

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

In the Matter of)	
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
)	
National Association of State Utility)	CG Docket No. 04-208
Consumer Advocates' Petition for Declaratory)	
Ruling Regarding Truth-in-Billing.)	
)	
)	

**INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES**

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Pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") Rules, 47 C.F.R § 1.415, the National Association of State Utility Consumer Advocates ("NASUCA")¹ hereby submits these comments in response to the Commission's March 18, 2005 Second Further Notice of Proposed Rulemaking ("*Second FNRPM*") in these proceedings.²

I. INTRODUCTION AND SUMMARY OF COMMENTS.

On March 18, 2005, the Commission released its *Second FNRPM* in this docket seeking comments on issues related to the Commission's "Truth-in-Billing" rules and state jurisdiction over telecommunications carriers' billing practices. NASUCA hereby submits these initial

¹ NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g., Ohio. Rev. Code* Ch. 4911; *71 Pa.Cons.Stat. Ann.* § 309-4(a); *Md. Pub.Util.Code Ann.* § 2-205; *Minn. Stat.* § 8.33; *D.C. Code Ann.* § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.,* the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

² *I/M/O Truth-in-Billing and Billing Format: National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170 & CG Docket No. 04-208, FCC 05-55 (Rel. March 18, 2005 ("*Second FNPRM*"). A summary of the *Second FNPRM* was published in the Federal Register on May 25, 2005. *See* 70 Fed. Reg. 29979.

comments to respond to the questions set forth in the *Second FNPRM*, and to respond to other proposals regarding states' jurisdiction over carriers' billing practices.

As an initial matter, NASUCA notes that it has filed a petition for review of the declaratory ruling portion of the Commission's March 18, 2005 decision, which is currently pending in the United States Court of Appeals for the Eleventh Circuit.³ NASUCA's comments in response to the *Second FNPRM* in no way waive its opposition to the March 18, 2005 declaratory ruling or any arguments that it may present in support of its petition for review in the Eleventh Circuit. Moreover, NASUCA wishes to emphasize that it is generally opposed to the Commission's tentative conclusions in the *Second FNPRM* regarding states' jurisdiction over intrastate telecommunications services provided by both wireless and wireline carriers and that, by filing comments in response to specific Commission questions and proposals, NASUCA is not waiving that opposition or its right to petition for review of any final rules that the Commission may adopt.

In summary, NASUCA:

- Supports listing government mandated charges in a section of the customer's telephone bill separate from other charges, and further supports a definition of "government mandated charges" that includes only amounts that a carrier is required to collect and remit to government.
- Supports further separation of charges to include a section on customers' monthly telephone bills labeled "Carrier Imposed Charges," containing charges that carriers may, but are not required to, impose.
- Does not believe that the First Amendment presents an impediment to the Commission's adoption of national, uniformly labeled categories of charges on customer bills.
- Urges the Commission to adopt rules that prohibit carriers from recovering several types of costs in one line item and requiring carriers to characterize their line items as accurately and concisely as possible.

³ *National Association of State Utility Consumer Advocates*, No. 05-11682-DD (11th Cir., filed March 28, 2005). This action has been consolidated with a similar petition for review filed in the United States Court of Appeals for the Second Circuit. *Vermont Public Service Board v. FCC*, No. 05-12601-DD (2nd Cir., filed March 28, 2005).

- Supports the Commission’s adoption of point of sale disclosure rules to be concurrent with state laws applicable to such matters. Such rules should incorporate and build upon the point of sale provisions contained in the Assurance of Voluntary Compliance agreements negotiated by state Attorneys General in order to clearly apply to carriers’ agents, changes to existing service, providing for risk-free cancellation of service up to 45 days after receipt of the first bill, and establishing effective penalties.

II. BILLING OF GOVERNMENT-MANDATED AND NON-MANDATED CHARGES.

In the *Second FNPRM*, the Commission tentatively concludes that “where carriers choose to list charges in separate line items on their customers’ bills, government mandated charges must be placed in a section of the bill separate from all other charges.”⁴ NASUCA supports the Commission’s tentative conclusion that government-mandated charges should be listed in a section of the customer’s bill that is distinctly separate from those other portions of the bill setting forth monthly recurring charges, usage-based charges, and other charges that carriers impose at their discretion.

A. Distinction Between “Mandated” And “Non-Mandated” Charges.

The Commission also sought comment on “how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes.”⁵ The Commission indicated that it is considering two options in this regard. Defining the first option, the Commission asked whether it should “define government ‘mandated’ charges as amounts that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments.”⁶ Under the second option, the Commission would distinguish “between government mandated and non-mandated charges . . . based on whether the amount listed is remitted directly to a governmental

⁴ *Second FNPRM*, ¶ 39.

⁵ *Id.*

⁶ *Id.*, ¶ 40. Under this option, government mandated charges would include state and local taxes, federal excise taxes on communications services, and some state E911 fees. According to the Commission, non-mandated charges would consist of government authorized but discretionary fees, such as fees that carriers remit pursuant to regulatory action, such as Telecommunications Relay Service (“TRS”) and universal service charges, as well as administrative fees and other purely discretionary charges. *Id.*

entity or its agent.”⁷ Under this definition, the Commission notes, “‘mandated’ charges would differ from non-mandated ones in that non-mandated charges only would be composed of fees collected by carriers that go to the carrier’s coffers, and which are not directly related to any regulatory action or government program.”⁸

NASUCA believes the first option for defining “mandated charges” is the clearly superior choice between the two options and urges the Commission to adopt it for a number of reasons.

1. Achieving Truth-in-Billing Goals.

Most importantly, the first option will achieve the overriding goal of the Commission’s Truth-in-Billing efforts – namely to reduce or eliminate consumers’ confusion regarding the charges that appear on their monthly telephone bills. Defining government mandated charges as those charges carriers are required to collect and remit to government is a narrower and more accurate definition that conforms to the commonly understood, and logical, meaning of what is “mandated” by the government and what is not. The verb “mandated” is widely defined as “[t]o make mandatory; require,” while the adjective “mandatory” is defined as “[r]equired by or as if by mandate; obligatory.”⁹ Lawyers, regulators and business people understand these terms quite well. So do average consumers. Customer confusion is the end result of adopting a definition of government mandated that conflates “mandatory” charges with “permissive” or discretionary charges, as is the case with the Commission’s second option.¹⁰

The Commission is well aware that many consumers are confused by the manner in

⁷ *Id.*, ¶ 41.

⁸ Under the second option for defining government mandated charges, universal service charges would be considered mandated, though line items for administrative and other costs related to collecting universal service fund contributions would be considered non-mandated. *Id.* This arrangement obviously increases the chances of customer confusions as carrier universal service charges relating to its contribution end up in two different sections of the customer’s bill, one “mandated,” the other not.

⁹ See *The American Heritage Dictionary: Second College Edition* 761 (1985); see also *Webster’s II New College Dictionary* 664 (1995); *Oxford American Dictionary* 403 (1980).

¹⁰ See *I/M/O Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (May 11, 1999) (“*TIB Order*”).

which carriers currently denominate their monthly end-user charges and the manner in which carriers place those charges on the customers' bill. The Commission received over 19,000 comments from individual consumers in response to NASUCA's petition for a declaratory ruling in CG Docket No. 04-208. To NASUCA's knowledge, not one of those 19,000 commenters suggested that consumers were clearly informed as to the origin or basis of the charges appearing on their monthly telephone bills. Similarly, as the Commission noted in its March 18, 2005 order, the bulk of telecommunications consumer complaints received by the Commission involve carriers' bills and charges.¹¹

If the Commission wants to reduce consumer confusion over the charges appearing on monthly telephone bills, then it should adopt rules that do not define government mandated charges to include charges that are discretionary, *i.e.*, charges that have been authorized or permitted but not required. Specifically, discretionary charges should not be allowed in a section of the telephone bill identified as "government mandated charges."

2. Deterrence.

Adopting the straightforward definition of government mandated charges proposed in the Commission's first option should deter carriers from blaming the government for charges that they are not required to pass through to customers. Carriers have strong incentives to blame government, rather than themselves, for the charges their customers must pay – and the record developed in response to NASUCA's petition for a declaratory ruling bore this out. This phenomenon is not limited to wireless or wireline interexchange carriers ("IXCs") – local carriers likewise find it easy to blame the Commission for discretionary charges they impose on customers.

The Commission should consider, for example, the subscriber line charge ("SLC") that it

¹¹ *Second FNPRM*, ¶¶ 14, 16.

has previously authorized – but not required – local exchange carriers to recover. The SLC recovers local telephone plant costs assigned to the interstate jurisdiction, *i.e.*, local loop costs incurred by local carriers when the loop is accessed by IXCs to complete toll calls.¹² The Commission previously authorized competitive local exchange carriers (“CLECs”) to impose SLCs in the same fashion as incumbent local exchange carriers (“ILECs”), and even suggested that an ILEC’s SLC could serve as a benchmark for the CLEC operating in the ILEC’s territory in setting its own SLC.¹³ CLECs have accepted the Commission’s invitation to impose SLCs but do not use the ILEC’s SLC as a benchmark and choose instead to impose higher charges than the incumbent.

More troubling, some CLECs misleadingly characterize their SLCs as having been approved by the Commission when clearly they are not, and misleadingly attribute recent SLC increases to Commission action. For example, VarTec Telecom, Inc. (“VarTec”) recently increased its primary line SLC for its “OneChoice” local service plan by \$3, to \$9.50/month, effective February 17, 2005, and increased the SLC by \$2.50 for each additional line.¹⁴ VarTec explained that the increase to its “*FCC Approved*” SLC was “in response to changing business and regulatory conditions affecting the costs of competitive access to local telephone lines.”¹⁵ Similarly, Sage Telecom, Inc. (“Sage”) recently sent a letter to its customers advising them that, due to Sage’s new interconnection agreement with SBC – negotiated in the wake of the *USTA II*

¹² See, e.g., *I/M/O Access Charge Reform*, Sixth Report and Order, Report and Order and Eleventh Report and Order, 15 FCC Rcd 12962, 12998-99, ¶¶ 91-93 (May 31, 2000) (“*CALLS Order*”).

¹³ See *I/M/O Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Order, 17 FCC Rcd 10868, 10870, ¶ 2 fn. 8 (2002).

¹⁴ See Attachment A. NASUCA understands that VarTec’s affiliate, Excel Telecommunications, Inc. has taken identical action to increase the SLCs Excel charges its customers.

¹⁵ Given the timing of VarTec’s SLC increase and its explanation, NASUCA suspects that VarTec’s action is a response to the Commission’s recently released unbundling rules. See *I/M/O Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533 (2005).

decision¹⁶ – and the resulting increases in its wholesale costs paid to SBC, “it is necessary for us to raise the FCC [SLC] \$3.00 per line starting next month.”¹⁷

Prohibiting carriers from placing charges that the Commission has authorized, but not required, in a “government mandated charges” section of the telephone bill may at least mitigate some of the confusion consumers experience as a result of such misleading carrier communications.

3. Consistency with Truth-in-Billing Rulings.

As the Commission recognized in the *Second FNPRM*, defining government mandated charges to include only those charges carriers are required to impose and subsequently remit to the government is consistent with its earlier pronouncements in the context of Truth-in-Billing on end-user charges imposed by carriers to recover their contributions to the federal universal service fund.¹⁸ Similar pronouncements are found in other Commission statements in the Truth-in-Billing and other contexts. For example, in its *TIB Order*, the Commission recognized that labeling a line-item charge as mandated when it is not makes it more difficult for consumers to understand their bills and shop for the best value for the telecommunications services they need:

As the record in this proceeding demonstrates, line-item charges are being labelled [sic] in ways that could mislead consumers by detracting from their ability to fully understand the charges appearing on their monthly bills, thereby reducing their propensity to shop around for the best value. Consumers misled into believing that these charges are federally mandated, or that the amounts of the charges are established by law or government action, could decide that such shopping would be futile. In addition, lack of standard labeling could make comparison shopping infeasible. Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce. For example, when a consumer purchases socks from the local department store, the consumer knows what item the bill refers to, whether it

¹⁶ *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.), cert. denied sub nom., *Nat’l Ass’n of Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 160 L. Ed. 2d 223, 125 S. Ct. 313, 2004 U.S. LEXIS 6710 (2004) (“*USTA II*”).

¹⁷ See Attachment B. NASUCA understands that Sage’s SLC is now \$8.38/month, after the increase.

¹⁸ *Id.*, ¶ 40.

describes the product as socks, men's wear, hosiery, etc. In contrast, a consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill.¹⁹

The 19,000 comments filed in CG Docket No. 04-208 noted above demonstrate that consumers' confusion has not abated in the six years since the Commission's Truth in Billing order was issued.

