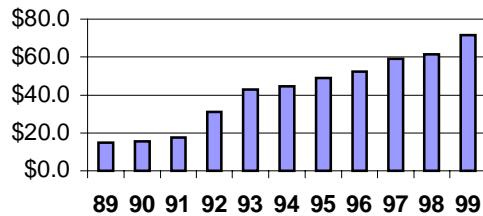
C. How ATM Surcharges And Foreign Fees Contribute To Bank Profits

In 1999, banks had their ninth straight year of record profits. The \$71.7 billion reported to the FDIC exceeded last year's record of \$61.8 billion by 16%, or \$9.9 billion. According to the FDIC, "continued strength in non-interest revenues, particularly fee income," is a critical part of commercial bank income. For example, non-interest income accounted for 44% of net operating revenues in the fourth quarter 1999.

In the Federal Deposit Insurance Corporation's quarterly reports on bank income and expenses, ATM surcharges are incorporated in the lump-sum category, "other non-interest income." This fast growing category includes credit card fee income and other fees. Foreign ATM fees are incorporated in the category "Revenue from deposit account service fees."



Fee Income Helps Drive Ninth Record Year for Commercial Bank Profits Profits-Billions of Dollars -- Source FDIC



Specific 1999 data on contributions from service fees on deposit accounts and other non-interest income, are not yet available, but 1989-1998 data on these income categories shows impressive growth. In 1989, service charges on deposits, including foreign fees, were \$10.3 billion, rising to \$19.8 billion in 1998. Other non-interest income, including surcharges, rose from \$29.0 billion in 1989 to \$77.2 billion in 1998.

In March 2000, BankRate.com projected that ATM surcharge revenues would total \$2 billion in 2000, consistent with previous PIRG and U.S.

Congressional Budget Office estimates that ATM surcharge revenues annually total over \$2 billion.⁴ Although the total number of foreign transactions has declined slightly, the percentage of banks surcharging and the amount of the surcharge have both increased, maintaining surcharge revenue at over \$2 billion.

Data from the banks' lawsuits against Santa Monica and San Francisco are illustrative. In declarations to the court, Bank of America and Wells Fargo estimated that their surcharge revenues annually in these two cities alone, totaled \$5,840,000. Other banks had combined annual surcharge revenue of \$1,182,820. So, banks in those two cities alone earn \$7 million annually on surcharges⁵. These totals for ATM surcharges revenue do not include interchange fee revenue, foreign fee revenue, and other ATM fee income.

⁴ According to GAO, banks owned 132,000 ATMs in January 1998 and averaged 1,023 off-us ATM transactions per machine per month (the increase in the number of ATMs has resulted in a decline in per-ATM transactions). At a 93% surcharging rate at \$1.37/transaction, this corresponded to annual ATM surcharge revenue of approximately \$2.1 billion.

⁵ Throughout report, all data on San Francisco and Santa Monica ATM market and profits from Briefs and Declarations of bank officials in Motion for Preliminary Injunction, *Bank of America, Wells Fargo and California Bankers vs. City and County of San Francisco and City of Santa Monica*, CV 99-4817 VRW, see, e.g., declaration of William Raymond, Senior Vice President, Bank of America, November 2, 1999.

Surcharging actually saves banks money. In 1997, a study by the Federal Office of Thrift Supervision reported that the average human teller transactions costs a bank \$2.93, while the average ATM transaction costs the bank 27 cents. ATMs are cheaper than branches and tellers.

It has been argued that surcharge fees are necessary to cover the costs of new ATM deployment. However, thousands of consumers may never benefit from using one of these new ATMs. Further, assuming that surcharging has led to the deployment of an additional 40,000 ATMs, the "cost" of \$2 billion in surcharges amounts to \$50,000 a year per "new" ATM. Yet, cash-only machines now cost as little as \$5,000. Most studies estimate the true cost of maintaining machines at only \$12,000/year, including depreciation costs.

