

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

National Association of State Utility
Consumer Advocates' Petition for
Declaratory Ruling Regarding Monthly
Line Items and Surcharges Imposed
by Telecommunications Carriers

Truth-in-Billing
and Billing Format

CG Docket No. 04-208

CC Docket No. 98-170

**OPPOSITION OF
CTIA – THE WIRELESS ASSOCIATION™**

Michael F. Altschul
Senior Vice President, General Counsel

CTIA – The Wireless Association™
1400 16th St., N.W.
Suite 600
Washington, D.C. 20036
202-785-0081

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To: The Commission

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CTIA – The Wireless Association™¹ hereby submits its opposition to the above-captioned petition.² CTIA opposes the petition filed by the National Association of State Utility Consumer Advocates (“NASUCA”) for a declaratory ruling prohibiting “monthly line-item charges, surcharges or other fees on customers’ bills unless such charges have been expressly mandated by a regulatory agency.”³

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS and ESMR, as well as providers and manufacturers of wireless data services and products.

² *National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format*, CG Dkt. No. 04-208, Public Notice, DA 04-1495 (rel. May 25, 2004) (NASUCA Petition).

³ NASUCA Petition at 1.

I. INTRODUCTION AND SUMMARY

NASUCA asks the Commission to take the unnecessary step of prohibiting the use of line items to recover carriers' operating costs—an activity the Commission previously has expressly allowed in a rulemaking context—and asks the Commission to take such a step via declaratory ruling. NASUCA requests drastic Commission action concerning the methods by which carriers structure their bills without explaining why the Commission should intervene in a competitive market that—if this is indeed an issue of concern to consumers—will surely correct itself.

NASUCA's proposal demonstrates the law of unintended consequences. Not only would Commission action in this respect serve to limit the amount of information available to consumers in determining which carrier to choose, it would hamstring carriers' attempts to provide consumers with national and regional calling plans and would ultimately impede the operation of a fully functional, competitive marketplace.

Rather than eliminating carrier flexibility to communicate with consumers about the costs associated with Federal, State or local mandates, the FCC could better achieve its interest in protecting consumers by:

- preventing state and local authorities from imposing additional mandates;
- relying on existing restrictions on misleading and deceptive practices and state contract law; and
- permitting the industry-led voluntary consumer code to operate undisturbed for a sufficient time to fairly gauge its efficacy.

II. THE FCC MUST CONSIDER THE PRACTICAL IMPACT OF NASUCA'S PROPOSAL ON WIRELESS CARRIERS' ABILITY TO DELIVER SERVICES CONSUMERS VALUE.

Regulated businesses find themselves subject on a regular basis to government requirements (that are not taxes) that affect their costs of doing business. Unlike unregulated business, these entities often do not have control over the timing of the costs associated with meeting these requirements. Sometimes formal, sometimes suasive, but in any event, the nature of public regulation—its very essence—is that the operation of the business is subject to alteration as a consequence of judgments by public officials as well as judgments by its managers. This is a reality with consequences that must be accommodated, including in the ways pricing information is presented to the public. In light of this, it is unsurprising that wireless service contracts and other up-front information provided to customers note the carrier's ability to separately charge for the costs associated not only with taxes and fees, narrowly defined, but also with other government mandates.

Line items provide useful detail to consumers on the surcharges and fees that are being collected beyond the basic rates for service. The Commission has in the past declined to ban this practice, noting its usefulness in providing customers with full information about the nature of their charges.⁴ The Commission has acknowledged that, “so long as we ensure that consumers

⁴ See *Truth-in-Billing and Billing Format*, CC Dkt. No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 7492, ¶ 55 (1999), *reconsideration granted in part*, 15 FCC Rcd. 6023 (2000) (*Truth-in-Billing Order*). The Commission stated that it would “prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates, or to list the charges in separate line items.” *Id.* (“Although we adopt the guideline that charges be identified through standard labels, carriers may nevertheless choose to include additional language further describing the charges. We are persuaded by the record not to adopt any particular ‘safe-harbor’ language, as set forth in the *Notice*, or mandate specific disclosures. Rather, we believe carriers should have broad discretion in fashioning their additional descriptions, provided only that they are factually accurate and non-misleading.”)

are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner.”⁵

Customers are able to obtain the wireless services they prefer because of the very practices NASUCA protests. Banning recovery of the costs of compliance with government mandates via separate line items would inhibit carriers from providing the long-term contracts that provide certainty and thus efficiency to both customers and carriers, and the national and regional rate plans that have proliferated as a result of customer demand. If the NASUCA proposal were forced on the industry, any significant variance in mandate compliance costs from jurisdiction to jurisdiction would prevent wireless firms from advertising prices in any meaningful way in regional or nationwide advertising campaigns. Customers would ultimately end up with less information rather than more—an outcome that certainly neither NASUCA nor the Commission seeks, but which is nevertheless the inevitable result of NASUCA’s request.