In decisions regarding universal service there have been similar concerns over the misleading nature of allowing carriers to characterize universal service contributions as taxes or otherwise mandated charges when carriers have flexibility to recover such contributions through rates or surcharges. For example, the Federal-State Joint Board on Universal Service ("Joint Board") wrote:

We believe that inaccurately identifying or describing charges on bills that recover universal service contributions may violate section 201(b) of the Act. For instance, it is important for consumers to understand that universal service support has long been implicit in the rates for various intrastate and interstate telecommunications services. We therefore recommend that the Commission take decisive action to ensure that consumers are not misled as to the nature of charges on bills identified as recovering universal service contributions. *Specifically, we recommend that the Commission consider prohibiting carriers from identifying as a "tax" or as mandated by the Commission or federal government any charges to consumers used to recover universal service contributions. Similarly, we recommend that the Commission consider prohibiting carriers from incorrectly describing as mandatory or federally-approved any universal service line items on bills.* This restriction would include both written descriptions of the charges and any oral descriptions from consumer service representatives *as well as placement on the bill.* While interstate telecommunications providers are required to contribute to the universal service support mechanisms, they are not required to impose such charges on consumer bills.²⁰

Limiting government mandated charges to those charges required by, and remitted by carriers to, federal, state or local governments is also consistent with the Commission's joint policy statement with the Federal Trade Commission ("FTC") regarding carrier advertising of

¹⁹ *TIB Order*, 14 FCC Rcd at 7532, ¶ 62 (emphasis added); *see also id.*, ¶ 63 (carriers should be prevented from misleading consumers into believing they cannot "shop around" to find carriers that charge less for fees "resulting from federal regulatory action") (emphasis added).

²⁰ *In the Matter of Federal-State Joint Board on Universal Service*, Second Recommended Decision, 13 FCC Rcd 24744, 24771-24772, ¶ 70 (1998) (emphasis added).

dial-around services.²¹ Although the subject of the *Advertising Joint Policy* concerned advertising *per se* rather than billing practices, the observations and concerns regarding customer confusion resulting from carriers' communications regarding pricing and services in carrier advertising that were noted by the Commission and the FTC should apply to billing. This is made clear by the parallels between the consumer protection concerns expressed in both the *TIB Order* and the *Advertising Joint Policy*, as well as the measures designed to protect consumers in both decisions.²²

Like the Commission's *TIB Order*, which was intended to address the increase in complaints regarding slamming, cramming and misleading bills, the *Advertising Joint Policy* was intended to deal with "the proliferation of advertisements for dial-around numbers, long-distance calling plans, and other new telecommunications services, *as well as an increase in the number of complaints regarding how these services are promoted.*"²³ In accord with the Commission's observations in the *TIB Order*, both agencies noted how critically important accurate information is to consumers in the context of carrier advertising of long-distance services and rates in the *Advertising Joint Policy* and accordingly adopted an expansive view of what constitutes misleading or deceptive advertising by carriers:

A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances about a material fact. Material facts are those that are important to a consumer's decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. The cost of a product or service is an

²¹ See *I/M/O Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, Policy Statement, File No. 00-72, FCC 00-72, (rel. March 1, 2000) ("*Advertising Joint Policy*").

²² For example, the Commission noted that the "fundamental principles" enunciated in the *Advertising Joint Policy* "apply across the board" and that misleading information in ads for dial-around services would likely be deceptive in ads for long-distance dialing plans if the same misrepresentations or omissions occurred. *Id.*, ¶ 9. The Commission also noted that "the same standards of truthfulness apply regardless of the medium advertisers choose to communicate their message to consumers," regardless of whether that medium is television, radio, magazines, newspapers, direct mail, telemarketing, the Internet or oral representations made by customer service representatives. *Id.*

²³*Id.*, ¶ 3 (emphasis added).

*example of an attribute presumed material.*²⁴

“The issue,” the agencies wrote, “is whether the act or practice is likely to mislead, rather than whether it causes actual deception.”²⁵ To make this determination, the agencies look to the “net impression” conveyed to consumers by the ad in question, “the entire mosaic, rather than each tile separately.” Under this standard, “even if the wording of an ad may be literally truthful, the net impression conveyed to consumers may still be misleading.”²⁶ Applying a “net impression” standard, it is clear that consumers would be misled regarding the true source of the charges they are billed if discretionary charges authorized but not required by government action are included in a section of the bill listing government mandated charges.

Nor are disclaimers or explanations buried in fine print somewhere on the back of a bill likely to remedy the customer confusion that will flow from the Commission’s adoption of the second option. In the *Advertising Joint Policy*, the Commission observed that “in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.”²⁷ Accurate information contained in the text of the ad, both the Commission and FTC noted, may not remedy a misleading impression created by a headline, and disclosures in the fine print or legalistic or ambiguous disclaimers likewise do not cure the problem.

4. Benefits to Carriers.

Since the universe of charges that federal, state and local governments *require* carriers to collect and remit to the government is far smaller than the universe of charges carriers *may* impose pursuant to government authorization, it should be easier for carriers to place just those charges in the government mandated charges section of the bill. For example, other than the 3%

²⁴*Id.*, ¶ 5 (emphasis added).

²⁵*Id.*, ¶ 6.

²⁶*Id.*

²⁷*Id.*, ¶ 8.

federal excise tax on telecommunications services, there are no federal line items or fees that carriers are required to charge their customers and remit to the government. All the federal fees and charges that currently appear on customers' bills (*e.g.*, SLCs, universal service fund charges, local number portability charges, E911 charges) are authorized but not required. Moreover, with the exception of universal service fund charges, carriers remit none of the revenues generated by these federally-authorized charges to the government.

In contrast, carriers are required to impose most state and local charges and are usually required to remit the revenues from such charges to the governing body responsible for the charge. Adopting the Commission's first option would enable carriers and consumers alike to benefit from an apples-to-apples comparison of government mandated charges.

5. Consistency with Other Enforcement Actions.

Finally, as the Commission recognized, limiting charges that may be included in a "government mandated charges" section of the customer's monthly telephone bill to only those charges required by, and remitted to, the government, is consistent with the Assurance of Voluntary Compliance ("AVC") agreements negotiated by thirty-three states' Attorneys General with Verizon Wireless, Cingular Wireless and Sprint PCS.²⁸ Those agreements which, unlike CTIA's Consumer Code,²⁹ are *legally binding and enforceable*, require the wireless signatories to:

- a. separate (i) taxes, fees, and other charges that Carrier is required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs, from (ii) monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges (including but not limited to Universal Service Fund fees), except when such taxes, fees, and other charges are bundled in a single rate with the monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges; and

²⁸ *Second FNPRM*, ¶ 40.

²⁹ CTIA, *Consumer Code for Wireless Service* ("CTIA Code") (available at www.ctia.org).

b. not represent, expressly or by implication, that discretionary cost recovery fees are taxes.³⁰

The AVCs each provide that the agreement binds not only the carrier, but also on “any and all of its affiliates, successors, employees, shareholders, officers, directors, and assigns.”³¹ Customers formerly served by AT&T Wireless are now covered by the *Cingular AVC*, just as customers currently served by Nextel will be covered by the *Sprint AVC* if that merger is ultimately approved. Thus, nearly two-thirds of wireless customers served in over two-thirds of the country are currently governed by the terms of these three AVCs.³² This fact supports the Commission’s adoption of rules limiting charges that are placed in a “government mandated charges” section of the telephone bill to charges required by, and remitted to, federal, state or local governments.

B. Separate Section For Government Mandated Charges.

Given the level of customer confusion and anger over the number of charges that appear on their monthly telephone bills displayed in the record, and the carriers’ apparent enthusiasm for characterizing many discretionary charges in a manner suggesting that the charges are mandated by government action, NASUCA strongly supports Commission action requiring carriers to include a separate section for government mandated charges on monthly bills. NASUCA’s support for such action is premised, however, on the Commission adopting a definition of “government mandated charges” consistent with the first option discussed in the

³⁰ See *I/M/O Cingular Wireless LLC*, Assurance of Voluntary Compliance, ¶ 36 (Effective July 21, 2004); (“*Cingular AVC*”); *I/M/O Sprint Spectrum, L.P.*, Assurance of Voluntary Compliance, ¶ 36 (Effective June 25, 2004) (“*Sprint AVC*”); *I/M/O Cellco Partnership, d/b/a Verizon Wireless*, Assurance of Voluntary Compliance, ¶ 36 (Effective June 25, 2004) (“*Verizon Wireless AVC*”).

³¹ See *Cingular AVC*, ¶ 49; *Sprint AVC*, ¶ 49; *Verizon Wireless AVC*, ¶ 49.

³² According to the latest data available, at the end of 2003, Cingular held 30.3% of the nationwide wireless market (including AT&T Wireless’ subscribers to reflect the companies’ merger), Sprint held 10.5% of the national market and Verizon Wireless has a 24.7% share of the national market. See Wireless Competition Bureau, Federal Communications Commission, *Ninth Annual CMRS Report*, Appendix A, Table 4 (Sept. 2004). If the merger of Sprint and Nextel merger is approved, that entity would hold nearly 20% of the market, driving the number of wireless customers potentially covered by the AVCs to roughly 75%. *Id.*

Second NPRM. In other words, if the Commission determines that only charges that are required by, and remitted to, federal, state and local government should be considered “government mandated charges,” then such a separate section should be required for monthly bills.

However, if the Commission concludes that discretionary charges should be allowed to be listed as “government mandated,” then allowing carriers to place such charges in a separate section so denominated will only reinforce consumers’ erroneous notion that government is indeed the source of the numerous fees and line items that carriers use to recover their ordinary operating costs. Such action would undermine, if not eviscerate, the consumer protection efforts embodied in the Commission’s *TIB Order* – something NASUCA cannot support.

C. Other Considerations.

1. Additional Separation of Billed Charges.

The Commission seeks comment whether bills should separate only government-mandated from non-mandated charges or whether it should require separations of categories of charges beyond that. NASUCA supports further separation of charges.

In addition to requiring carriers to list government-mandated charges in a separate portion of customers’ bills (in accordance with NASUCA’s proposal defining what constitutes “government-mandated” charges), the Commission should mandate that other charges that carriers may, but are not required to, impose be separated into one other category of charges on the bill, which NASUCA suggests should be labeled “Carrier Imposed Charges.” In this portion of the bill, carriers could include government-authorized charges which they *may* impose, regardless of whether the revenues generated by the charge is remitted to the government. In this section of the monthly bill, carriers could include, for example. their monthly universal service charge, local number portability charge, charges that recover property tax assessments, service-related surcharges (such as paper billing fees, payphone use surcharges) and any charges that

otherwise recover the carrier's operating costs (*e.g.*, regulatory compliance and proceedings, access charges, etc.).

By designating such charges as "Carrier Imposed," consumers would be accurately, and concisely, informed about the true source of the charges included in this portion of the bill: the carrier. The records in both the Commission's original Truth-in-Billing proceeding and CG Docket No. 04-208 make it clear that consumers are often confused and frustrated not only by the number of charges that appear on their monthly bills, but also over the source of those charges.³³ The records in these proceedings also suggest that consumers are confused and frustrated by the format of their bills, including the mixing together of surcharges that are mandated with those that are discretionary and often bear little or no relationship to government action.

2. Nationally Uniform Categories of Charges.

The Commission also sought comment whether the labeling of such categories of charges should be subject to nationally uniform standards and, if so, what such categories should be called.³⁴ Given the disparate and varying manner in which carriers have identified their monthly line items and surcharges and placed them on customers' bills,³⁵ NASUCA believes that the consumers' interest in clear and non-misleading charges, as well as consumers' interest in being able to make reasonable price comparisons between competing providers or services, requires guidance in labeling these categories of charges.

While the surcharges carriers may impose at their discretion will likely vary to a considerable extent among carriers (some may impose a surcharge to recover property taxes they pay while others may not, for example), consumers should be able to readily discern not only the

³³ See, *e.g.*, *TIB Order*, 14 FCC Rcd at 7494-96, ¶¶ 3-4; *Second FNPRM*, ¶¶ 16, 18.

³⁴ *Second FNPRM*, at ¶ 44.

³⁵ See *NASUCA Initial Comments, infra*.

total amount of discretionary line items different carriers charge, but also what costs the carriers recover through such charges. This is hardly the apples-to-apples price comparison that NASUCA sought in its petition for declaratory ruling, but at least it is a fruit-to-fruit comparison.