3. WHY STATES AND CITIES HAVE THE AUTHORITY TO BAN SURCHARGES

Throughout the ATM surcharge legal battle, nationally-chartered banks have argued that the National Bank Act of 1863 prohibits state and local action regulating ATM surcharges of nationally-chartered banks. Historically, banks have argued that this general law preempts any consumer laws as it applies to national banks, even though, for example, in this case, it fails to even mention ATM fees and includes no explicit preemption of state ATM laws. Advocates argue, on the other hand, that the clear and explicit anti-preemptive language of the specific law pertaining to ATM and other electronic transactions, the 1978 Electronic Fund Transfer Act, should prevail. Here is the critical "savings clause," or anti-preemption language of the EFTA, describing its relation to state laws:

"This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provision of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." [15 USC 1693a(6)]

A. Stronger State Laws Should Always Be Allowed To Stand

Consumer groups, and the states and cities, believe that local action should be allowed whenever it protects consumers better than federal law, or whenever there is no federal law, provided that there is no conflict between complying both with local laws and any federal law on the same subject matter. In this case, there is clearly no conflict. Since national banks and their regulators can point to no federal law governing ATM fees, they have developed a convoluted case based on OCC's view of "conflict" preemption theory derived from the general powers of the NBA. They believe that even in circumstances where the federal law fails to protect consumers at all, or provides less protection, that state consumer laws should always be preempted anyway. Their logic is that virtually all state consumer laws conflict with the broad powers that the NBA supposedly gives national banks to do whatever they want, even where no federal law protects consumers. Regardless of their views, most subject matter consumer banking laws are written the way EFTA is written, allowing for passage of stronger state laws that are not inconsistent with federal law.

As CALPIRG and other consumer groups argued last month to the Ninth Circuit Court of Appeals in their friend of the court brief supporting the cities' efforts to overturn a district court injunction blocking their surcharge bans:

The District Court erred in ruling that the National Banking Act, 12 U.S.C. §§ 21, et seq. ("NBA"), preempts the Santa Monica and San Francisco ordinances, which seek to protect customers from the excessive non-customer ATM surcharges. Far from preempting the ordinances at issue,

Congress specifically authorized local governments to enact laws which afford consumers “greater protection” in their ATM transactions in the Electronic Fund Transfer Act , The “primary objective” of the EFTA “is the provision of individual consumer rights” “in [the] electronic fund transfer systems.” The EFTA specifies that regulation of ATMs is within its authority....[On the other hand], the United States Supreme Court has repeatedly and unmistakably held that Congress must express a “clear and manifest” desire to preempt state laws in areas of its historic police power of the states.⁶

Throughout the ATM surcharge rebellion, the chief national bank regulator , the Office of the Comptroller of the Currency (OCC), has supported efforts by national banks to overturn or ignore state or local authority. Consumer groups also argue strongly in their brief that OCC has misinterpreted not only the alleged preemptive authority of the National Bank Act, but also its own power. The brief continues:

The District Court was persuaded by OCC’s informal letters sent to the Banks in anticipation of this litigation. It stated: “The Supreme Court has made clear that interpretations of the National Bank Act by the [OCC] are entitled to great weight. In this case the Comptroller of the Currency has made abundantly clear that he considers the ordinances at bar to be preempted by the [NBA].” Once again, the District Court failed to acknowledge or accept the true state of the law with regard to deference to OCC rulings.

Based on OCC’s zeal in issuing informal, non-published letters or opinions regarding the preemptive scope of the NBA, Congress required the agency to promulgate formal opinions subject to a notice and comment period. In this instance, the OCC failed to follow the established procedures for issuing a formal decision and, instead, issued interpretative letters to support the Banks’ litigation position. Contrary to the District Court’s holding, the Supreme Court has expressed an unwillingness to defer to informal OCC opinions, such as those at issue here, even in cases in which the NBA is applicable. *See Smiley* (“Of course we deny deference ‘to agency litigation positions that are wholly unsupported by regulations, rulings or administrative practice.’ The deliberateness of such positions, if not indeed their authoritativeness, is suspect.”)

Similar arguments, that the courts erred in granting deference to the political efforts of the OCC have been raised in a brief supporting the California cities filed by the nine states of California, Connecticut, Iowa, Minnesota, New York, Nevada, Oregon, Washington and West Virginia. In its petition to the Supreme Court, seeking review of the Eighth Circuit’s reversal of a District Court decision overturning its EFTA law, the state of Iowa, makes the same points.

B. OCC Preemption Determinations Have Had a Chilling Effect On State Consumer Protection Efforts

In general, the pattern and practice of the Office of the Comptroller of the Currency (OCC) to abuse its preemption authority has hindered the ability of the states to regulate bank and credit card fees, ban usurious triple-digit payday lending⁷, or enact low-cost checking accounts. In 1992, the OCC preempted (held that

⁶ Brief amicus curiae of CALPIRG, Foundation for Taxpayer and Consumer Rights, et al, in *Bank of America, Wells Fargo and California Bankers Association vs. City and County of San Francisco and City of Santa Monica*, On Appeal of CV 99-4817 VRW, to the Ninth Circuit, Cases 99-17590, 99-17591, February 4, 2000.