A. NASUCA’s Request Would Make It Impossible to Effectively Offer National and Regional Rate Plans or Advertise Prices.

A great many wireless customers have expressed a preference for bundled and national or regional calling plans, a preference reflected in the proliferation of national rate plans and regional multi-state plans that bundle local and long-distance services into one charge. For wireless carriers to continue to provide these plans, they must be able to separately itemize taxes and fees that vary by jurisdiction. Telecommunications carriers are subject to approximately 14,412 Federal, State and local taxing jurisdictions. In the nature of their business, they are also subject to different mandate compliance costs. Under NASUCA’s petition, CMRS providers

⁵ *Truth-in-Billing Order*, 14 FCC Rcd 7492, ¶ 55. The Commission also expressed concern that “precluding a breakdown of line item charges would facilitate carriers’ ability to bury costs in lump figures.” *Id.*

could not adjust individual bills for these occasionally large costs, but would have to either average them across all customers and jurisdictions or adopt localized rates.

Either solution results in an imperfect product and less choice and information for consumers. Averaging these types of costs across jurisdictions would mean that customers in one jurisdiction would pay for regulatory costs borne or imposed in another jurisdiction. Localized rates would result in a patchwork quilt of billing practices—even within states—and would preclude carriers from advertising a single nationwide or even statewide rate for services. Requiring localized rates would make it next to impossible for carriers to advertise such charges in national or regional media.

It is axiomatic that consumers benefit from more information rather than less. By separating taxes, fees and new mandate-recovery costs from the basic monthly charge for a fixed volume of service, carriers can advertise rates that customers can easily understand and compare. Forcing new mandate costs into the basic charge would make advertising and price comparison virtually impossible because it would preclude the continuity necessary to effective advertising campaigns. Separating the costs associated with taxes and analogous surcharges and complying with new government mandates enables more, not less, information about price. It also provides consumers with important information that governments sometimes would prefer to suppress—the costs associated with providing wireless service versus the costs associated with taxes, fees and mandates.

The Commission has recognized that the effective functioning of a competitive market is predicated on consumers having access “to accurate, meaningful information in a format they

can understand.”⁶ As an iron rule, economists prefer pricing that sends correct signals to consumers. Similarly, consumer groups should welcome wireless bills that highlight for consumers the charges associated with the production of basic services and with the additional requirements imposed by regulators on their behalves.

NASUCA claims line item surcharges and fees that are not expressly mandated “mask the true cost of a carrier's service and make it difficult for consumers to make an ‘apples-to-apples’ comparison of the cost of carrier service.”⁷ However, consumers have the tools they need to make appropriate comparisons about the costs of different carriers’ services. The media regularly reports on wireless carrier service plans and includes these line item costs in their comparisons; like any consumer, NASUCA itself can go to carrier websites and Point of Sale outlets to obtain this information in order to post comparisons on state consumer group websites and issue regular press releases to the media. Ultimately, so long as carriers provide information about surcharges and fees—as do all the carriers who subscribe to CTIA’s Consumer Code—consumers have the tools they need to make appropriate comparisons about the costs of different carriers’ services.

B. NASUCA’s Request Would Inhibit Long-Term Contracts.

Recovering the costs of government mandates via separate line items also allows carriers to accommodate changes in the costs of those mandates and still provide customers with long-

⁶ 2000 Biennial Regulatory Review—Telecommunications Service Quality Reporting Requirements, CC Dkt. No. 02-229, Notice of Proposed Rulemaking, 15 FCC Rcd 22113, ¶ 11 (2000).

⁷ NASUCA Petition at 37.

term contracts.⁸ When new charges are imposed or changed (such as, for example, the USF contribution rate, which changes every three months), wireless contracts and the associated billing systems must be sufficiently flexible to accommodate those changes without requiring carriers and customers to enter into new agreements. If costs associated with government mandates were included in basic charges, carriers would need to change their rates every time an expensive new surcharge or mandate was adopted.

Such constant changes are incompatible with long-term contracts, which benefit both consumers and carriers by providing certainty and rewarding customer loyalty. As is well-recognized, there are significant benefits to long-term contracts that are shared by producers and consumers in the form of lower costs and rates. Carriers and customers are able to mutually benefit from entering into an agreement for a fixed term at an agreed price for a basic, well-defined product—air time—while permitting taxes, surcharges, fees and the costs of government mandates to fluctuate. Long-term contracts, among other things, permit producers to more closely evaluate the capacity requirements they confront and to invest accordingly. This is particularly important in a high fixed-cost, lumpy investment environment like wireless. These contracts are feasible for carriers in this time of proliferating government mandates—absent a moratorium on such mandates—only if those costs can be separated out, changed when necessary, and recovered from customers with adequate disclosure of what caused the change.