However, to the extent the Commission equates uniformity with federal preemption of state billing regulations, NASUCA is opposed to this determination, as set forth more fully hereafter.

3. There Are No Legal or Policy Impediments to Separately Labeled Categories of Charges.

The Commission also asked parties to comment whether the First Amendment presents an impediment to standardized labeling.³⁶ NASUCA does not believe there are any such legal or policy impediments to the Commission's adoption of national, uniformly labeled categories of charges.

As an initial matter, the First Amendment does not constitute a legal impediment to the Commission's imposition of standardized labeling for the categories of charges NASUCA proposes. NASUCA discussed, at length, in its petition and comments filed in CG Docket No. 04-208, why the First Amendment does not prohibit the Commission from adopting reasonable truth-in-billing rules that apply to their line item charges, including standardized labeling requirements for categories of carrier charges.³⁷ NASUCA incorporates those comments here.

The standardized labeling of categories of charges that NASUCA proposes here, into "Government Mandated Charges" and "Carrier Imposed Charges" is concise and accurate, is not overly burdensome on the carriers, and is designed to reduce consumer confusion regarding the origin and nature of the costs being recovered in the charge, which in turn advances the government's substantial interest in protecting consumers from misleading or deceptive carrier

³⁶ *Id.* at ¶ 45.

³⁷ See *NASUCA Petition*, CG Docket No. 04-208, at 62-65 (March 31, 2004); *NASUCA Reply Comments*, CG Docket No. 04-208, at 31-55 (Aug. 13, 2004).

billing practices. So long as the Commission’s labeling requirements respect the separate jurisdiction of state commissions over intrastate telecommunications service or those services that states are expressly authorized to regulate (*e.g.*, other “terms and conditions” of commercial mobile service), NASUCA does not believe that are any other potential legal impediments to the Commission’s adoption of uniformly labeled categories of charges on carriers’ monthly bills.

4. There May Be Impediments to Delegating Enforcement of the Commission’s Truth-In-Billing Rules to the States.

The Commission also seeks comment regarding what separate role, if any, states should have with respect to labeling and determining what labels and descriptions are misleading.³⁸ In addition, the Commission asks whether, if it establishes national rules, the Commission can have states enforce those rules.³⁹

The first question presupposes that the Commission will not preempt states from adopting or enforcing their own truth in billing rules or other consumer protection provisions to regulate carriers’ billing and related practices. As is made clear throughout these comments, NASUCA strongly opposes any such preemption of states’ regulation of carriers’ billing practices. To the extent states are not preempted, they would play the same role that they currently do, namely enforcing any general or industry-specific state laws and regulations governing carriers’ billing practices. The Commission’s truth-in-billing regulations could serve as a model for states considering their own rules and should constitute a floor, rather than a ceiling, on states enacting their own billing rules and regulations. State deceptive and unfair trade practices laws, other general state consumer protection laws, and state industry-specific laws and regulations – coupled with the Commission’s truth in billing rules and other guidance (*e.g.*, the *Advertising Joint Policy*) – would provide the principles governing whether a particular charge or billing

³⁸ *Second FNPRM*, ¶ 45.

³⁹ *Id.*

practice is unreasonable or unlawful under state law.

The Commission's second question may or may not contemplate preemption of state regulation of CMRS providers' and IXCs' billing practices. If the Commission's question is premised on the notion that the Commission will preempt such state regulation but give states the option of electing to enforce the Commission's exclusive, national truth-in-billing regulations, then NASUCA is opposed to the Commission's effort altogether as an unlawful preemption of state authority to regulate matters traditionally within their jurisdiction.

NASUCA has concerns even if the Commission's question does not contemplate preemption of state jurisdiction over CMRS providers' and IXCs' intrastate billing practices, but instead is proposing a regulatory model analogous to the Commission's slamming regime which allows the states to elect to enforce the Commission's scheme for interstate services. Although NASUCA does not necessarily oppose such a regulatory model, it believes that such a proposal may be considered an unlawful sub-delegation of the Commission's authority. In *USTA II*, the D.C. Circuit rejected the Commission's effort to delegate its "impairment" determinations under section 251(d)(2) to state commissions, holding that:

While federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so.⁴⁰

The Commission's slamming regulatory scheme was adopted pursuant to section 258 of the Act.⁴¹ Unlike the sections of the Act pursuant to which the Commission proposes to adopt an exclusively federal truth-in-billing regulatory scheme that states could enforce,⁴² section 258

⁴⁰ *USTA II*, 359 F.3d at 566. Enforcement decisions presumably would fall within the rubric of "decision making."

⁴¹ *I/M/O Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd. 15996, 15997-98, ¶¶ 1-2 (2000).

⁴² Actually, NASUCA is not entirely certain what sections of the Act the Commission is relying on in this regard since the *Second FNPRM* does not make this clear.

included express language allowing states to enforce the Commission's verification procedures and slamming rules.⁴³ Section 258(a) provides, in part, that “[n]othing in this section shall preclude any State commission from enforcing such [verification procedures as the Commission shall prescribe] with respect to intrastate service.”⁴⁴ It is unclear whether there is any provision in the sections of the Act pursuant to which the Commission presumably would adopt its truth-in-billing rules analogous to section 258(a). Having chosen not to challenge the *USTA II* decision, NASUCA does not believe the Commission can now take action inconsistent with that ruling.⁴⁵

5. Misleading Carrier Charges Must be Eliminated.

The Commission also asks a series of questions regarding whether certain carrier charges and billing practices are misleading. For example, the Commission asks whether it is misleading for carriers to include expenses like property taxes, regulatory compliance costs and billing expenses in line items labeled such as “regulatory assessment fees” or “universal connectivity charge.”⁴⁶ The Commission also asks for comment on whether surcharges identified as “regulatory assessment fees” or “cost recovery charges” are sufficiently clear and specific enough to comply with the requirements of 47 C.F.R. § 64.2401(b). As set forth more fully in NASUCA's March 31, 2004 petition to the Commission, as well as its comments filed in CG Docket No. 04-208, the answer to the first question is “yes,” and the response to the second question is correspondingly “no.” NASUCA incorporates its earlier comments here.⁴⁷

In light of the inherently misleading, if not downright deceptive, nature of labeling these charges as “regulatory assessments” or “cost recovery charges,” NASUCA urges the

⁴³ 15 FCC Rcd. at 16007, ¶ 21.

⁴⁴ 47 U.S.C. § 258(a).

⁴⁵ NASUCA notes that it disagrees with much of the D.C. Circuit's reasoning and conclusions in *USTA II*.

⁴⁶ *Second FNPRM*, ¶ 47.

⁴⁷ *See, e.g., NASUCA Petition*, CG Docket No. 04-208, at 27-35 (March 31, 2004); *NASUCA Reply Comments*, CG Docket No. 04-208, at 15-28 (Aug. 13, 2004)

Commission to adopt rules that prohibit carriers from recovering several types of costs in one line item. Thus, if carriers want to recover the federal, state or local property taxes they pay on utility real or personal property, then the line item that recovers those taxes should recover only those taxes. Prohibiting carriers from aggregating disparate operating expenses enables consumers and regulators to at least have some chance to determine how much of a particular line item is directed toward recovering a particular cost and to determine whether the surcharge bears some reasonable relationship to the carrier's expenses.

NASUCA also urges the Commission to require carriers to characterize their line items as accurately and as concisely as practical, in order to allow consumers to readily understand what it is they are paying for. This is another reason why the Commission ought to prohibit line items that aggregate disparate costs and expenses. To take the preceding example of a line item that recovers property taxes paid by the carrier, the Commission should require carriers to characterize that line item as "Property Tax Recovery Charge."⁴⁸ A line item that recovers access charges paid by the carrier should be labeled something like an "Access Charge Fee." Granted, NASUCA's proposal may produce a plethora of line items that appear on a customer's bill. This is an unavoidable consequence, however, of the Commission's decision to allow carriers to recover any operating expenses through line item surcharges rather than through monthly or usage-based rates.⁴⁹ On the other hand, at least wireless carriers made it clear, in comments to the press and the Commission in reaction to NASUCA's petition for a declaratory

⁴⁸ If carriers include a line item that recovers costs from multiple jurisdictions or sources, such as property tax assessments or compliance with government regulation, NASUCA believes that the Commission should require the carriers to provide, in the description of charges that carriers include in the monthly bill, information disclosing which states' or local governments' property taxes or which federal or state regulatory programs are included in the charge. In the alternative, NASUCA believes the carriers should include at least a reasonably conservative estimate of their total direct costs associated with such taxes, regulatory programs.

⁴⁹ While NASUCA originally sought to reduce the number of carrier charges appearing on customer bills through its petition for declaratory ruling in CG Docket No. 04-208, the Commission has rejected that effort.

ruling, that customers want more information - not less - on their bills and that carriers want to convey to customers an accurate idea of just how much government regulation and mandates cost them.⁵⁰ To the extent more charges may appear on consumers' telephone bills as a result of NASUCA's proposal on this point, that is in accord with these carriers' comments to the Commission, regulators and the media regarding what they think the public wants.

III. COMBINING FEDERAL REGULATORY CHARGES IN LINE ITEMS.

The Commission seeks comment on whether it is unreasonable under section 201(b) of the Communications Act of 1934, as amended (the "Act"), for carriers' line items to combine federal regulatory charges.⁵¹ As it made clear in its original petition for a declaratory ruling and in comments, filed in CG Docket No. 04-208, NASUCA believes that carriers' practice of combining federal regulatory charges into one or more line items violates section 201(b) of the Act and directly conflicts with the concerns identified by the Commission in its *TIB Order*.

Section 201(b) of the Act provides:

All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.⁵²

The Commission has already – in its *TIB Order* – spoken to the misleading and deceptive nature of “lump sum” surcharges and fees that seek to recover costs associated with numerous regulatory programs. On this point, the Commission wrote:

We believe that so long as we ensure that consumers are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner. Moreover, we are concerned that precluding

⁵⁰ See, e.g., AT&T Wireless Comments at 8-9; Cingular Comments at 7; CTIA Comments at 3-4, 5-6; Global Crossing Comments at 2; Leap Comments at 14; NTCA Comments at 3-4; Rural Cellular Ass'n at 3, 8; Sprint Comments at 11; US Cellular Comments at 2; Verizon Comments at 7; see also Comments of Michael Altschul to the FCC Consumer Advisory Committee (June 18, 2004).

⁵¹ *Second NPRM*, ¶ 48.

⁵² 47 U.S.C. § 201(b).

a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures. *Insofar as regulatory-related charges have different origins, and are applied to different service and provider offerings, we also question whether implementation of a lump-sum figure for all charges resulting from federal regulatory action could be presented in a manner which consumers could clearly understand the origin of such a charge.*⁵³

NASUCA urges the Commission to recall that its avowed "goal is to enable consumers to make comparisons among different service providers in connection with these charges."⁵⁴ Lump sum charges, such as those identified in NASUCA's comments in CG Docket No. 04-208, hinder rather than help consumers' efforts to make accurate comparisons among different carriers. As such, they should not be allowed.

The Commission's concerns about lump sum charges clearly apply to the interexchange carrier line items complained of in NASUCA's March 31, 2004 petition in CG Docket No. 04-208. For example, AT&T's "Regulatory Assessment Fee" purportedly helps the company recover "interstate access charges; regulatory compliance and proceedings costs and property taxes," costs that clearly have "different origins" and apply to "different service and provider offerings."⁵⁵ AT&T customers have no way of ascertaining what "regulatory compliance and proceedings" involves, whether only telecommunications regulation or all government regulation (federal or state) is implicated, and cannot even begin to guess what the carrier's cost of complying with a particular government regulatory program might be. NASUCA noted the same concerns with "carrier cost recovery" line items imposed by Sprint, MCI, BellSouth, and

⁵³ *TIB Order*, 14 FCC Rcd. at 7527-28, ¶ 56 (emphasis added). It is true that, in the next breath, the Commission "recognize[d] that consumers may benefit from a simplified total charge approach," and therefore encouraged industry and consumer groups to consider whether categorization and aggregation of charges would be advisable (such as putting all line items associated with long distance service together and putting all line items associated with local service together). *Id.* The question whether a total charge approach truly offered benefits was never answered because the collaborative effort between industry and consumer groups envisioned by the Commission never materialized.

⁵⁴ *Id.* at 7527, ¶ 55.