⁷ See “Show Me The Money,” February 2000, a PIRG/Consumer Federation of America payday loan study, which details how the OCC is allowing national banks to partner with the firms, which make triple-digit short-term loans “until payday,” at rates as high as 390-780% APR or more. The national bank partnership allows the payday lender to use the “protection” of the national bank charter to avoid compliance with state laws that ban or restrict their outrageous practices. <<http://www.pirg.org/reports/consumer/payday/index.html>>. Also see PIRG’s OCC Watch page at PIRG’s <<http://www.stopatmfees.com>> site.

national banks do not need to comply with it) a New Jersey Lifeline Banking law, despite the absence of any federal law explicitly requiring banks to provide lifeline banking accounts. Despite a regulatory petition filed in 1995 to overturn that preemption, no Comptroller has taken action to do so.⁸ The existence of the New Jersey preemption determination (#92-572) has had a chilling effect on state legislative attempts to enact further lifeline laws or enact other pro-consumer laws. In an attempt to rein in what Congress called the OCC's "overly aggressive" preemption determinations, the 1994 Riegle-Neal Interstate Branching and Efficiency Act amended the NBA to require the OCC to both publish a notice and meet a higher standard before preempting state consumer and community reinvestment laws. Unfortunately, as noted in the consumer group brief to the Ninth Circuit, above, the OCC has attempted numerous end-runs around that law.⁹

4 COMPETITION ISN'T WORKING.

Banks argue that ATM surcharges are needed to cover the cost of remote ATMs. They claim that ATM growth is being spurred by ATM surcharges. Actually, ATM surcharging is part of the big banks' anti-competitive strategy to squeeze out smaller banks and credit unions by encouraging their customers to switch their accounts to banks with larger ATM networks. When confronted with the argument that, in fact, banks are surcharging at local branches as well as in far-off convenience stores, casinos and at ski areas, banks reply that, "consumers should pay for convenience" and "consumers have a choice between ATMs that surcharge and those that do not."

PIRG believes that consumers should choose their bank on the basis of its fees, including its ATM fees. Surcharging makes that selection process imperfect. First, the big banks changed the rules in the middle of the game, after convincing small banks not to capitalize their own ATM networks, but instead, to join theirs. Second, when a consumer is walking down the street looking for an ATM that doesn't surcharge, he or she is faced with the dilemma of paying an "inconvenience" charge, not a convenience charge. In Boston, over half the bank-owned machines are owned by Fleet. In San Francisco, 362 of 423 bank-owned machines (86%) are owned by Wells Fargo or Bank of America.¹⁰

However, the real question of choice in the marketplace is not between surcharge and no-surcharge ATMs. It is between high-cost and low-cost banks and credit unions. If surcharging helps the big banks get bigger, all consumers lose, since big banks have higher fees. When only big banks are left, consumers will have no choice, except to pay higher fees, whether or not they want the "convenience."

⁸ In response to the 1995 petition, the OCC did in 1996 meet the minimum requirements of the 1994 Riegle-Neal Act by issuing a Federal Register Notice (Docket #96-01) to obtain comments on overturning the rule, but has done nothing since.

No regulatory policy of either the OCC, the FDIC or the Federal Reserve Board or any other agency explicitly requires financial institutions to provide any account or service in conflict with the New Jersey Checking Account law. In the absence of conflicting federal law, it has long been the federal tradition of this country that the states proceed to protect their consumers, as New Jersey has correctly done. Over 700,000 New Jersey consumers have obtained New Jersey Checking Accounts.

⁹ For a detailed list of OCC and Office of Thrift Supervision (OTS) preemption determinations, see a recent General Accounting Office (GAO) report to House Banking Chairman James Leach. (Report # B284372, 7 Feb 2000, "Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law").

¹⁰ See Declarations of Wells Fargo and Bank of America to U.S. District Court, November 1999. Even when the 292 non-bank owned ATMs are added to the equation, Bank of America and Wells Fargo still own 51% of the machines in the city. A consumer can't open an account at a non-bank owned ATM, so the 86% figure is more significant.

A. The Market Isn't Working. Surcharges Keep Going Up

Competition isn't working: If the marketplace were working and competition existed, ATM owners would compete on the basis of price. For example, machines in less expensive locations, such as the machines attached to branches, would not impose surcharges, while remote machines would impose surcharges. At the very least, we would see higher surcharges at some machines and lower surcharges at others. Instead, we see only higher and higher surcharges. This is especially true in an environment of rising numbers of machines, where ATM growth has skyrocketed to 225,000 total machines in 1999, but fees have not declined, despite the saturation.¹¹

Competition in a free market should decrease prices for consumers. However since April 1, 1996, when surcharging was permitted by the ATM networks, there has been a massive increase in ATM deployment, but no reduction in ATM fees.