⁸ The Commission recognized the benefits of setting rates by contract when it declined to require tariffs from wireless carriers, “premised on the expectation that carriers will establish a contractual relationship with customers to whom they sell service. Even in a competitive situation, where the customer has a choice of carriers, a contract is beneficial to both the carrier and the customer because it makes clear the rights and obligations of both parties.” *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Dkt. No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, ¶ 10 (2002) (citation omitted).

III. THE NASUCA PROPOSAL IS INAPPROPRIATE IN THE HIGHLY COMPETITIVE CMRS INDUSTRY.

A. The FCC Has Repeatedly Made Clear That the Mobile Telephone Sector Is Highly Competitive.

The Commission has repeatedly found that “[t]he wireless industry is characterized by a high level of competition between carriers[,]”⁹ and noted that, even without price regulation, competition has forced prices for wireless services steadily downward over the past several years.¹⁰ Acknowledging the beneficial effects competition has had on the industry, the Commission noted that it is unnecessary to regulate wireless rates “because consumers typically have a choice of several CMRS carriers who compete, on the basis of such things as price, to attract subscribers.”¹¹ The Commission has observed that, “while there are several large,

⁹ *Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Routing Issues*, CC Dkt. No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, ¶ 35 (2003) (LNP Order). *See also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Dkt. No. 02-379, Eighth Report, 18 FCC Rcd. 14783, ¶ 12 (2003) (*Eighth CMRS Competition Report*) (“After analyzing these various measures, we conclude that there is effective competition in the CMRS marketplace.”). The Commission’s conclusions are based on such indicators as “the nature and number of market participants, the geographic extent of service deployment, technological improvements and upgrades, price competition, investment, usage patterns, churn, subscriber growth and product innovations.” *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Dkt. No. 04-111, Notice of Inquiry, 19 FCC Rcd 5608, ¶ 2 (2004) (*Ninth CMRS Competition Report NOI*).

¹⁰ *See LNP Order*, 18 FCC Rcd 23697, ¶ 35. *See also Eighth CMRS Competition Report*, 18 FCC Rcd 14783, ¶ 91.

¹¹ *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Dkt. No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 10861, ¶ 53 (1999) (*Calling Party Pays Declaratory Ruling*). The Commission has noted that “95 percent of the U.S. population has three or more different operators offering mobile telephone service in the counties in which they live and 83 percent have a choice of 5 mobile telephone providers,” “that the price consumers pay for mobile telephony service continued to fall, while subscribership increased” and the introduction of “innovative and enhanced services such as advanced wireless

established carriers in the CMRS industry, they have no guarantee of maintaining their market share, and they are faced with consumers that would readily leave carriers that attempted to raise prices or diminish service quality.”¹²

These observations are confirmed by the realities of the wireless market. The Commission recently noted a churn rate for U.S. wireless carriers of more than 30 percent of customers each year, even before wireless local number portability removed a barrier to switching.¹³ The high rate at which consumers switch carriers indicates that the carriers have no particular ability to retain customers if they do not provide competitive service quality, features and—most significantly here—price.¹⁴

B. NASUCA’s Proposal is Inconsistent With the Commission’s Record of Promoting Industry-Led Solutions to Wireless Issues.

The Commission has long recognized the consumer benefits that arise from a competitive market—including “lower prices, greater choice of sellers, and innovative products and services”¹⁵—and has, up to now, taken a strong position that it will not intrude in a competitive

services and larger digital footprints” to conclude that “CMRS carriers have no guarantee of maintaining their market share, and that customers are able to change providers if a carrier attempts to raise rates or diminish service quality.” *Ninth CMRS Competition Report NOI*, 19 FCC Rcd 5608, ¶ 2 (footnote omitted).

¹² *Eighth CMRS Competition Report*, 18 FCC Rcd. 14783, ¶ 4.

¹³ *See id.* at ¶ 57.

¹⁴ *See id.* at ¶ 4.

¹⁵ *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, *et al.*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 70 (2003). *See also id.* at ¶ 57 (citing F.M. SCHERER AND DAVID ROSS, *INDUS. MKT STRUCTURE AND ECON. PERFORMANCE* (3d Ed.) at 19–28 (Houghton Mifflin Co., Boston, MA, 1990)).

market.¹⁶ Now, however, NASUCA requests that the Commission reverse years of precedent and ignore its long, successful history of allowing market forces to resolve issues that, in less competitive contexts, would require its intervention.¹⁷

When Congress amended the Communications Act in 1993 to accommodate the growing market for wireless telecommunications services, it acknowledged that traditional Title II regulation might not be necessary to promote competition or protect consumers in the wireless marketplace¹⁸ and allowed the Commission to forbear from application of certain regulations that

¹⁶ As Chairman Powell has stated,

A well-structured market policy is one that creates the conditions that empower consumers: It lets consumers choose the products and services they want—which is their right as free citizens. It breeds entrepreneurs—giving an opportunity for someone with a good idea the chance to build a business and acquire wealth and opportunity. Something few, if any, nations have done as well as this country. It creates a fertile environment for innovation. Innovators know they have the prospect of reaping great rewards (if they take great risks) and consumers get the benefits of the latest products and latest services. It allows market forces to calibrate pricing to meet supply and demand. Consumers get the most cost-efficient prices and enjoy the benefits of business efficiencies. The result for consumers is better, more cutting edge products, at lower prices.