⁵⁵ *NASUCA Petition* at. 12-13.

others.⁵⁶

The same concerns applied to CMRS providers' line items that recover costs associated with a grab bag of regulatory programs. For example, AT&T Wireless' charge helps to fund compliance "with various government mandated programs which may not be available yet to subscribers," while ALLTEL's "recoup[s] expenses incurred to provide government mandated services" and Cingular's "help[s] defray its costs incurred in complying with obligations and charges imposed by State and Federal telecom regulations."⁵⁷

In the *TIB Order*, the Commission wrote:

The record in this proceeding persuades us that unclear or cryptic telephone bills exacerbate consumer confusion, as well as the problems of cramming and slamming.

* * *

We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague information, such as, for example, charges identified as "miscellaneous," would not conform to our guideline.⁵⁸

Line items that aggregate multiple regulatory programs' costs together, or worse, aggregate numerous disparate costs of regulatory compliance and assorted operating costs, are, practically speaking, no different from a line item entitled "Miscellaneous."⁵⁹

IV. PREEMPTION OF INCONSISTENT STATE REGULATION.

The truly critical component of the *Second FNPRM* consists of a number of tentative

⁵⁶ *Id.*, at 13-15.

⁵⁷ *Id.*, at 18-20.

⁵⁸ *TIB Order*, 14 FCC Rcd at 7517-18, ¶¶ 39-40.

⁵⁹ In fact, a line item entitled "miscellaneous" would be preferable to one entitled "federal regulatory compliance fee" or such like. A line item described as "miscellaneous" is objectionable because it fails to provide any information about what the consumer is being billed for. This is, the Commission rightly noted, bad. Line items that recover a grab bag of operating costs under the moniker "regulatory fee" are worse. Consumers still don't know what they're being billed for but they're led to believe that it's the government's fault. With these regulatory line items consumers are not only left confused, they are also misled and invited to direct the ire that results toward "Big Brother" rather than the carrier that opts to recover its operating costs through a line item.

conclusions regarding “preemption of state billing practices regulations that are inconsistent with our truth-in-billing rules, guidelines and principles” and request for comment regarding those conclusions or their underlying legal bases.⁶⁰ The Commission’s assertions and tentative conclusions with regard to preempting state regulatory authority over billing matters are fundamentally wrong.⁶¹

The Commission’s tentative conclusions, and their underlying premises, eliminate the concept of dual sovereignty between states and the federal government enshrined in the Constitution and embodied in the Act itself. Taken to their logical conclusion, the Commission’s conclusions would eliminate any role for the states in regulating telecommunications carriers – whether providers of local service, intrastate long distance service or wireless carriers providing service within a state. NASUCA opposes any action by the Commission to adopt its tentative conclusions and disagrees with the flawed Commission reasoning that led to those conclusions.

A. The Commission’s “Pro-Competition” Scheme Does Not Authorize Complete Preemption of State Jurisdiction Over Carriers’ Billing Practices.

Based on arguments advanced by wireless carriers “primarily in *ex parte* submissions,” the Commission tentatively concludes that one or more theories provide additional support – beyond that contained in the rate and entry preemption provision of section 332(c)(3) of the Act – for preemption of state regulations related to billing.⁶² In this regard, the Commission asserted that “there are clearly discernible federal objectives that may be undermined by states’ ‘non-rate’ regulation of CMRS carriers’ billing practices,” apparently being “the Commission’s pro-

⁶⁰ See *Second FNPRM*, ¶ 50-54.

⁶¹ The tentative conclusions and reasoning set forth in the *Second FNPRM* are so sweeping and so objectionable to NASUCA that the association finds itself compelled to respond with uncharacteristically blunt criticism. That cannot be helped. However, NASUCA notes that two of the Commission’s five members dissented from the *Second FNPRM*, as well as the declaratory ruling portion of the March 18, 2005 order. See *Second FNPRM*, Separate Statement of Michael J. Copps and Separate Statement of Jonathan S. Adelstein. NASUCA genuinely appreciates, and supports, the comments of Commissioners’ Copps and Adelstein and wishes to make this point clear.

⁶² *Second FNPRM*, ¶ 49 & fn. 147-48.

competitive federal scheme for truth in billing regulation” identified by several wireless carriers.⁶³ Relying on this theme, the Commission sought comment whether it should preempt state regulation of wireless carriers’ billing practices beyond the preemption of state authority over line items announced in the declaratory ruling portion of its March 18, 2005 order and sought comment regarding the degree to which “such ‘conflict preemption’ [can] be applied to *all* carriers under the provisions of the Act and other policy frameworks.”⁶⁴

Nothing in the Constitution, the Act, judicial precedent or the telecommunications industry supports the broad preemption contemplated by the Commission in the *Second FNPRM*. State commissions have long regulated the billing practices of local, interexchange and wireless carriers, in order to ensure that those practices are fair, reasonable, lawful, nondiscriminatory, etc. under terms of state law. These regulations have existed alongside federal regulatory, or deregulatory, policies and rules.

According to the Commission, such state regulations must now be preempted in order to achieve the Commission’s goal of promoting competition.⁶⁵ The Commission does not discuss what changes in the law compel this sweeping change in regulatory policy. The Commission cites no expression of Congressional intent or any particular provision of the Act in support of its conclusions. In fact, the expressions of Congressional intent in the 1993 amendments to section 332(c)(3) contradict the Commission’s conclusions. Section 332(c)(3)(A) expressly preserves to states jurisdiction over “other terms and conditions” of wireless service.⁶⁶ The legislative history of the section provides strong evidences of Congress’ intent that preemption of state jurisdiction over commercial mobile services was meant to be limited, and that the reservation of jurisdiction

⁶³ *Id.* at ¶ 50.

⁶⁴ *Id.* (emphasis original).

⁶⁵ *Second FNPRM* at ¶ 50.

⁶⁶ 47 U.S.C. § 332(c)(3)(A).

to the states should be widely, not narrowly interpreted.⁶⁷ Nothing has changed the legal backdrop against which the Commission’s order was issued.

The Commission’s conclusions, however, are inconsistent with long-standing concepts of federalism. “Federalism” refers to the concept of dual sovereignty – that state governments and the federal government each retain and actively exercise the functions and powers of government at the same time.⁶⁸ When state law and federal law conflict, the Supremacy Clause of the United States Constitution⁶⁹ provides Congress with the power to preempt state law.⁷⁰ Preemption occurs in several ways: (1) when Congress, in enacting a federal statute, expresses a clear intent to preempt state law; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is, in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.⁷¹ Preemption may result not only from acts of Congress but also from acts of federal agencies acting within the scope of their congressionally delegated authority.⁷² The intent of Congress, whether to preempt state law or to allow it to operate, is the “touchstone” of preemption analysis.⁷³

In discerning whether Congress intended to preempt state law, courts begin with the

⁶⁷ More evidence that Congress intended the scope of preemption in section 332(c)(3)(A) to be limited is provided by other provisions of that statute. Although Congress removed states’ jurisdiction over entry and rates charged by CMRS providers, it expressly provided a mechanism whereby states could exercise jurisdiction over these issues in certain circumstances. The last two sentences in section 332(c)(3)(A) authorize such state jurisdiction where: (1) the wireless services are a substitute for land line exchange service for a substantial portion of the communications within a state, or (2) the state successfully petitions the Commission for authority to regulate rates for commercial mobile service. 47 U.S.C. § 332(c)(3)(A); *see also Southwestern Bell*, 14 FCC Rcd. at 19901, ¶ 6, *citing Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 432 (5th Cir. 1999).

⁶⁸ *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

⁶⁹ U.S. Const., art. VI, cl. 2.

⁷⁰ *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 368 (1986).

⁷¹ *Id.* at 368-69 (citations omitted).

⁷² *Id.* at 369.

⁷³ *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

presumption that Congress does not intend to displace state law, particularly where the state law addresses traditional areas that come within the police power of the state.⁷⁴ State laws regulating telecommunications carriers' billing practices come within its police power since they touch on citizens health, safety and well-being.⁷⁵ Generally speaking, precluding states' regulation in areas otherwise within their jurisdiction is a serious act that should not be casually attributed to Congress.⁷⁶

The various forms of preemption identified by the Court in *Louisiana PSC* fall into two broad categories – express preemption and implied preemption. The doctrines of implied preemption are usually further divided into “field” and “conflict” preemption. The preemption contemplated in paragraph 50 of the *Second FNPRM* obviously is not express, and thus must be implied. The implied preemption is not “field” preemption^[DCB1] because it does not preempt the entire field of regulation over carriers' billing practices. Instead, the implied preemption suggested by the Commission falls within the “conflict” preemption although the Commission's order does not make it clear whether it believes that state regulation of carriers' billing practices actually contradicts (*i.e.*, conflicts with) the Commission's truth-in-billing regulations⁷⁷ or whether the Commission believes that state regulation of carriers' billing practices stands as an obstacle to the full realization of Congress's purposes in enacting the Act.⁷⁸ Frankly, the Commission's lack of clarity regarding the basis for its tentative conclusion that state regulation of carriers' billing practices should be preempted is one reason why NASUCA believes the Commission's intended course of action is legally insupportable.

⁷⁴ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996).

⁷⁵ See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 432-33 (2002).

⁷⁶ See Laurence H. Tribe, *American Constitutional Law* §6-28, at 1175-76 (3d Ed. 2000).

⁷⁷ Conflict preemption is ordinarily not to be implied absent an “actual conflict.” *English v. General Elec. Co.*, 496 U.S. 72, 90 (1990). Merely contradictory language or requirements are generally not enough.

⁷⁸ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

If the Commission *is* operating on the premise that state regulation of carriers' billing practices stand as an obstacle to the Commission's pro-competition truth-in-billing regulations, then NASUCA is at a loss to understand the Commission's reasoning or its basis. With respect to the commercial mobile service industry, at least, the Commission's reasoning is at odds with its earlier pronouncements. The Commission previously addressed this alleged federal preference that the CMRS industry must be governed by competitive forces rather than competition in *Southwestern Bell*. Although the Commission agreed with that "as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation,'" in the next breath it noted that it "condition[s] our ruling, however, in the context of an evolving CMRS market."⁷⁹ The Commission emphasized that, in the very order quoted in support of the principle that there is a general preference for competitive forces over regulation:

*We do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied.*⁸⁰

The Commission fails to identify any in the telecommunications industry that have occurred since May 1999 – when it adopted its current truth in billing regulations but expressly allowed states to enact their own, more stringent billing regulations⁸¹ – to account for the Commission's 180-degree turnabout. The Commission clearly did not consider state billing regulations to be an obstacle to the implementation of the Commission's truth in billing rules six years ago. Indeed, the Commission wrote:

[S]tates will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today.

⁷⁹ 14 FCC Rcd. at 19902, ¶ 9.

⁸⁰ *Id.* at 19903, ¶ 10 (emphasis added).

⁸¹ *TIB Order*, 14 FCC Rcd. at 7507-08, ¶ 26.

*In addition to whatever powers they may have to enforce their rules under state law, states also have express authority under section 258 to enforce the Commission's verifications procedure rules, including the principles and guidelines adopted here, with respect to intrastate services. We are aware of several states that have existing regulations that are consistent with the truth-in-billing guidelines we adopt here. . . . We support these efforts.*⁸²

The Commission does not explain in the *Second FNPRM* why such state regulations have become such an obstacle that they should be preempted altogether. Given the importance of federalism to our scheme of government, as well as courts' hesitance to preempt state laws regulating areas within their traditional sovereignty,⁸³ the Commission is obligated to do more than merely cite some wireless carriers' arguments to justify its tentative conclusion.

As the Supreme Court has made clear, the Commission ought not preempt state regulation – here regulation of carriers' billing practices – without some clear indication of Congressional intent – either express or at least implied – that federal regulation in these matters should be supreme.⁸⁴ With regard to the tentative conclusions set forth in the *Second FNPRM*, and their underlying bases, the Commission is not giving effect to Congress' intent – it is in fact overriding that intent.

It is undisputed that the Act, and particularly the 1996 amendments to it, reflects federal policy in favor of increasing competition in the telecommunications industry.⁸⁵ However, with

⁸² *Id.* (emphasis added).

⁸³ Telecommunications carriers' billing practices is an area that states have traditionally regulated, whether through utility regulations or consumer protection regulations or both. As the Commission is well aware, states regulated telecommunications services long before the federal government did. See *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 477 (2002) (discussing history of telecommunications regulation in the United States).

⁸⁴ The presumption against preemption is acute in areas such as consumer protection, which are deeply rooted within the province of a state's core police powers. Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the *clear and manifest purpose* of Congress." *Medtronic*, 518 U.S. at 485, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).

⁸⁵ *Louisiana PSC*, 476 U.S. at 369. To some extent, that policy has been implemented – though there are dissenting voices being raised about the degree to which competition in the local exchange has been realized at a time when there is increasing concentration of market share in the local, long distance and wireless market.

certain limited exceptions,⁸⁶ Congress has preserved the dual state-federal jurisdiction over intrastate-interstate telecommunications services. That relationship is spelled out in several provisions of the Act.