In fact ATM fees have steadily risen over time.

- In 1999, PIRG found that the most common surcharge had increased from \$1.00 to \$1.50, found at 57% of all banks, up from 40% of banks in 1998.
- Now, in 2000, at least one bank, Cleveland's Fifth Third, is imposing a \$2 surcharge.
- Another, Mellon Bank, (PA) is charging \$1.75.
- Surcharge percentages are at least 95% for big banks, over 90% for all banks.
- There is no price differential between on-premise and remote ATM location surcharging. In a free market, the higher cost machines would have higher fees.

Other analysts find similar results: According to a March 2000 study by BankRate.Com:

"More institutions are surcharging non-customers, and charging more, for use of their ATMs. Although the most common charge remains \$1.50, 56 percent of the institutions charge non-customers \$1.50 or more for this service. This is an increase in the number of institutions requiring these high surcharges from 49 percent in October 1999 and 44 percent a year ago." [Businesswire, 20 Mar 00].

Why isn't competition working? Why isn't the ATM marketplace competitive? As antitrust expert David Balto has suggested:

Those who advocate for surcharges suggest that surcharging is simply a "free market" at work. But is the market competitive?

Typically in a competitive market we would expect that price would be pushed down to marginal cost. That is, with any product, if there is sufficient consumer choice, consumers will seek out those competitors that offer the best combination of price, quality, and service. For an undifferentiated product like ATM access, one would expect that firms would compete aggressively on price, and prices would be driven down to marginal cost. Yet, as the evidence shows, in spite of an increase in the

¹¹ U.S. PIRG contacted the Federal Deposit Insurance Corporation for up-to-date information on current numbers of bank-owned ATMs, the number of foreign transactions at each ATM, and the numbers of on and off-premise ATMs. The FDIC stated that it no longer keeps track of ATMs, and referred us to two consulting firms that track the industry. Neither firm, Speer Associates or Faulkner and Gray, publishers of Bank Network News, were able to give precise data on foreign transactions, but their estimates were that, in 1999, there were 225-250,000 ATMs and banks owned at least 60% of them. [Telephone interviews by USPIRG researcher Jenny Anderson, March 2000.]

number of ATMs and the number of ATM deployers, the average price for surcharges has consistently increased over time.¹²

Balto goes on to argue that ATM surcharging could lead customers to move from small banks to big banks, as the big banks use ATM market power to offset the generally lower fee structures on all accounts offered by smaller institutions:

ATM surcharges changed the pro-competitive aspects of ATM sharing. With surcharges, large banks can impose higher costs on the customers of small banks and credit unions. In turn, the large banks can try to induce customers to defect from these smaller institutions. In essence, ATM surcharges return the competitive dynamic to that which existed before ATM shared networks were formed.

Moreover, surcharges present a perverse form of price competition where firms can actually gain customers by raising prices (and the costs of their rivals). As Professor Paul Horvitz observes: "there is little downside to such a strategy -- either you gain substantial market share or earn substantial fee income." [Paul M. Horvitz, "ATM Surcharges: Their Effect on Competition and Efficiency," 18 *Journal of Retail Banking Services* 57, 61 (Autumn 1996).]

It is important to recognize that small banks and credit unions often can be of far greater competitive significance than their size suggests. Recent studies by the Federal Reserve Board and consumer groups have shown that credit unions and small banks on average offer higher interest rates and lower fees for deposit and checking accounts. Simply they are often the leaders in providing the most efficient, consumer friendly level of service. Often they are far more committed and knowledgeable of local community concerns. Losing, or even hobbling these efficient, low-cost rivals will harm all consumers. Thus, preserving a level playing field may be important to bring consumers a competitive retail banking market.

Balto then makes the following important argument:

ATM surcharges, especially surcharges imposed by the larger banks, could deter the ability of these smaller institutions to effectively compete. Because these smaller institutions cannot offer as large a network of "surcharge free" ATMs, consumers may depart to the larger banks. By focusing competition on the size of a bank's ATM network, competition in terms of interest rates and fees may be weakened.