Consumer Policy in Competitive Markets, Remarks by Michael K. Powell, Chairman, Federal Communications Commission, before the Federal Communications Bar Association, Washington, D.C. (June 21, 2001) (*Powell Speech*).

¹⁷ See, e.g., *Calling Party Pays Declaratory Ruling*, 14 FCC Rcd 10861, ¶ 53 (“We do not regulate CMRS rates because consumers typically have a choice of several CMRS carriers who compete, on the basis of such things as price, to attract subscribers.”) As the Chairman notes, “The beauty of a well-functioning market, of course, is that consumers make the choices, and if not served well they drop their provider and shift to another. Government should protect consumers, but should not exercise choices or intervene where the market will correct for bad business offerings or practices.” *Powell Speech*.

¹⁸ See *Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services*, GN Dkt. No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, ¶ 14 (1994) (*Forbearance Order*) (implementing the amendments to the Communications Act embodied in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)–(B), 107 Stat. 312, 392 (1993) (“Budget Act”), and forbearing to apply much traditional Title II regulation to CMRS providers).

historically restricted wireline common carriers.¹⁹ From the very beginning of its implementation, the Commission sought to adopt an appropriate level of regulation for wireless carriers and “establish[ed], as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed[.]”²⁰ As the Commission itself has stated, “the statutory plan [of section 332(c)] is clear. Congress envisioned an economically vibrant and competitive market Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.”²¹

The Commission has already taken steps, via its *Truth-in-Billing* guidelines, to improve consumers’ understanding of their telephone bills and to ensure that they have the information

¹⁹ The Budget Act also limited state regulation of wireless rates and entry but allowed states to petition the Commission for authority to regulate rates under certain circumstances. *See* 47 U.S.C. § 332(c)(3). To date, the Commission has not allowed states to regulate wireless rates; it has recognized in its rulings 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’[.]” *See Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19898, ¶ 9 (1999) (*Southwestern Bell Order*).

²⁰ *Forbearance Order*, 9 FCC Rcd. 1411, ¶ 15.

²¹ *Petition of the Conn. Dep’t of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Conn.*, PR Dkt. No. 94-106, Report and Order, 10 FCC Rcd 7025, ¶ 10 (1995), *review denied*, Connecticut Dep’t of Pub. Util. Control v. FCC, 78 F.3d 842 (2d Cir. 1996) (emphasis added). To the extent that NASUCA asks the Commission to provide for state enforcement of these new limitations it requests, NASUCA’s proposal may also violate Section 332(c)(3)(A)’s prohibition on state or local regulation of CMRS provider rates. The Commission has found that the phrase “rates charged” in section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states and local authorities are precluded from regulating either of these. *See id.* at ¶ 3; *Southwestern Bell Order*, 14 FCC Rcd 19898, ¶ 20. NASUCA’s proposal might require state or local regulators to prescribe both rate elements and rate levels.

they need to make informed choices in a competitive market. By asking the Commission to set requirements for wireless bills that eliminate transparency in carrier billing practices, NASUCA's request goes against the very goals of the *Truth-in-Billing* proceeding.

In adopting the *Truth-in-Billing* guidelines, the Commission intended to ensure that consumers had the information they needed in a competitive telecommunications marketplace without unnecessarily restricting the methods by which carriers recover costs. The Commission placed a variety of obligations on carriers' billing practices; for example, the guidelines require that charges on consumer telephone bills "must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered."²² If a carrier fails to comply with these requirements, the Commission can take action to enforce its rules. Additional regulations such as those NASUCA requests are unnecessary.

Notably, the Commission exempted wireless carriers from much of its other *Truth-in-Billing* requirements,²³ finding that the structure and the competitive nature of the wireless industry made most of the obligations unnecessary. For those obligations the Commission did place on wireless carriers, it recognized that "carriers may satisfy these obligations in widely divergent manners that best fit their own specific needs and those of their customers."²⁴

²² *Truth-in-Billing Order*, 14 FCC Rcd 7492, App. A at 66.

²³ The *Truth-in-Billing* guidelines that applied to CMRS carriers were only (1) that the carrier associated with each service charge be clearly identified on the bill and (2) that the customer bills prominently display a toll-free contact number for questioning or disputing charges on the bills. *See id.* at ¶ 17.