Section 151 of the Act established the Commission and sets forth its authority to regulate

[I]nterstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication [and to] execute and enforce the provisions of this chapter.⁸⁷

Although this section of the Act gives the Commission broad authority, the Supreme Court roundly rejected the argument that section 151 supports the notion that state regulation that frustrates the ability of the Commission to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.⁸⁸ On this point, the Court wrote:

We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again [section 152(b)] asserts that ‘nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. . . .’ *By its terms, this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters ‘in connection with’ intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.*⁸⁹

⁸⁶ For example, those portions of the 1996 amendments that vested exclusive jurisdiction in the Commission to implement the local competition provisions of the amendments. *See AT&T Corporation v. FCC*, 525 U.S. 366, 378 n. 6 (1999). Similarly, the amendment of section 332(c)(3) of the Act in 1993, which prohibited states from regulating CMRS providers’ rates or entry. *See* 47 U.S.C. § 332(c)(3).

⁸⁷ 47 U.S.C. § 151.

⁸⁸ *Louisiana PSC*, 476 U.S. at 370.

⁸⁹ *Id.* (emphasis added). Consistent with the Court’s analysis in *Louisiana PSC*, courts have similarly rejected efforts to read the preemption of “rates charged by” CMRS providers broadly and the reservation of state jurisdiction over other “terms and conditions” narrowly. *See, e.g., Iowa v. US Cellular*, 2000 WL 33915909, *4 (S.D. Iowa 2000).

In resolving the tension between the two sections of the Act to avoid a conflict, the Court in *Louisiana PSC* observed that, “the [two] sections are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal.”⁹⁰ Finally, to disabuse the Commission and others of any notions to the contrary, the Court opined further that: “[W]ere we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.”⁹¹

The Court’s decision in *Louisiana PSC* still governs the tentative conclusions regarding preemption set forth in the *Second FNPRM*.⁹² In fact, the Court in *AT&T Corp.* recently noted that:

After the 1996 Act, § 152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States’ exclusive control. *Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate any aspect of intrastate communications not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission’s primary jurisdiction.*⁹³

The Commission does not cite any provision of the Act where Congress has expressed any intent to preempt states’ regulation of carriers’ billing practices, whether to foster competition or to further some other federal purpose. Nor can it.

It is, or at least should be, axiomatic that “an agency cannot confer power upon itself,” and that permitting “an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.”⁹⁴ Standing alone, the

⁹⁰ *Id.* (emphasis original).

⁹¹ *Id.*

⁹² See *AT&T Corp.*, 525 U.S. at 381 n. 7 (noting the continued viability of the *Louisiana PSC* decision).

⁹³ *Id.* (emphasis added).

⁹⁴ *Louisiana PSC*, 476 U.S. at 374-75.

Commission’s “pro-competitive federal scheme,” expressed in its current truth-in-billing principles and guidelines, does not suffice to confer upon it the power to preempt state regulations governing carriers’ billing practices.

B. The Other “Potential Bases” for Commission Preemption of State Regulation Over Carriers’ Billing Practices Do Not Suffice.

Although the Commission does not apparently rely on them, the Commission noted two other “potential bases” for preempting states’ jurisdiction over carriers’ billing practices and sought comment on the merits of these grounds for preemption, in addition to its self-proclaimed “pro-competitive federal scheme.”⁹⁵ These bases are: (1) wireless carriers’ arguments that “requiring these carriers to satisfy 50 different states’ sets of rules relating to consumer disclosures and details on bills would stifle the further development of wireless competition and unreasonably burden interstate commerce, in contravention of the U.S. Constitution’s Commerce Clause;”⁹⁶ and (2) another wireless carrier’s assertion that “sections 201(b) and 205(a) of the Act give the Commission ‘express preemptive authority over state regulatory agencies with respect to prescribing billing format and content, including line item charges.’”⁹⁷

1. State Regulation of Carrier Billing Practices Does Not Violate the Commerce Clause.

If there is a burden on interstate commerce that results from carriers having to comply with state regulations governing consumer disclosures and other billing details, that is nothing less than what Congress envisioned and intended when it enacted the Act in 1934. As the preceding section in NASUCA’s comments made clear, in 47 U.S.C. § 152(b), Congress expressly limited the Commission’s authority to preempt state regulation over matters relating to intrastate communications services, including wireless telecommunications. In other words,

⁹⁵ *Second FNPRM*, at ¶ 50.

⁹⁶ The carriers were Verizon Wireless, Nextel and T-Mobile.

⁹⁷ *Id.*, citing Leap Comments at 17.

Congress itself concluded that state regulation of intrastate telecommunications services (more precisely, matters relating to intrastate service) does not burden interstate commerce.

Even absent this conclusion by Congress, the state regulations at issue do not, in fact, impose an unreasonable burden on interstate commerce. A state law is invalid under the Commerce Clause only if the burden imposed “is clearly excessive in relation to the putative local benefits.”⁹⁸ State regulation to protect consumers from false, misleading or otherwise unreasonable carrier billing practices serves a legitimate local interest, namely protecting state citizens and consumers. Meanwhile, the burden of complying with such regulations is not excessive – carriers are complying with such regulations for years and none, particularly in the wireless industry, appear to have been terribly harmed (at least, if revenues and subscriber growth are reliable indicators for the health of this sector). Nor is there any claim that such regulations unreasonably discriminate in favor of in-state carriers.

Now for the problems reality poses for this asserted basis of preemption. The fact is, the carriers “doth protest too much” the burden of complying with states’ billing regulations. For one thing, at least in the context of wireless carriers, many states have removed wireless carriers from state utility commission jurisdiction altogether. To the extent wireless carriers complain of state utility commissions’ billing regulations impeding their ability to operate, this is not a problem in nearly half the country. For the other half of the country where state commissions still regulate wireless carriers within the scope of the jurisdiction reserved to them section 332(c)(3)(A), the burden of compliance with those commissions’ billing regulations is hardly unreasonable. For example, in West Virginia, the commission’s billing regulations exempt interexchange and wireless carriers from the most onerous billing requirements applicable to

⁹⁸ *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981).

local exchange carriers.⁹⁹

On the other hand, if consumer disclosure and billing details are required by some other state regulation – such as those required by consumer protection and contractual laws of general applicability – it is hard to see where the carriers’ basis for preemption gets them. Even the Commission in its *Second FNPRM* would apparently permit such state regulation to continue – so long as such state laws do not require or prohibit the use of line items.¹⁰⁰ In any event, aside from rather broad brush assertions of the burdens imposed on them by state billing regulations, the wireless carriers’ arguments cited by the Commission are skimpy, at best, in detailing what regulations constitute a burden, the extent of the burden, or why that burden is unreasonable.

2. Neither Section 201 Nor Section 205 of the Act Support Preemption.

The second basis of preemption tentatively identified by the Commission is the agency’s authority under sections 201(b) and 205(a) of the Act.¹⁰¹ These sections of the Act, however, do not indicate any intent on the part of Congress to preempt state regulation of carriers’ billing practices. Section 201(b) merely authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter” in connection with its authority to ensure that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and

⁹⁹ See *W.Va. Code State Reg.* § 150-6-2.2.f.7 (2004) (exempting wireless and interexchange carriers from disconnection notice requirements, informal billing dispute resolution procedures, deferred payment agreement obligations, and non-termination in the event of certified health or safety grounds requiring continued service).

¹⁰⁰ *Second FNPRM*, at ¶ 53. NASUCA deliberately uses the modifier “apparently” because it is unclear precisely what the Commission means in preempting state regulation of billing practices while concluding that states enforcement of generally applicable contractual and consumer protection laws that do not otherwise require or prohibit line items is not preempted rate regulation under 47 U.S.C. § 332(c)(3)(A). The Commission indicates that it is currently considering whether to preempt non-rate regulation of wireless carriers’ billing practices in its notice. *Second FNPRM*, at ¶¶ 50 & 52. If it does preempt such non-rate regulation, NASUCA is unsure whether the Commission would tolerate even state enforcement of generally applicable contractual and consumer protection laws. Again, this is another rather large gap in the Commission’s proposed rulemaking that NASUCA objects to.

¹⁰¹ *Second FNPRM* at ¶ 50.

reasonable.”¹⁰² In light of the limitation on the Commission’s authority to regulate matters relating to intrastate telecommunications service embodied in 47 U.S.C. § 152(b) and upheld by the Court in *Louisiana PSC* and other decisions, the authority conferred on the Commission by Congress in section 201(b) hardly implies any preemption of dual state authority.

Likewise, section 205(a) does not evidence Congress’ intent to do away with the dual state-federal jurisdiction over carriers’ billing practices. That section of the Act provides only that the Commission may, after hearing, prescribe just and reasonable charges, classifications, regulations or practices if it finds a carrier to be in violation of any provisions of the Act.¹⁰³ Again, the carriers’ argument that either sections 201(b) or 205(a) of the Act vest the Commission with the authority to preempt states’ regulation of carriers’ billing practices simply ignores section 152(b) of the Act, as well as the Court’s decision in *Louisiana PSC* preserving the dual sovereignty of states regarding matters relating to intrastate communications services. As the Court there noted:

[G]iven the breath of the language in § 152(b), and the fact that it contains not only a substantive jurisdictional limitation on the FCC’s power, but also a rule of statutory construction (“[Nothing] in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to intrastate communication service. . .”), we decline to accept the narrow view [of § 152(b)] urged by respondents. . . .¹⁰⁴

Further there are other provisions in the Act, some included in the 1996 amendments, which reiterate Congress’ intent that state authority over matters relating to intrastate communications service is preserved. For example, the 1996 amendments added section 253 to the Act, entitled “Removal of Barriers to Entry.” Subsection (a) of that provision prohibits state or local laws that may prohibit or have the effect of prohibiting the ability of any entity to

¹⁰² 47 U.S.C. § 201(b).

¹⁰³ See 47 U.S.C. § 205(a).

¹⁰⁴ 476 U.S. at 373.

provide any interstate or intrastate telecommunications service.¹⁰⁵ However, subsection (b) of section 253 reiterates and reinforces states' authority over intrastate service by providing:

*Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.*¹⁰⁶

As the Commission itself recognized in its *TIB Order*, truth in billing rules are necessary to “safeguard the rights of consumers” and there is no reason to believe that Congress considered states' traditional police powers to likewise safeguard consumers' rights, including through regulation of carriers' billing practices, to be any less important. Likewise, as the Commission recognized in more enlightened times, even its authority to prescribe verification procedures to deter slamming under section 258 of the Act did not preclude more stringent state verification regulations.¹⁰⁷ Here too, Congress envisioned continuing state jurisdiction over matters relating to intrastate service, including billing.

3. There is No Basis for Reversing the Commission's Recognition of States' Role in Regulating Carriers' Billing Practices.

In light of its belief that there are legal bases for preempting state regulation of carriers' billing practices, the Commission also tentatively concluded that it should “reverse [the] prior pronouncement [in the *TIB Order*] that states may enact and enforce more specific truth-in-billing rules” than the Commission's.¹⁰⁸ The Commission then sought comment on this conclusion and several related ideas that flowed from it.¹⁰⁹ As NASUCA makes clear

¹⁰⁵ 47 U.S.C. § 253(a).

¹⁰⁶ 47 U.S.C. § 253(b) (emphasis added).

¹⁰⁷ See *TIB Order*, 14 FCC Rcd. at 7507-08, ¶ 26, citing 47 U.S.C. § 258(a) (“Nothing in this section shall preclude any State commission from enforcing such [verification] procedures with respect to intrastate services”).

¹⁰⁸ *Second FNPRM*. at ¶ 51.

¹⁰⁹ For example, the Commission asked whether, if it reversed its prior decision in the *TIB Order* regarding more stringent state regulations, it should limit the scope of what constitutes “consistent truth-in-billing requirements by the states” under 47 C.F.R. § 64.2400(c), eliminate section 64.2400(c) from its rules altogether, or adopt an

throughout its comments, there is no basis for the Commission’s reversal of its decision that states may enact and enforce more specific truth-in-billing rules. The Commission should not adopt its tentative conclusion.