Balto's thesis is also argued in an article by Federal Reserve Board economist James McAndrews, who agrees that ATM surcharging has potential to affect competition negatively. If enough customers migrate accounts to larger banks for ATM "convenience," the fewer, bigger banks may gain the market power necessary to set deposit interest rates for all consumers artificially low.¹³

B. Surcharging Is One of Numerous Anti-Competitive ATM-related Practices of Big Banks

Small banks and credit unions also contend that surcharges are just one of the anti-competitive ATM practices imposed by ATM networks. As bank mergers continue, ATM network control and ownership also concentrates in the hands of the bigger players. Community banks argued before Federal Reserve Board hearings on recent

¹² Regulatory, Competitive, and Antitrust Challenges of ATM Surcharges, 70 BNA Banking Report 82 (July 13, 1998) by David Balto

¹³ "ATM Surcharges," James McAndrews, Current Issues In Economics And Finance, Federal Reserve Bank of New York, July 1998, Vol \$, #4, pages 1-6. <http://www.ny.frb.org/rmaghome/curr_iss/CI4-4.PDF>

mergers that the larger institutions would change ATM network rules in ways that would make it more difficult for small banks and their customers to participate. They would raise customer fees, bank membership fees, and impose unfair restrictions on participation. As the California Independent Bankers testified before a Federal Reserve Board hearing on the Bank of America merger with Nationsbank:

A key concern in large interbank mergers, and one that does not get the attention it warrants, is the effect on ATM networks. Market concentrations resulting from bank mergers and acquisitions have potential anti-competitive implications for ATM network markets (specifically control of ATM switches).

ATM networks are joint ventures between competing banks. ATM networks are self-regulated, private sector entities, owned and controlled in the majority of cases by large banks, that set their own pricing and related operating rules subject only to the constraints imposed by the antitrust laws. Given the structure of ATM networks, certain anti-competitive aspects are inherent. For community banks, these anti-competitive aspects are more pronounced as they generally have little influence over network fees, bylaws or operating rules. Access at a fair price to ATM and other electronic financial services networks is critical for community banks to insure their customers also have fairly and competitively priced access to these networks to transact their banking business.¹⁴

C. Partial Solution Of Selective Surcharging Nearly Blocked By Anti-Competitive Practices

"Some people pay a surcharge at the ATM. SUM don't."

-- From the SUM Program website.

As another example of anti-competitive practices by bigger banks, until the U.S. Department of Justice (DOJ) intervened in 1998, large ATM networks had prohibited small banks from forming "selective surcharge" alliances. In numerous states, small banks and credit unions had sought to compete with bigger banks by forming sub-networks that didn't surcharge each other's customers, but did surcharge others. Selective surcharge alliances are a way for small, community banks to fight back against the unfair market power of the ATM network owners.

However, establishment of the alliances was blocked by unfair rules imposed by the networks. Had small banks been able to form selective surcharging alliances earlier, more might have formed. Nevertheless, the fragile, partial success of one selective surcharging alliance is illustrative.

The Massachusetts-based SUM program of the NYCE ATM network has managed to fight the trend. It is a community-bank based selective surcharging bulwark against big bank surcharging, although it precariously nests within NYCE, a big-bank owned network. Following the DOJ intervention that allowed its formation, SUM has expanded significantly from its Massachusetts roots into Connecticut and New York. A few of its members even have branches in other states, including one each in Kentucky and Tennessee. However, the SUM program of the NYCE ATM network, and similar efforts by credit unions around the country, are the exception, rather than the rule.

¹⁴ Testimony of Craig Collette President, Marathon National Bank, Los Angeles and Member, California Independent Bankers Board Of Directors at the hearing of the Federal Reserve Bank of San Francisco on planned merger of Nationsbank and Bank of America July 10,1998 San Francisco.

SUMMARY OF THE SUM SELECTIVE SURCHARGING PROGRAM		
Number of Banks, Credit Unions and ATMs by state.		
	ATMs	Banks/Credit Unions
CT	275	40
KY	1	1
MA	1493	246
ME	1	1
NH	15	5
NY	60	8
RI	5	2
TN	1	1
TOTALS	1851	297

State by state totals greater than 297 due to multi-state members.
 [SUM IS OWNED BY THE NYCE ATM NETWORK]
 Data derived from [<http://www.sum-atm.com/>]

Second, consumers should beware that the benefits of the SUM program (and similar selective surcharge alliances) are partial. These programs help consumers avoid surcharges, but not foreign fees. Consumers seeking to avoid ATM fees should still seek to use their own bank's machines. A March 2000 survey by MASSPIRG, for example, found that 12 of 27 SUM members impose foreign fees on their customers using other SUM bank's machines. Two others gave consumers 3 free foreign transactions before imposing foreign fees. [See <<http://www.masspirg.org/masspirg/>> and click "Free Checking"]

Third, community banks should beware that Sum's existence is fragile. It is primarily owned by surcharging big banks. Further, SUM is owned by NYCE, which is 96% owned by 8 large, surcharging banks, each with a 12% share: Bank of New York, BankBoston, Chase, Citibank, Fleet, Marine Midland, Peoples¹⁵ and Summit. The other 4% is owned by 150 community banks.