²⁴ *Id.* at ¶ 9. Then-Commissioner Powell recognized that competition would best serve this purpose:

The threat of consumer churn and the related downward pressure on profitability provides an important *in terrorem* effect that encourages providers to do everything possible to avoid losing customers to the competition, including

The Commission considered the very issue of misleading line items in the *Truth-in-Billing* and later proceedings, noting that “line-item charges are being labeled in ways that could mislead consumers by detracting from their ability to fully understand the charges appearing on their monthly bills.”²⁵ It issued a *Further Notice of Proposed Rulemaking* (still pending) seeking comment on the appropriate label to identify various charges relating to federal regulatory action on consumers’ bills, tentatively concluding that uniformity in labeling—not banning the practice altogether—would better enable consumers to understand the charges and provide a basis for comparison among providers.²⁶

Ultimately, the Commission adopted a guideline requiring carriers to use clear, standardized labels on telephone bills to refer to line-item charges associated with specified federal regulatory actions, although it has not yet specified what those labels will be.²⁷ It is highly instructive, however, that the Commission indicated that its standardized labels would encompass both federal regulatory action involving explicit transfers (*i.e.*, universal service) and

avoiding inaccuracies and misleading information in their bills. Simply put, the risk to providers of engaging in fraudulent practices in a competitive market is that consumers will soon discover these practices and cease to generate revenues for those providers.

Truth-in-Billing Order, 14 FCC Rcd 7492, separate statement of Commissioner Michael K. Powell, concurring, at 73 (citation omitted) (emphasis in original).

²⁵ *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd. 3752, n.279 (2002) (citation omitted).

²⁶ *See id.* at ¶ 103 (“At that time, the Commission excluded CMRS providers from these labeling requirements, but indicated that, should it adopt uniform labels for charges resulting from federal regulatory action, it would include CMRS providers to ensure consistency and understandability for consumers.”) (citation omitted).

²⁷ *See Truth-in-Billing Order*, 14 FCC Rcd 7492, ¶¶ 55–56 (1999).

other types of obligations that do not involve explicit transfers (*i.e.*, local number portability).²⁸

The Commission has plainly recognized that carriers may recover costs associated with government mandates that do not involve explicit transfers.

FCC proceedings throughout the history of the wireless industry have determined that, in a functioning competitive market, market forces will produce consumer welfare. Regulation is at best unnecessary and at worst damaging in this environment. The Commission has noted that, even in less-than-perfectly competitive markets, market forces can provide solutions to industry problems better than any regulation could.²⁹ Rather than impose regulations that will decrease the amount of information available to consumers—and thus diminish market forces—the Commission should decline to join NASUCA in its implicit assumption that consumers in a competitive market lack the capacity and incentive to make self-interested selections of their service suppliers.

C. The Wireless Industry’s Consumer Code Serves the Purposes Requested by NASUCA Without Undue Regulation of a Competitive Market.

NASUCA’s proposal is particularly untimely in light of the wireless industry’s recent adoption of a voluntary consumer code. NASUCA’s proposed regulation would unnecessarily burden the highly competitive wireless market without providing any better or quicker solution to its posited problem (even if it existed) than industry-led, market-based efforts could provide. Consumers in the wireless market have numerous choices. If those consumers are concerned

²⁸ See *id.* at ¶ 71.

²⁹ See *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd. 24178, n.25 (2000) (“Of course, real world markets rarely satisfy fully all the conditions of perfect competition. They nonetheless often perform effectively. In particular, less-than-perfectly competitive markets can constitute mechanisms for generating public benefits superior to non-price mechanisms such as reliance on regulatory or administrative processes.”).

with the practices at issue here, the competitive marketplace provides them the opportunity to move to another carrier. NASUCA requests drastic Commission action concerning the methods by which carriers structure their bills without explaining why, absent fraud, the Commission should intervene in a competitive market that—if this is indeed an issue of concern to consumers—will surely correct itself.

If NASUCA is concerned about fraud, there are many relevant safeguards, none of which require the Commission to impose unnecessary regulation on a competitive market.³⁰ Wireless carriers are, of course, subject to the conventional prohibitions against fraud. It appears, however, that NASUCA's case involves the possibility of consumer confusion, not fraud. And this makes NASUCA's timing especially odd, because voluntary, industry-led consumer protection measures have just been implemented.

CTIA's Consumer Code for Wireless Service goes far beyond the Commission's *Truth-in-Billing* regulations and addresses many of the concerns described in NASUCA's petition.³¹ Of all the FCC's regulated industries, it is the wireless industry that has followed the Commission's wishes and developed industry best practices, along the lines of those the

³⁰ For example, a settlement reached last year in Missouri requires wireless carriers there (who did not admit liability in the settlement) to use more explanatory language in their advertising and billing materials to clarify that government mandate recovery charges were imposed by the carriers and not by federal or state governments. *See* Press Release, Missouri Attorney General's Office, Nixon obtains agreements requiring Nextel, Sprint to use clearer language in cell phone bills, ads regarding fees (July 3, 2003) (*available at* <www.ago.state.mo.us/newsreleases/2003/070303.htm>). It is important to note that the actions precluded by this settlement would have also been banned under CTIA's Consumer Code, which had not yet been implemented.

³¹ The Consumer Code for Wireless Services can be found on CTIA's website at <http://files.ctia.org/pdf/The_Code.pdf>.