C. The Commission’s Concern With “Creeping Federalism” Is Seriously Misguided.

The Commission also opined that limiting¹¹⁰ state regulation of wireless and other interstate carriers’ billing practices in favor of a “uniform, nationwide, federal regime” would “eliminate the inconsistent state regulation that is *spreading across the country*, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers.”¹¹¹ After making this pronouncement, the Commission asked commenters to address the proper boundaries of “other terms and conditions” under section 332(c)(3)(A), and generally to delineate what they believe should be the relative roles of the Commission and the states in defining carriers’ proper billing practices.¹¹²

NASUCA finds the Commission’s avowed intent to stem “inconsistent state regulation . . . spreading across the country” particularly disturbing. In other words, the Commission is trying to stem what can best be described as “creeping federalism,” ostensibly in order to reduce the rates consumers pay for telecommunications service. The Commission’s concern is as misplaced as its efforts are misguided.

For one thing, the Commission does not specify any “inconsistent” state regulation that is the source of its concern. For example, the wireless carriers’ comments in response to

enforcement regime where states are permitted to enforce rules developed by the Commission. *Second FNPRM* at ¶ 51.

¹¹⁰ Frankly, the Commission is being disingenuous here. What it has in mind in this rulemaking is not “limiting” state regulation – it is “ending” state regulation of telecommunications carriers’ billing practices.

¹¹¹ *Second FNPRM* at ¶ 52 (emphasis added).

¹¹² *Id.*

NASUCA's petition for declaratory ruling in large part decried the increased burden of state and local taxes imposed on wireless carriers, which were driving up their costs of providing wireless service.¹¹³ Is the effort embodied in the Commission's *Second FNPRM* aimed at prohibiting state and local governments from imposing taxes on wireless service, which to the natural extent that they are different jurisdiction-to-jurisdiction, are "inconsistent"? If so, there are substantial legal and constitutional impediments to the Commission's effort. The Commission clearly is not authorized to limit or prohibit state and local governments' taxation of business activities occurring within their jurisdiction and it should not be swayed by carriers' arguments that it consider such state actions in deciding whether to preempt state billing regulation.

Another major source of wireless carriers' complaints in response to NASUCA's petition for a declaratory ruling was state regulations governing billing format and disclaimers.¹¹⁴ The wireless carriers' concerns were more than a little exaggerated.

As previously discussed, roughly half the states in the country have exempted wireless carriers from any regulation by their utility commissions, so carriers do not have to comply with 50 different sets of billing regulations in any event. In addition, many states that do regulate wireless carriers specifically exempt them from the more burdensome provisions of their billing regulations.¹¹⁵ More importantly, the burdensome and inconsistent state regulations bemoaned by the wireless carriers apparently consist of regulations governing the placement and prominence of key terms and conditions of wireless carriers' service.¹¹⁶ The wireless carriers make no attempt to quantify the burden imposed on them by these state regulations but the Commission accepts, at face value, their suggestion that the burden is unreasonable. NASUCA finds it interesting that interexchange carriers – who presumably are subject to at least the same,

¹¹³ See, e.g., AT&T Wireless Comments at 6-8; Cingular Comments at 18-20; Global Crossing Comments at 2; US Cellular Comments at 3; Verizon Comments at 9; Verizon Wireless Comments at 8 fn. 19.

¹¹⁴ See, e.g., Nextel Comments at 12-19.

¹¹⁵ See *Second FNPRM* at ¶¶ 50, 52.

¹¹⁶ See, e.g., Nextel Comments at 12-19.

if not more onerous, varying state billing regulations – did not urge preemption of the states’ billing regulations.

The Commission also conveniently overlooks perhaps the biggest factor in the wireless carriers’ complaints about overregulation in singling out state billing regulation as the focus of its efforts to lower carriers’ costs and consumers’ rates – namely the Commission’s own regulatory initiatives.. Time and again in their comments, the wireless carriers (and in this case, the interexchange carriers) cited Commission regulatory initiatives and mandates as the source of their increased operating costs (and ultimately the line items complained of by NASUCA and other commenters). The carriers were unsparing in citing the Commission’s decisions requiring local and wireless number portability, compliance with the Communications Assistance in Law Enforcement Act (“CALEA”), number pooling, E911, etc., as the source of their troubles. NASUCA does not give much credence to the carriers’ complaints but, if the increased burden of regulation on carriers’ operating costs is the focus of the Commission’s concern, then perhaps it should have engaged in a critical self-examination of its own regulatory decisions before embarking on a crusade to gut state regulation of carriers.

There is another point that has been made previously but likewise bears repeating. If state laws governing consumer disclosures, disclaimers, etc. have their genesis in generally applicable state contractual or consumer protection laws, then the Commission’s preemption of state telecommunications regulations does not really advance the ball in the Commission’s effort to reduce carriers’ costs or consumers’ rates. The Commission, at least at first blush, would be required to leave such regulations in place.

Finally, there is an even larger problem with the Commission’s misplaced concern with creeping federalism and its misguided effort to stem that phenomenon – namely its inability to analyze cause and effect. The Commission apparently assumes that the offending state

regulations are recent developments – after all, they are “spreading across the country”¹¹⁷ The Commission’s assumption is wrong, it turns out. State regulations governing wireless carriers’ billing and related practices have been in existence for years.¹¹⁸

The Commission also appears to accept, without question, the wireless carriers’ assertions that allegedly inconsistent state billing regulations regarding consumer disclosures and billing details “would stifle the further development of wireless competition.”¹¹⁹ If the proliferation of inconsistent state regulation threatens further development of wireless competition, then how does the Commission account for its own data showing that the growth of wireless service has been accelerating over recent years? According to CTIA’s most recent survey, there are now over 182 million wireless subscribers¹²⁰ – an increase of over 15% from 2003.¹²¹ Wireless usage is also up 32.7% over the past year and now stands at over 1 trillion minutes of use annually.¹²² Moreover, according to most analysts, wireless carriers’ revenues are

¹¹⁷ *Second FNPRM*, at ¶ 52.

¹¹⁸ For example, the Vermont Public Service Board “proposal” to prohibit carriers from itemizing a separate charge to recover the state’s gross receipts tax on carriers was not of recent vintage, as implied by Verizon Wireless, but rather was established by order of the Vermont PSB in 1991. *See Vermont PSB ex parte* at 4 (March 4, 2005). Other state laws governing carriers’ billing practices are also fairly longstanding. *See, e.g., La. Rev. Stat. §§ 45:844.5-844.8* (Enacted, 1999) (“prohibits automatic renewal clauses, requires disclosure of contract terms, and requires rules governing wireless telephone solicitations); R. I. Gen. Law § 39-2-1.3 (Enacted, 1998) (precludes carriers from imposing late fees unless the payment is at least 30 days past due); *Tenn. Code* § 47-18-1901 (Enacted 1997) (requires wireless contract to have a separate acknowledgement of any minimum service period).

¹¹⁹ *Second FNPRM*,. at ¶ 50.

¹²⁰ CTIA, *Semi-Annual Wireless Industry Survey*, “Year End 2004 Estimated Wireless Subscribers” (2005) (available at: http://files.ctia.org/img/survey/2004_endyear/slides/EstSubscribers_4.jpg).

¹²¹ CTIA’s survey notes that 2004 was the “Second Highest Growth Year Ever: Up 23.4 Million from 2003.” Wireless growth was not much worse in preceding years. It increased 13% from 2002 to 2003, almost 10% from 2001 to 2002, and over 17% from 2000 to 2001. *Id.* Not bad for an industry under increasing assault from state regulators and local taxing authorities.

¹²² *Id.*, “Reported Wireless Minutes of Use Exceed One Trillion in 2004” (2005) (available at http://files.ctia.org/img/survey/2004_endyear/slides/wireMinutes_7.jpg). Interestingly, the Commission continues to find that the vast majority – 80% or more – of residential wireless usage is intrastate, not interstate. *9th CMRS Report*, Table 11.4.

up sharply as well, and CTIA's data confirms healthy growth in carriers' revenues.¹²³ The wireless industry's performance over the past year is no aberration either; it is the continuation of a decade-long trend.

In sum, there is nothing to support the Commission's concern that the mischaracterized "recent" increase in allegedly inconsistent state regulation of carriers' billing practices threatens the growth of competition in the wireless, or any other, telecommunications market.

D. The Proper Boundaries Of State Jurisdiction Over "Other Terms And Conditions" Of Wireless Service Have Been Defined By Congress And The Courts.

In its notice of proposed rulemaking, the Commission requests commenters to address the proper boundaries of "other terms and conditions" under section 332(c)(3)(A) of the Act, and to delineate generally what they believe should be the relative roles of the Commission and the states in defining carriers' proper billing practices.¹²⁴ NASUCA believes that the proper boundaries of state jurisdiction over "other terms and conditions" of wireless service have previously been defined by Congress and the courts and that the Commission's request for additional comment is unwarranted and inappropriate, at least if the Commission believes that section 332(c)(3)(A) provides a basis for preemption of non-rate regulation of wireless carriers' other terms and conditions of service.

Section 332 was amended in 1993 to eliminate the distinction between public mobile

¹²³ CTIA, *Semi-Annual Survey*, "CTIA's Semi-Annual Wireless Industry Survey Results: June 1985 – December 2004" (2005) (available at: http://files.ctia.org/img/survey/2004_endyear/slides/SemiAnnual_3.jpg). From December 2003 to December 2004, wireless revenues increased 12.5%. Revenue growth during the December-to-December period in preceding years was also robust to say the least: 13.9% in 2003, 13.5% in 2002, 19% in 2001, and 26% in 2000. *Id.*

¹²⁴ *Second FNPRM*, at ¶ 52. The Commission's request for comment regarding section 332(c)(3)(A) is somewhat odd since it is made in the context of the Commission's immediately preceding statement that it believes limiting state regulation of CMRS "and other interstate carriers' billing practices" in favor of a uniform, nationwide (*i.e.*, exclusive) federal regime will eliminate inconsistent state regulation, reduce carriers' costs and consumers' rates. *Id.* Section 332 of the Act applies to wireless carriers only; it has no applicability to "other interstate carriers." Section 332(c)(3)(A) is no basis for preempting state regulation of other interstate carriers' billing practices.

services, which were subject to federal common carrier regulations as well as state regulation of intrastate services, and private mobile land mobile services that were exempt from common carrier regulation.¹²⁵ Congress replaced “public mobile services” and “private mobile land services” with two new categories of service: “commercial mobile radio service” (“CMRS”) and “private mobile radio service” Congress determined that CMRS providers would be treated as common carriers subject to all provisions of Title II of the Act, though the Commission was authorized to forbear from applying any provisions of Title II it found unnecessary. Congress also limited states’ jurisdiction over CMRS providers, until then generally minimally exercised, by adding subsection (c)(3) to the Act. That section provides, in pertinent part:

*Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.*¹²⁶

In other words, Congress expressly preempted states from regulating the entry of, or rates charged by, CMRS providers but also expressly reserved to states their existing authority to regulate “other terms and conditions” of CMRS providers’ service. This reservation made clear Congress’ intent not to preempt states’ authority to regulate “other terms and conditions” of CMRS providers’ service. Moreover, in the legislative history of the 1993 amendments to section 332 of the Act, Congress made it clear that the phrase “other terms and conditions” of commercial mobile service was intended to be construed broadly. The Committee report to the 1993 amendments states:

¹²⁵ See Peter W. Huber, *et al.*, *Federal Telecommunications Law*, § 10.2, at 867-68 (2nd Ed., 1999).

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

It is the intent of the Committee that the states would still be able to regulate the terms and conditions of these services. *By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”*¹²⁷

While the scope of what falls within “rates” versus “other terms and conditions” has been hotly debated in the courts,¹²⁸ the Commission has made it clear that the preemption contemplated in its March 18, 2005 notice applies to states’ “non-rate” regulation of CMRS providers’ service.¹²⁹ Specifically, the Commission cites state regulations governing consumer disclosure rules and bill details in connection with its proposed rulemaking.¹³⁰ Consumer disclosure rules and other billing details clearly fall within “customer billing information and practices and billing disputes and other consumer protection matters” reserved to states by Congress under section 332(c)(3)(A). In any event, consumer disclosure rules and billing details would be considered within a non-illustrative list of “other matters generally understood to fall under ‘other terms and conditions’” of commercial mobile services. Section 332(c)(3)(A) clearly is not an appropriate basis for preempting states’ jurisdiction of what can only be considered “other terms and conditions” of commercial mobile radio service, let alone preempting state regulation of other interstate carriers’ billing practices.

E. There Is No Basis For “Field” Preemption Of State Regulation Of Carriers’ Billing Practices, In CTIA’s Consumer Code Or Elsewhere.

¹²⁷ H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 588, LEXSEE 103 H. Rpt. 111, at 4 (1993) (emphasis added).