Finally, policymakers should beware that the SUM program isn't a market-based solution to surcharging. In fact, it wasn't until the Department of Justice intervened that the SUM participants were allowed to set it up. If left up to the "market," the big banks would have been successful in their attempt at blocking the creation of selective surcharging programs.

Unfortunately, these efforts may be too little, too late, as big banks have developed powerful ATM networks of their own, through mergers and acquisitions. In Boston, for example, the dominant bank, Fleet, owns more than half of the ATMs. It owns 40% of all ATMs in the state. In San Francisco, Wells and Bank of America own an even larger share, 86%, together. City residents, especially, bear the brunt of big-bank dominated surcharges and the other negative effects of bank mergers and bank consolidation. It is entirely appropriate that cities, and their citizens, lead the fight against unfair surcharges.

D. Wells Fargo and Bank of America Denial of Access May Violate Network Rules

As part of their orchestrated campaign to chill further surcharge ban activity by other cities, Bank of America and Wells Fargo widely trumpeted their plans to restrict access to Santa Monica and San Francisco ATMs to their own customers unless an injunction was granted. In November, Bank of America, for example, said "No business should be expected to provide free service to non-customers." In fact, at least in Santa Monica, the two big banks are **still** banning access to non-customers. But other banks in the city are saving consumers money, since most are not surcharging despite the temporary injunction blocking the ban.

Nevertheless, their prohibition on non-customer access may violate ATM network anti-discrimination rules that require a bank's machines to be open to other bank's customers if it wants to participate in the network. The rule is a logical one. Since networks are special arrangements between supposed competitors, those competitors are supposed to act fairly, as a condition of network participation.

¹⁵ Peoples may not yet surcharge, since surcharging was banned in Connecticut until December 15, 1999.

In effect, the action by Wells Fargo and Bank of America gives their customers all the benefits of access to the full ATM network, including ATMs owned by other banks, but blocking non-customers means they don't have full access to Wells Fargo and Bank of America ATMs. The problem illustrates a fundamental issue: Big bank surchargers want to obtain excess, monopolistic fees characteristic of a closed proprietary network while simultaneously taking special advantage of an open, shared network.

Industry insiders inform us that network rules may allow a *de minimis* number of machines to be removed from a network without violating anti-discrimination rules. In Santa Monica, the two banks only own 33 machines, with 21 Bank of America ATMs and 12 Wells Fargo ATMs. However, had the either of the two restricted access in San Francisco as well, where they own more machines (Bank of America 188 and Wells 174) their actions would have likely violated network rules. Regardless, claiming that access without surcharges is "free" is patently false. The Santa Monica action is deserving of review by regulators as a potential violation of competition laws as well as network rules.

E. Some banks are surcharging their own customers

Banks are exploring more ways to surcharge their own customers. For years, Bank One has deployed private label machines known as Bank One "Rapid-Cash" ATMs which impose \$1.00 surcharges on Bank One customers and higher \$1.50 surcharges on non-customers. In Canada, the consumer group Democracy Watch is fighting the Canadian Imperial Bank of Commerce, which has rolled out 180 similarly unbranded or "white-label" "Ready Cash" machines¹⁶. Bank of America maintains unbranded machines in casinos that surcharge its own customers.¹⁷ Although bankers claim that the growing number of non-bank ATMs, owned by Independent Service Operators (ISOs), offer competition to them, expect more joint venture ownership schemes between banks and ISOs where banks attempt to mask their ownership of machines to obtain more surcharge revenue from their own customers.

F. Surcharging Battle Spreads Across Atlantic

The British consumer group Consumers Association [www.which.net] has been campaigning against double ATM fees. Consumers Association calls foreign fees "disloyalty fees" and calls surcharges :"direct charges."

"Some banking institutions offer free access to their Automated Teller Machines (ATMs) or cash machines as they are commonly known. Some banks already charge a so-called disloyalty fee to customers using the ATMs of other banks within the LINK network. Now, some banks within the LINK network want to impose direct charges that will put an end to customers being able to choose a bank that offers free access to all ATMs."