Commission determined preferable, in a voluntary consumer code. The code was adopted last September, and implementation has only begun in the last several months.³²

The Consumer Code is intended to “provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that meets consumers’ needs[.]”³³ Signatories to the code have committed to disclosing rates and terms of service and to state—in collateral or other disclosures at the point of sale, on their websites and in their advertising (to the extent the medium allows)—whether any additional taxes, fees or surcharges apply and the amount or range of any such fees or surcharges that are collected and retained by the carrier. In addition, signatories are required to distinguish monthly charges for service and features and other charges collected and retained by the carrier from taxes, fees and other charges collected by the carrier and remitted to Federal, State or local governments. Signatories are banned from labeling cost recovery fees or charges as taxes.

Even if there were a genuine problem here, the only responsible course for the Commission would be to await the results of the fully implemented code before attempting to intervene. Reticence is warranted not only as a sound economic policy, but also as the recognition that NASUCA’s proposal has serious and negative First Amendment implications and significant procedural defects.

³² ALLTEL, AT&T Wireless, Cellular South, Cincinnati Bell Wireless, Cingular Wireless, First Cellular of Southern Illinois, New-Cell, NEXTEL, Southern LINC, Sprint, T-Mobile USA, Triton PCS, US Cellular and Verizon Wireless have subscribed to the code.

³³ Consumer Code preamble.

IV. NASUCA PETITION WOULD PROHIBIT PROTECTED SPEECH.

NASUCA's petition would unlawfully censor truthful non-misleading speech. Carriers simply have no better way of communicating with their customers about the true regulatory costs of their services than through bills. NASUCA's petition would entirely foreclose that avenue of communication.

The requests in NASUCA's petition would be found unconstitutional under the four-part test for examining restrictions on commercial speech enunciated in the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*.³⁴ Under the test, the following inquiries must be made:

- Whether the speech concerns lawful activity and is misleading;
- Whether the asserted governmental interest in regulating the speech is substantial;
- Whether the regulation directly advances the governmental interest asserted; and
- Whether the regulation is no more extensive than is necessary to serve that interest.³⁵

NASUCA's proposal would impose regulation on speech that concerns lawful activity and is not misleading. In its sampling of wireless carriers' surcharges, NASUCA cites language used by CMRS carriers and included in consumer invoices that explains that line items are not taxes and are not, in the narrow sense, government-required charges.³⁶ CMRS carriers are thus

³⁴ 447 U.S. § 557 (1980).

³⁵ *Cent. Hudson*, 447 U.S. at 566.

³⁶ See NASUCA Petition at 18–23 (describing AT&T Wireless Services, Inc.'s claims that its Regulatory Programs Fee is intended to “help fund ... compliance with various government mandated programs” and “is not a tax or government required charge;” ALLTEL Wireless' assertion that its Regulatory Cost Recovery Fee is used to “recoup expenses incurred to provide government mandated services;” and Nextel's explanation that its Federal Programs Cost Recovery Fee “is not a tax or government required charge,” among others).

being honest with their customers, not attempting to hoodwink them, as alleged, into thinking that they are paying nonexistent regulatory fees. In addition, CMRS carriers are not engaging in illegal activities. They are assessing a charge to assist their compliance with mandated regulatory programs. It is not surprising that regulatory charges vary from carrier to carrier. Differences in CMRS carriers' sizes and the localities in which they operate lead to disparate costs and disparate charges to consumers. NASUCA's petition would limit CMRS carriers' speech that would "disseminate accurate information [about] the operation of market competitors, . . . which can benefit consumers by informing their consumption choices and fostering price competition."³⁷ Thus, NASUCA's petition should fail under the first prong of the *Central Hudson* test.

CTIA acknowledges that protecting consumers from misleading billing practices is a substantial government interest that would fulfill the second prong of the *Central Hudson* analysis. However, the restriction on speech required by the NASUCA petition would not directly or materially advance the asserted government interest. "It is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"³⁸ To sustain a restriction on commercial speech, NASUCA must "demonstrate that the harms it recites are real and its restriction[s on speech] will in fact alleviate [the harms] to a material degree."³⁹

³⁷ Greater New Orleans Broad. Assoc. v. United States, 527 U.S. 173, 184–85 (1999).

³⁸ *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983)).

³⁹ *Edenfield*, 507 U.S. at 771. Supreme Court precedent indicate that this requirement is "critical" because the government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 771).

It is doubtful that NASUCA could sustain this burden. The sampling of wireless carriers' surcharges included in the NASUCA petition demonstrates that information about these charges is publicly available on carriers' websites or on customer invoices. Customers can easily compare the fees charged by providers, allowing them to make an informed choice. Restricting line items would mean that carriers would likely have to raise calling plan rates and could not "break out" how much it costs to comply with regulations. NASUCA's restrictions can not be sustained if they provide only ineffective or remote support for the government's purposes.