¹²⁸ *See, e.g., Cellco Partnership v. Hatch*, No. 04-3198 (8th Cir., filed Sept. 8, 2004); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004); *Iowa v. U.S. Cellular Corp.*, 2000 WL 33915909 (S.D. Iowa 2000); *Cellular Telecommunications Industry Ass’n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999); *Sprint Spectrum, L.P. v. Kansas State Corporation Comm’n*, 149 F.3d 1058 (10th Cir. 1998); *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421 (D. Md. 2000); *Mountain Solutions, Inc. v. Kansas State Corporation Comm’n*, 966 F.Supp. 1043 (D. Kan. 1997).

¹²⁹ *Second FNPRM*, at ¶ 50.

¹³⁰ *Id.*

In response to Nextel's and T-Mobile's argument that any Commission rules governing line item charges occupy the field and preclude additional state regulation irrespective of any statutory distinction between "rates" regulation and regulation of "other terms and conditions" of wireless service, the Commission seeks comment on whether CTIA's Consumer Code is enough to occupy the field, to the extent the Commission occupies it.¹³¹ In response to the Commission's request, NASUCA submits that there is no basis for field preemption of state regulation of carriers' billing practices in either CTIA's Consumer Code or elsewhere.

As a general matter, when a federal statute or regulatory scheme is so extensive and detailed that it leaves no room for states to act, then the entire field of regulation and all state law regulating within it is said to be preempted.¹³² Where the United States Supreme Court has found field preemption, it has usually involved a subject of particular federal interest or an issue committed to federal control by history and tradition, such as foreign affairs, Indian commerce and maritime law.¹³³ Here that is not the case: States have traditionally regulated telecommunications carriers, including before the Commission's creation. Moreover, the states regulated wireless carriers, at least public land radio service to some extent, prior to 1993 when Congress enacted section 332(c)(3)(A). Likewise, while the Commission's truth-in-billing rules are of recent vintage; some states' regulations governing carriers' billing practices predate the Commission's rules by years, if not decades.

Where there is no express statement of preemptive intent in a statute, field preemption is usually based on statutory complexity, but such field preemption is rarely found today.¹³⁴ Here,

¹³¹ *Second FNPRM*, at ¶ 52.

¹³² *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

¹³³ *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

¹³⁴ *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983) (despite complexity of federal nuclear power regulations, state economic decisions regarding the need for new power plants found not preempted).

the Commission's truth in billing rules are hardly a model of complexity or detail, consisting rather of general principles and guidelines that carriers must follow, coupled with the recognition (until March 18, 2005) that states could enforce more stringent billing rules of their own. Furthermore, the Court has indicated its unwillingness to find field preemption where, as in section 332(c)(3)(A), a statute contains express preemption.¹³⁵

In any event, it makes no sense that field preemption of state regulation of carriers' billing practices would not be found under the Act but that the Commission could, nevertheless, decide that its truth in billing rules have so occupied a field of regulation traditionally shared with the states, that state-specific regulations would be preempted. This would allow the Commission to confer upon itself a power greater than that delegated to it by Congress under the Act, something the Court in *Louisiana PSC* clearly rejected.¹³⁶

Likewise without any legal or logical basis is the Commission's suggestion that CTIA's Consumer Code may serve to "occupy the field" and thereby preempt state regulation that is not consistent with CTIA's Code. NASUCA is unaware of any circumstance in which the Court has endorsed an agency's preemption of state regulation by embracing a voluntary, industry-crafted and implemented code of business guidelines. The carriers' argument is an innovation that is wholly inconsistent with the principle of federalism or the presumption against preemption of areas of traditional state regulation.¹³⁷

F. The Commission-Defined Line Dividing Permissible From Preempted State Regulation Finds No Basis in the Act or the Constitution.

The Commission tentatively concludes that, based on its undisclosed precedents, the "line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is

¹³⁵ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

¹³⁶ 476 U.S. at 374-75.

¹³⁷ The Commission could more easily, and perhaps less erroneously, find that the AVCs entered into among 33 state attorneys general and three of the largest wireless carriers, occupies the field. At least the AVCs include detailed requirements and enforcement provisions for non-compliance that the CTIA Code lacks.

properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices."¹³⁸ The Commission then asks commenters to address the proper boundaries of "other terms and conditions" under section 332(c)(3)(A) and to generally delineate the relative roles of the Commission and the states in defining carriers' proper billing practices.¹³⁹ Frankly, NASUCA views the Commission's tentative conclusion and request for comment as akin to an invitation for states and consumer advocates to "bid against themselves." This NASUCA will not do.

As set forth in the prior section of its comments, NASUCA believes that the proper boundaries of the Commission's and the states' roles were clearly spelled out by Congress in section 332(c)(3)(A). Congress limited the scope of state preemption to efforts by states to regulate the "rates charged by" or the "entry of" commercial and private mobile service providers. Congress preserved states' *existing* jurisdiction over commercial wireless providers' "other terms and conditions" of service. This is a critical point. Prior to 1993, states had jurisdiction over intrastate services provided by public mobile land service providers (known as CMRS providers post-1993), including their rates, licensure or certification and all other terms and conditions of service. Congress expressly limited the scope of state preemption in the 1993 amendments to section 332 of the Act, but made it clear that "this paragraph *shall not* prohibit a State from regulating the other terms and conditions of commercial mobile services."

Nextel and T-Mobile urge the Commission to read the limitation on state preemption contained in section 332(c)(3)(A) "narrowly," something the Commission appears all too willing to do. That narrow interpretation, however, contradicts the clear language of section 332(c)(3)(A). The carriers' narrow interpretation of "other terms and conditions" also violates principles of statutory construction established by the courts that seek to limit state preemption to

¹³⁸ *Second FNPRM*, at ¶ 53.

¹³⁹ *Id.*

the degree necessary to give effect to Congress' intent.¹⁴⁰

Similarly, the carriers' (and Commission's) effort to limit the reservation of states' jurisdiction over "other terms and conditions" of commercial mobile services is in direct conflict with the 1993 amendments' legislative history. As set forth in the preceding section of NASUCA's comments, Congress clearly – and expansively – defined what it considered to be "other terms and conditions" of commercial mobile services. The phrase, Congress wrote, "*include[s]* such matters as *customer billing information and practices* and *billing disputes* and *other consumer protection matters.*"¹⁴¹ The phrase, Congress continued, also "*include[s]* . . . such other matters as fall within a states lawful authority."¹⁴² And if these expressions of intent to broadly reserve states' jurisdiction over "other terms and conditions" of CMRS providers' service were not clear enough, Congress made it clearer, noting that the list of areas included within the legislative history was "*intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'.*"¹⁴³

Despite the plain language of the 1993 amendments and the context of state regulation over CMRS providers in which the amendments were enacted, despite the clear intent of Congress in broadly defining the scope of matters reserved to state regulation as "other terms and conditions," and despite the courts' reluctance to broaden the scope of preemption beyond that clearly intended by Congress, the Commission appears inclined to accept the carriers' "narrow"

¹⁴⁰ See *Louisiana PSC*, 476 U.S. at 373 (refusing to adopt a narrow view of the scope of § 152(b) since that section, like section 332(c)(3)(A), contains not only a substantive jurisdictional limitation on the Commission's power, but also a rule of statutory construction).

¹⁴¹ H. R. Rept. 103-111, LEXSEE 103 H. Rpt. 111, at 4 (emphasis added).

¹⁴² *Id.* Prior to the 1993 amendments, states' lawful authority extended to *all* aspects of commercial mobile radio services, including rates charged by and entry of such providers. To the extent Congress specifically preempted only states' regulation of CMRS providers' rates and entry, it clearly was not reducing or limiting states' hitherto lawful jurisdiction.

¹⁴³ *Id.* (emphasis added).

view of states' jurisdiction. This it claims is in accord with its "precedents."¹⁴⁴ Yet the Commission cites neither precedent, nor anything in such "precedents" that supports its view that states' jurisdiction over "other terms and conditions" of CMRS providers' service is limited to only their enforcement of "generally applicable contractual and consumer protection laws."¹⁴⁵

The Commission's order in *Southwestern Bell* certainly does not support the Commission's assertion in the *Second FNPRM*. In *Southwestern Bell*, the Commission was asked to declare that "state-law claims directly or indirectly challenging the 'rates charged' by CMRS providers are barred by Section 332(c)(3)" in response to class action lawsuits alleging CMRS providers' marketing and billing practices violated state consumer fraud or contract laws."¹⁴⁶ The Commission denied the declaratory ruling petition on this particular point, disagreeing with wireless commenters' arguments "to the extent that they imply that such preference for competition over regulation results in a general exemption for the CMRS industry from the neutral application of state contractual or consumer fraud laws."¹⁴⁷ In denying other portions of the petition, the Commission state that:

[T]he legislative history of Section 332 clarifies that billing information, practices and disputes – *all of which might be regulated by state contract or consumer fraud laws* – fall within "other terms and conditions" which states are allowed to regulate. Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.¹⁴⁸

While the Commission notes that billing practices, etc. "might be regulated by state contract or consumer fraud laws" (the laws that were the subject of the class action lawsuits that prompted the declaratory ruling petition in the first place), the foregoing passage hardly supports the

¹⁴⁴ Presumably the Commission is referring to its order in *Southwestern Bell*, since this is the proceeding to which the wireless carriers cite, though even this is not clear. *Second FNPRM*, at ¶ 54.

¹⁴⁵ *Id.*

¹⁴⁶ *I/M/O Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling, Memorandum Opinion and Order*, 14 FCC Rcd 19898, ¶ 1 (1999) ("*Southwestern Bell*").

¹⁴⁷ *Id.* at 19902-03, ¶ 10; *see also id.* at 19908, ¶ 23.

¹⁴⁸ *Id.* (emphasis added).

assertion that such laws are the *only* source of state law or regulation over billing practices.

Nor do other Commission precedents (again, uncited) support the Commission's tentative conclusion that the "line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws." For example, in its ruling in *Wireless Consumers*, the Commission addressed the issue of whether damage awards against CMRS providers are preempted under section 332(c)(3)(A).¹⁴⁹ After noting that, in *Southwestern Bell*, it had concluded that "state contract or consumer fraud laws relating to the disclosure of rates and rate practices are not generally preempted,"¹⁵⁰ the Commission concluded that the award of monetary damages by state courts based on state tort or contract claims were not generally preempted either.¹⁵¹ Again, this hardly suggests that other state laws – such as utility commission regulations and orders – cannot regulate CMRS providers' "other terms and conditions" of commercial mobile service.

In fact, Commission precedent directly contradicts its tentative conclusion in the *Second FNPRM*. In *Connecticut DPUC*,¹⁵² though it declined "establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions" the Commission found it possible (and desirable) to "extrapolate certain findings from the legislative history . . . in the interest of minimizing future proceedings directed at this issue."¹⁵³ The Commission first noted that it viewed the statutory "other terms and conditions

¹⁴⁹ *I/M/O Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17022, ¶ 2 (2000) ("*Wireless Consumers*").

¹⁵⁰ *Id.* at 17025-26, ¶ 8; *see also id.*, at 17028-29, ¶ 14.

¹⁵¹ *Id.* at 17026, ¶ 9; *see generally, id.*, at 17034-40, ¶¶ 23-36.

¹⁵² *I/M/O Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, Report and Order, 10 FCC Rcd 7025 (1995), *aff'd sub nom., Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996) ("*Connecticut DPUC*").

¹⁵³ *Id.* at 7060, ¶ 80. The Commission did note, however, that the "legislative history [of section 332(c)(3)(A)] largely speaks for itself." *Id.*

language as “sufficiently flexible to permit Connecticut to continue to conduct complaint proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.”¹⁵⁴ So far, this accords with the Commission’s later decisions in *Southwestern Bell* and *Wireless Consumers*.

But the Commission went further in *Connecticut DPUC*, noting that:

[U]nder the same logic, we also conclude generally that *several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation*. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, *we believe Connecticut retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state*. We expect that, to the extent any interested party seeks reconsideration on this issue, *it will specify with particularity the provisions of the Connecticut regulatory practice at issue*.¹⁵⁵

The emphasized portion of the quoted passage makes it clear that existing state regulatory systems and regulatory practices, including regulations and orders promulgated by state agencies are also covered by section 332(c)(3)(A)’s reservation of state jurisdiction over “other terms and conditions” of commercial mobile service.

Finally, the Commission’s stunted reading of section 332(c)(3)(A)’s reservation of jurisdiction to states renders the general savings clause in section 414 of the Act superfluous. That section provides: “Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such

¹⁵⁴ *Id.* at 7061, ¶ 81.