According to Bloomberg News, a British government panel announced in March that the nation's largest banks "use their dominant position to charge unfair prices and offer ``slow and inflexible" service." Bloomberg reports further that banks overcharge 5 Billion Pounds (\$8 Billion):

Customers withdrawing money from automated teller machines are charged as much as six times more than it costs banks to run them, the review said....Link, a network of 34 banks, recently said it would discourage double charging. That came after a decision last month that would have enabled some banks to charge as much as 2.50 pounds for a cash withdrawal. ["U.K. Banks Overcharge 5 Billion Pounds (\$8 Billion), Panel Says" Tom Giles, Bloomberg London Bureau, March 20, 2000]

¹⁶ "Cost of convenience, Canadian style," ATMMagazine.com, 13 Dec 99

¹⁷ Personal communication with USPIRG, former Bank of America employee.

CONCLUSION

Surcharges are unfair for at least three reasons. First, surcharges are unfair since consumers already compensate ATM owners, through the foreign fee paid to their own bank that are shared with the network and the ATM owner. Second, surcharge revenue primarily benefits big banks, which tend to also impose anti-competitive higher fees on their own customers, too. Third, the threat of surcharges causes consumers to switch banks to avoid fees. If consumers leave low-cost small community banks, then big banks gain even more market power, exacerbating their ability to charge higher fees and eliminating marketplace choice.

As PIRG's series of "Big Banks, Bigger Fees," reports have shown, big banks are using their leverage to raise fees, impose new fees and make it harder for customers to avoid fees, all the while watching their profits soar to record highs. In 1998, bank profits peaked for an eighth year in a row, reaching nearly \$62 billion, with fee income being a growing piece of the profits. Bank revenue from ATM surcharges alone totaled over \$2 billion.

With bank fees skyrocketing, basic services are being placed beyond the reach of many citizens -- about 10% of Americans nationwide now cannot afford a bank account. In order to keep consumers from being ripped off, we need to stop these outrageous fees by big banks. Banning the surcharge is a step in the right direction; it will keep consumer's money in their wallets, and show banks they cannot continue to gouge customers.

RECOMMENDATIONS

- Cities, states and Congress should continue to seek to ban the ATM surcharge, which is unfair and anti-competitive.
- Congress should rein in the Office of the Comptroller of the Currency (OCC). The federal bank regulator's abusive interpretations of its authority have had a chilling effect on the ability of states and cities to regulate unfair banking practices, including ATM surcharges, over-priced checking accounts and triple-digit payday loan companies.
- Congress should reinstate a requirement that the Federal Reserve Board publish an annual study of bank fees, a requirement that the Congress sunset in 1999.

ATTACHMENTS:

- (1) STATUS OF STATE AND LOCAL SURCHARGE BAN PROPOSALS (2 pages)
- (2) GRAPHIC DESCRIBING HOW CONSUMER PAYS TWICE AND BANK GETS PAID TWICE