Here, NASUCA has failed to show how limiting speech on regulatory compliance would provide greater protection for consumers. Indeed, NASUCA is foreclosing the most effective means through which CMRS carriers can communicate with their consumers—their invoices. CMRS providers are being forthright, explaining to consumers why certain costs are being exacted. Providers are being clear that the regulatory assessment they must levy is not a traditional cost of providing service, but instead a cost associated with fulfilling legal duties. Thus, NASUCA's petition would fail under the third prong of the *Central Hudson* test.

A restriction on speech should not be more extensive than necessary to serve the interests that support it. "The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest."⁴⁰ The challenged regulation should show that its "proponent 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."⁴¹ NASUCA will not be able to demonstrate the requisite "narrow tailoring" required for its regulations to be upheld. NASUCA's proposed regulations would sweep in legal means of conveying information

⁴⁰ *Greater New Orleans Broad. Assoc.*, 527 U.S. at 188.

⁴¹ *Id.*

to consumers about CMRS carriers' costs. CMRS carriers' creation of a separate line item explaining the costs of government mandates enables customers to compare the amount spent by each individual carrier to achieve these ends, itself a proxy for quality. NASUCA's proposal sweeps in nonmisleading commercial speech that encourages informed choices by consumers, thus usurping the stated intentions behind its proposed regulations.

By prohibiting lawful, nonmisleading speech, NASUCA would give Federal, State and local regulators free reign to pile more and more regulatory mandates on the telecommunications industry without affording carriers their most effective means of letting their customers know that such costs have been imposed. The slippery slope created by the NASUCA petition would prevent CMRS carriers from using an effective means of informing consumers about the rising costs associated with compliance with regulatory mandates.

It is likely that the line items associated with Federal, State or local regulatory action deserve greater protection than that accorded to traditional commercial speech. The Supreme Court has recognized that commercial speech can also convey a political message. As explained in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system [and] . . . to the formation of intelligent opinions as to how that system ought to be regulated or altered."⁴² By breaking costs into separate line items, CMRS providers highlight the expense associated with complying with regulatory obligations. These line items then prompt consumers to contact lawmakers and to support or oppose existing programs and to support or oppose their extension. NASUCA's petition would silence these political statements

⁴² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

about the costs of government regulatory programs. The Supreme Court has been clear on why suppression of this type of speech is impermissible. The Court has explained that “bans that target truthful, nonmisleading commercial messages rarely protect consumers” from commercial harms.⁴³ Instead, “such bans often serve only to obscure an ‘underlying government policy’ that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.”⁴⁴

V. NASUCA’S PETITION WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

As explained above, the Commission has expressly allowed carriers to recover government mandate-related costs in separate line items. Now, NASUCA requests a change in the rules to prevent this activity. NASUCA itself acknowledges that the relief it requests effects a change in Commission policy; it notes that, in the *Contribution Order*, the Commission specifically stated that carriers can recover the costs of compliance through customer rates *or through another line item*.⁴⁵ Thus, rather than using the proper procedural vehicle, a petition for rulemaking, NASUCA attempts to circumvent proper Administrative Procedure Act (“APA”) procedures by requesting an adjudicatory ruling. The Commission should resist the temptation to act through this vehicle.

In the *Truth-in-Billing* and *Contribution* orders, the Commission specifically left carriers the flexibility to determine how to best recover their costs, a fact NASUCA acknowledges.⁴⁶

⁴³ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–503 (1996).

⁴⁴ *Id.* at 503.

⁴⁵ See NASUCA Petition at 9 (citing *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, ¶¶ 40, 54 (*Contribution Order*)).

⁴⁶ NASUCA Petition at 59–60.

NASUCA requests that the Commission take action to close this “loophole” in a manner directly contradicted by the APA.⁴⁷ NASUCA asks the Commission, not to interpret its existing rules, which the Commission has already determined allow line-item recovery, but to promulgate new rules that prohibit this activity. “It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”⁴⁸ The only proper vehicle through which the Commission could achieve NASUCA’s desired ends is a notice-and-comment rulemaking.

It is true that the FCC has opened the NASUCA petition to public comment. This action, however, does not fulfill the requirements of a notice-and-comment rulemaking. First of all, it is the Commission, not NASUCA, which must articulate the proposed rule and a “concise general statement of the rule’s basis and purpose.” That proposal must then be published in the Federal Register to gather “written data, views, or arguments” from interested persons. A petition for declaratory ruling from an interested party should not be a proxy for agency action.

[T]he notice requirement of the APA does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement “improves the quality of agency rulemaking” by exposing regulations “to diverse public comment,” ensures “fairness to affected parties,” and provides a well-developed record that “enhances the quality of judicial review.” In contrast to an informal adjudication or a mere policy statement, which “lacks the firmness of a [prescribed] standard,” an agency’s imposition of requirements that “affect subsequent [agency] acts” and have a “future effect” on a party before the agency triggers the APA notice requirement.⁴⁹

⁴⁷ 5 U.S.C. § 553(b).