¹⁵⁵ *Id.*, ¶ 82 (emphasis added). *Accord*: *I/M/O Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, Report and Order, 10 FCC Rcd. 7872, 7883-4, ¶¶ 54-57 (1995); *see also I/M/O Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 F.C.C.R. 1735, 1745, ¶ 20 (1997) (finding section 332 does not preempt state authority over matters which may have an impact on the costs of doing business).

remedies.”¹⁵⁶ If all that section 332(c)(3)(A) reserves to state jurisdiction is “generally applicable contractual and consumer protection laws,” then there is no need for section 414 which already makes such laws applicable to telecommunications service, including commercial wireless service.

The Commission’s proposed reading of section 332(c)(3)(A)’s reservation to states of authority over “other terms and conditions” of CMRS providers is totally inappropriate and unlawful. NASUCA urges the Commission to abandon it and adopt the reading of the statute intended by Congress – namely that, so long as states are not “fixing, setting or prescribing” the rates charged by CMRS providers or their entry into the state, they may regulate the “other terms and conditions” of such carriers’ service. Clearly, this means considerably more than having the jurisdiction to tell CMRS providers what font or typeface their bills should be in.

G. The Practical Reach of the Commission’s Tentative Conclusions Is Nothing Less Than Preemption of Virtually All State Telecommunications Regulation.

The Commission also solicits comment “on the practical reach of the line that we tentatively delineate between the Commission’s jurisdiction and states’ jurisdiction over carriers’ billing practices.”¹⁵⁷ In connection with this request, the Commission asks whether state “cramming” regulations fall within the Commission’s or states’ jurisdiction and what, if any, effect its tentative delineation of its jurisdiction over “carriers” billing practices would have on competition, both intermodal and intramodal.¹⁵⁸

There are a number of problems that need to be noted with the formulation of the Commission’s query. For one thing, it is unclear whether the Commission is referring only to the delineation between its and states’ jurisdiction over CMRS providers under section

¹⁵⁶ 47 U.S.C. § 414.

¹⁵⁷ *Second FNPRM*, at ¶ 54.

¹⁵⁸ *Id.*

332(c)(3)(A). If so, then its query is profoundly clumsy since it refers only to “carriers” rather than “CMRS providers.” Likewise, much of the *Second FNPRM* refers interchangeably to other interstate carriers and CMRS providers in the context of section 332(c)(3)(A) and other bases for preemption that the Commission tentatively identifies. As previously noted, section 332 is absolutely inapplicable to any carriers other than CMRS providers.

As for the request for comment on the “practical reach” of the Commission’s tentative line between state and federal jurisdiction, NASUCA will be blunt: The practical reach of the Commission’s line is nothing less than the outright preemption of state regulation of telecommunications carriers. As NASUCA has made clear, the Commission is contemplating preempting states’ “non-rate” regulation over interstate carriers’ billing practices, both wireline and wireless, billing practices, without any delegated authority.

If the Commission is willing to take such action, then there is little to discourage it from taking such action on any other aspect of states’ traditional regulation of intrastate telecommunications services or providers. Local exchange carriers are increasingly bundling local and long distance service, and in many instances offering that bundled service pursuant to regional or national pricing plans (*e.g.*, Verizon’s “Freedom” plans). State commission regulation of these carriers may interfere with their national marketing and pricing plans. So why should the Commission stop with wireless or interstate wireline providers if it goes forward with its efforts in this rulemaking? Similarly, regional Bell operating companies (“RBOCs”) have entered the interstate long distance markets in every state, and have captured a substantial share of the market in many of them. Will the Commission determine that these carriers’ interstate services are now inseparable from their intrastate services, necessitating a uniform, nationwide, federal regulatory scheme? Finally, local carriers are increasingly involved in the provision of wireless service (*e.g.*, BellSouth’s and SBC’s joint venture in Cingular, as well as

Verizon's wireless subsidiary), and often bundle wireless with wireline service in regional or national pricing and marketing strategies. What line does the Commission anticipate drawing if it preempts state regulation over matters that Congress has expressed no intent to preempt?

NASUCA's concerns notwithstanding, it will offer a response to at least one of the Commission's questions. With respect to cramming, *i.e.*, including charges for non-requested telecommunications services and non-telecommunications service on a customer's telephone bill, this is both a carrier billing practice and a matter of consumer protection. As such, the states at least have jurisdiction over cramming practices by both wireline carriers and CMRS providers operating within their borders.¹⁵⁹

V. POINT OF SALE DISCLOSURE.

The Commission also seeks comments on a number of points related to whether it should adopt point of sale disclosure rules, in light of the provisions of the AVCs entered into among states' attorneys general and some of the largest wireless carriers, as well as some carriers' independent support for such rules.¹⁶⁰

A. Point Of Sale Disclosures Generally.

In accord with the AVCs, and to "ensure that these obligations apply nationwide to all carriers," the Commission tentatively concludes that "carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale," and further notes that providing only a wide

¹⁵⁹ State regulation of cramming, and slamming, practices by carriers is vital to protect consumers. From 1996 to 1998, state commissions and attorneys general reported fines and penalties exceeding \$14,000,000 for slamming and cramming violations. *See* General Accounting Office, "Telecommunications: State and Federal Actions to Curb Slamming and Cramming," Report to the Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate (July 1999). While the GAO report has not been updated, it is nevertheless clear that slamming and especially now cramming violations continue with disturbing frequency and variety. Over the past several years, for example, the Iowa Office of Consumer Advocate, has sought civil monetary penalties for scores of alleged slamming and cramming violations pursuant to state law. *See Iowa Code* § 476.103 (2005). Most of the cases have been settled upon consent to assessment of a civil monetary penalty.

¹⁶⁰ *Second FNPRM*, at ¶ 55.

range of potential surcharges to the consumer at the point of sale could be misleading.¹⁶¹ The Commission also invites comment whether it would be misleading if such actual surcharges were in excess of 25 percent greater than the estimated surcharges, or whether surcharges in excess of 10 percent greater than estimated surcharges would be misleading.

NASUCA has supported the efforts of the states' attorneys general leading to the negotiation of the AVCs with Cingular, Sprint PCS and Verizon Wireless and consequently supports the Commission's tentative conclusion to apply the point of sale provisions of the AVCs nationally. Further, NASUCA supports extension of these provisions to all interstate carriers, wireless and wireline. The same truth in billing concerns implicated by point of sale disclosures apply with equal vigor to wireline carriers as they do to wireless carriers.

In addition, NASUCA believes that any Commission point of sale disclosure rules should build upon the AVCs' provisions in several major respects. NASUCA recommends that the Commission's rules should clearly, and expressly, apply to all employees, sub-contractors, agents or other persons acting or purporting to act on behalf of the carrier or its affiliates and subsidiaries, in marketing the carrier's services to existing or potential customers. Carriers, particularly wireless carriers, often rely on agents, etc. to market their services to customers, for example shopping mall kiosks where consumers can sign up for wireless service. Any rules adopted by the Commission must ensure that carriers' agents adhere to its point of sale disclosure rules by holding carriers' ultimately liable for the acts and representations of their marketing agents.

As suggested above, the Commission's point of sale disclosure rules should also make it clear that they apply not only to new customers who sign up for service, but also to situations when existing customers amend their existing service, such as by extending service for a new

¹⁶¹ *Id.*

term, adding a new service component to their existing calling plans, or adding additional lines, handsets or accounts to their current service plan. A carrier's rates and other terms and conditions of service may change significantly after a customer signs up for service, and even if those changes do not apply to the customer's existing service plan they may to any new plans or service components added to the existing plan. The same opportunities for consumer confusion and frustration exist in such circumstances and should be addressed by the Commission's rules.

With respect to the Commission's request for comments regarding a requirement that carriers provide a reasonable estimate of government mandated line items, and whether to adopt a 10 or 25 percent threshold for misleading surcharges, NASUCA believes that the Commission should adopt the lower, ten percent, threshold for misleading communications. As the Commission itself has noted, providing only a wide range of potential surcharge amounts at the point of sale could be misleading.¹⁶² The Commission should require carriers to be as accurate as possible in estimating government mandated line items, both to reduce consumer frustration over monthly bills that are higher than expected and to reduce consumer ire directed at the government when mandated charges are higher than the consumer was led to expect. Moreover, charges and taxes mandated by the government are either specified dollar amounts, or percentages applied to the total bill and are capable of being estimated with a high degree of accuracy.

Finally, NASUCA recommends that any point of sale disclosure rules that the Commission adopts should provide that consumers have up to 45 days after receipt of their first bill within which to cancel the new or changed service without penalty. The Commission has previously noted that, "for most consumers, the monthly telephone bill is their primary source of

¹⁶² *Second FNPRM*, at ¶ 55.

information and point of contact with respect to their telecommunications services providers.”¹⁶³ NASUCA agrees. Since most consumers will not know whether the required disclosures have been made in accordance with the Commission’s rules until after they have received their first bill, the Commission’s rules need to take this fact into account adequately. Moreover, given the Commission’s decision to legitimize carriers’ practice of placing any line item they wish on a consumer’s bill – so long as the line item is clear, accurate and not misleading – consumers need the time necessary to review their first bill, see precisely how many and what carrier imposed line items they will be paying, in order to determine whether they want to continue service with that carrier.

B. Enforcement Of The Commission’s Point Of Disclosure Rules.

The Commission also solicits comment on whether it should adopt an enforcement regime that permits states to enforce its point of sale disclosure rules, and further ask whether the Commission’s slamming rules provide a good model for point of sale disclosure rules that we may develop.¹⁶⁴ Similarly, the Commission asks whether, if it adopts an enforcement regime akin to its slamming rules, it should establish rules prescribing specific penalty amounts and procedures for punishing carriers’ violations of its point of sale disclosure rules similar to the Commission’s slamming rules. Finally, the Commission encourages commenters to address how states can administer the process of any penalty scheme that it establishes.¹⁶⁵

Despite its support for the Commission’s tentative decision to adopt point of sale disclosure rules, NASUCA has serious reservations regarding the Commission’s ability to delegate enforcement authority to the states that it raised in connection with the Commission’s suggestion that it could allow states to enforce its exclusive, federal billing regulations. As previously discussed, unlike the Commission’s slamming rules, which section 258 of the Act

¹⁶³ *TIB Order*, 14 FCC Rcd. at 7494-95, at ¶ 3.

¹⁶⁴ *Second FNPRM*, at ¶ 57.

¹⁶⁵ *Id.*

specifically allows states to enforce,¹⁶⁶ there is no specific grant to the Commission of authority to delegate enforcement of point of sale disclosure rules to the states. The *USTA II* court's ruling on the Commission's lack of authority to delegate its responsibilities to states suggests that the Commission's delegation of authority to states to enforce its point of sale disclosure rules may be ruled unlawful by the courts.¹⁶⁷

Moreover, NASUCA reiterates its opposition to any effort by the Commission to displace states' regulatory jurisdiction over such issues as point of sale disclosures by adopting rules that incorporate many of the provisions in the AVCs negotiated by states' attorneys general. In NASUCA's view, allowing the states to enforce exclusive, federal point of sale disclosure rules is rather like throwing a bone to a whipped dog. It does not excuse, or compensate for, the otherwise unlawful usurpation of state authority to regulate such matters within their proper jurisdiction. Moreover, the Commission could water down or even eliminate its point of sale disclosure rules and leave states and consumers without adequate enforcement tools.

These concerns aside, NASUCA generally supports the concept of penalties for violating the Commission's independent, rather than exclusive, point of sale disclosure rules and believes that the slamming rules provide a viable model for calculating and implementing appropriate penalties to deter confusing or misleading communications at the point of sale. Requiring carriers that violate the rules to pay a penalty over and above all charges that were incurred by the consumer's reliance on false, misleading or unreasonably confusing point of sales disclosures should serve to deter such practices. And like the Commission's slamming rules, NASUCA believes that carriers should bear the burden of demonstrating compliance with any point of sale disclosure rules adopted by the Commission.

So long as the Commission does not attempt to usurp the point-of-sale or other provisions

¹⁶⁶ See *TIB Order*, 14 FCC Rcd. at 7507-08, ¶ 26; 47 U.S.C. § 258.

¹⁶⁷ As previously discussed, NASUCA disagrees with much of the D.C. Circuit's reasoning in *USTA II*.

in the state attorneys generals' AVCs as a "federal regulatory scheme" that preempts states' jurisdiction over carriers' billing and marketing practices, NASUCA generally supports the Commission's incorporation of the AVCs' point of sale provisions into its own truth in billing rules.

VI. CONCLUSION.

NASUCA urges the Commission to issue an order concluding this proceeding in accordance with NASUCA's arguments and recommendations.

Respectfully submitted,

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