STATUS OF ATM SURCHARGE BANS -- REGULATIONS/LAWS/ORDINANCES		
STATE REGULATIONS		
IOWA – banned ATM surcharges by Banking Commissioner order of October 23, 1997.	Although a District Court upheld Iowa's EFTA regulation on July 24, 1998, that decision was overturned by the 8th Circuit on September 2, 1999. The ruling was silent on the EFTA's surcharge provisions, and only discussed other provisions. On appeal, the Iowa Bankers Association, the Iowa Community Bankers Association, and the Iowa Credit Union League filed friend of the court briefs on the side of the state.	On February 2, 2000, the Iowa Attorney General filed a petition to the Supreme Court seeking review of its case.
CONNECTICUT – Banned ATM surcharges by Banking Commissioner order of November 9, 1998.	The State Supreme Court ruled in December 1999 that the Banking Commissioner did not have authority to ban surcharges. Since no preemption determination was made, the matter is proceeding in the legislature, not the federal courts.	Proposed House bill 5014 in the legislature would impose a surcharge ban by law. See below.
ENACTED CITY ORDINANCES BANNING ATM SURCHARGES		
Santa Monica (Ordinance proposed by Council members McKeown and Feinstein)	On October 5, 1999 the City Council voted to ban surcharges. A temporary injunction blocking implementation was granted by US District Court judge Vaughn Walker on 15 Nov 99.	On December 10, 1999 , the cities filed notice of appeal to the Ninth Circuit, supported by friend of the court briefs filed by 9 state Attorneys General (California, Connecticut, Iowa, Minnesota, Nevada, New York, Oregon, Washington, and West Virginia and also by CALPIRG and other consumer groups.
San Francisco	On November 2, 1999 city voters, by referendum (66%-34%), voted to ban surcharges. A temporary injunction blocking implementation was granted by US District Court judge Vaughn Walker on 15 Nov 99.	
Woodbridge, NJ	Enacted February 15, 2000 by 9-0 City Council vote, temporary injunction blocking implementation granted on February 17, 2000.	
PENTAGON BAN ON MILITARY BASES		
Proposed Rule, FR 11 Aug 1999 (Volume 64, Number 154) Page 43855-43858	Would ban ATM surcharges on military bases.	Following comment period, is under consideration by Pentagon. Decision possible in April.
CITIES CONSIDERING ORDINANCES		
New York City (Intro 680, Vallone)	City Council Speaker Peter Vallone has drafted bill, has more than half of council as co-sponsors, and has released a detailed staff report, "Guilty As Surcharged" <http://www.council.nyc.ny.us/loi/atm.pdf>	Hearings expected, April 2000
Newark, NJ	Bill introduced by Council member Carrino February 17, 2000.	
Chicago	Introduced by Alderman Joe Moore, February 2000.	Hearing held 13 Mar 00
Los Angeles	Voted unanimously in October to instruct City Attorney to examine City's authority to ban fees. Motion made by Council members Alex Padilla and Mike Hernandez. Heard in committee on February 16, 2000	At City Attorney's advice, waiting until the Santa Monica/San Francisco court case is decided before taking action.
San Diego County	San Diego County - Chairwoman Pam Slater first proposed the ban October 19, 1999.	No action expected until the Santa Monica/San Francisco court case is decided
San Diego	San Diego City - Deputy Mayor Byron Wear proposed an ordinance October 18, 1999.	Mayor refuses to docket issue for vote.
West Hollywood	To ban surcharges	Voted December 20, 1999 to

STATUS OF ATM SURCHARGE BANS -- REGULATIONS/LAWS/ORDINANCES		
		file an amicus brief on behalf of Santa Monica Sponsor was Council member Paul Koretz
Eugene (OR)	To ban surcharges	Campaign underway, bill may be drafted soon.
Salem, (OR)	To ban surcharges	Council voted 5-4 not to draft bill at this time.
Portland (OR)	To ban surcharges	Campaign underway, bill may be drafted soon.
STATE LEGISLATIVE PROPOSALS-2000 Session		
Connecticut (HB 5014-Landino)	Would ban ATM surcharges. The State Supreme Court ruled in December 1999 that the banking commissioner's administrative ban had overstated his authority. Since no preemption determination was made, the matter can be resolved in the legislature.	Hearings held February 17, 2000. Bill passed by Joint House-Senate Committee by vote of 11-6 on March 7, 2000 despite opposition of State Senator McDermott, Co-chair of Banking Committee (Similar to bill that passed House in 1999 by 125-20 but Senate floor action blocked by McDermott)
Illinois	To ban surcharges.	Committee defeated proposed ban 4-3 in February
Massachusetts (SB 19) Senator Andrea Nuciforo (Senate Chair of Banking Committee) and Representative Carol Donovan.	To ban surcharges	Pending in the Ways and Means Committee in the Senate. The bill has a majority of lawmakers signed on in support of the bill.
Minnesota HF 1849 (Entenza)	To ban surcharges.	March 11,2000, First Reading, referred to Commerce
W. Virginia (SB 188) (Majority Leader Chafin and Senator Bowman) Introduced January 25, 2000.	Would limit total cost to consumer of combined foreign fee and surcharge to a "total of fifty cents for any single ATM transaction"	Pending in Banking and Insurance Committee
Wisconsin (SB 325) Sen. Robson/Rep. Lehman.	To ban surcharges	Passed Senate Financial Institutions Comm. 3-2, killed on Senate floor 16-17 on February 8, 2000.
CONGRESSIONAL PROPOSALS		
H.R.3229 (Sanders-I-VT)	Introduced November 14 1999, would ban ATM surcharges.	No action by committee.
H.R. 3494 (Sanders-I-VT)	Introduced November 18, 1999, would clarify that no federal law supercedes Electronic Funds Transfer Act (EFTA) provision clearly granting states and localities authority to ban ATM surcharges.	No action by committee
H.R. 3503 (Waters-D-CA)	Introduced November 18, 1999, would ban ATM surcharges, would enact low-cost lifeline banking requirements and would reinstate Federal Reserve Board Annual Report to Congress on bank fees that was allowed to sunset in 1999.	No action by committee

For more information, see the state PIRG's ATM website:
<<http://www.stopatmfees.com>>