⁴⁸ *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

⁴⁹ *Sprint Corp. v. FCC*, 315 F. 3d 369, 373 (D.C. Cir. 2003) (citing *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) and *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 95–96 (D.C. Cir. 2002)).

Under the APA, a rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]”⁵⁰ This definition is intentionally broad; it includes nearly every statement an agency may make.⁵¹ The Commission has recognized that “‘substantive rules’ requiring notice and comment are those that effect change in existing law or policy[.]”⁵² By altering the Commission’s approach to line item recovery, NASUCA’s proposal would impose on the CMRS industry a distinct obligation that had not existed previously, with an intentional and binding effect, indicating a definite change in Commission policy. Therefore, any Commission action in response to this petition is a substantive rulemaking action that requires notice and comment under the APA.

The APA requires the Commission to provide the public with notice of any rules it proposes to adopt and to allow interested persons the opportunity to submit comments on those

⁵⁰ 5 U.S.C. § 551(4).

⁵¹ See *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980).

⁵² *National Exchange Carrier Association, Inc., Proposed Modifications to the 1998–99 Interstate Average Schedule Formulas*, ASD Dkt. No. 98-96, Order, 15 FCC Rcd 1819, ¶ 6 n.22 (1999) (citing *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434 (Fed. Cir. 1998)). “In determining whether a rule is substantive, we must look at its effect on those interests ultimately at stake in the agency proceeding.” *Applications of Columbia Bible College Broadcasting Co., Monroe, North Carolina*, MM Dkt. No. 90-607, Hearing Designation Order, 6 FCC Rcd 516, ¶ 18 (1991) (citing *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974)).

proposals.⁵³ This is not an obligation to be taken lightly. Indeed, the notice and comment procedure is a fundamental tenet of the APA.⁵⁴

To be sure, the notice and comment provisions of the APA do not apply to, *inter alia*, interpretive rules, policy statements, or rules of agency organization, procedure, or practice.⁵⁵ Nevertheless, exceptions to the APA are to be construed narrowly.⁵⁶ The D.C. Circuit has held that “substantive rules are those which grant rights, impose obligations, or effect a change in existing policy. By contrast, interpretive rules are those that merely clarify or explain existing laws or regulations.”⁵⁷

Similarly, quoting the Sixth Circuit, the First Circuit explained that “[i]f a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in

⁵³ 5 U.S.C. § 553(b) and (c); *see also* American Medical Ass’n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (“The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted. These requirements, which serve important purposes of agency accountability and reasoned decision-making, impose a significant duty on the agency.”).

⁵⁴ *See* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1486 (9th Cir. 1992) (“It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.”).

⁵⁵ 5 U.S.C. § 553(b)(3)(A).

⁵⁶ *See* Petry v. Block, 737 F.2d 1193, 1200 (D.C. Cir. 1984) (“As an elementary principle, it is clear that exceptions to Section 553 notice-and-comment procedures are to be ‘narrowly construed and only reluctantly countenanced.’”) (citations omitted).

⁵⁷ National Medical Enterprises, Inc. v. Shalala, 43 F.3d 691, 697 (D.C. Cir. 1995) (citations omitted); *see also* Hocr v. U.S. Dept. of Agriculture, 82 F.3d 165, 169 (7th Cir. 1996) (“[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes (or requires—it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency. Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency’s view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure not followed here is mandatory . . .”).

the law itself, then it is substantive.”⁵⁸ The substantial impact that a prohibition on line-item recovery would have on the regulated industry (as well as its customers) and the burdensome obligations it imposes render it a rule that should have been submitted to the notice-and-comment procedures demanded by the APA.⁵⁹

VI. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny NASUCA’s petition for declaratory ruling.

Respectfully submitted,

CTIA – The Wireless Association™

/s/ Michael F. Altschul

Michael F. Altschul
Senior Vice President, General Counsel

CTIA – The Wireless Association™
1400 16th St., N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Its Attorney

July 14, 2004

⁵⁸ *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) (citing *Ohio Dept. of Human Servs. v. HHS*, 862 F.2d 1228, 1233 (6th Cir. 1988)).

⁵⁹ *See United States Dept. of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984) (“When a proposed regulation of general applicability has a *substantial impact* on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided.”) (citations omitted) (emphasis in original).

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 14th day of July, 2004, copies of the foregoing Opposition of the National Association of State Utility Consumer Advocates' Petition For Declaratory Ruling were delivered via postage pre-paid first class mail, unless otherwise indicated, to the following parties:

Federal Communications Commission*
445 12th Street, SW
Washington, DC 20554

Patrick W. Perlman
Deputy Consumer Advocate
The Public Service Commission of
West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301

David C. Bermann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

NASUCA
8380 Colesville Road
Suite 101
Silver Spring, MD 20910

/s/ Dennette Manson
Dennette Manson

*via electronic filing