

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

OPPOSITION TO PETITION

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OPPOSITION TO PETITION

BellSouth Corporation, on behalf of its wholly owned subsidiaries (collectively “BellSouth”), files this Opposition to the National Association of State Utility Consumer Advocates’ (“NASUCA”) Petition for Declaratory Ruling (“Petition”).¹

I. INTRODUCTION

The Commission must deny NASUCA’s Petition because the relief it seeks is patently illegal and procedurally flawed. Moreover, even if granting of the Petition could withstand judicial scrutiny – which it cannot – it should be denied because it reaches improper conclusions regarding carriers’ billing practices and seeks to regulate an area that is better left to the competitive market.

The Petition asks the Commission to issue a declaratory ruling that prohibits carriers from billing “all line-items, surcharges and fees unless both recovery of the fee, and the amount of the fee carriers are entitled to assess, is expressly mandated by federal, state or local

¹ *National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format, CG Docket No. 04-208, Public Notice, DA 04-1495 (May 25, 2004).*

government.”² This broad ruling request is based on references to various carriers’ billing for fees and expenses that NASUCA does not contend are improperly billed,³ but instead argues that the manner in which they are billed (separate line items on the bill) is misleading and violates Commission rules. Ironically, NASUCA makes these claims even though in many instances the carrier has meticulously followed the Commission’s Truth-in-Billing (“TIB”) guidelines,⁴ the only rules that the Commission has issued on billing and collection matters since de-regulation in 1985. Moreover, the carriers’ bills that are the putative subject of NASUCA’s complaint provide more detail to the consumer, not less. Indeed, it is the additional detail that NASUCA complains about. BellSouth does not deny that a telephone bill can sometimes be confusing; however, confusing bills cannot be corrected by yet more regulation.⁵ As the Commission has fully acknowledged, competition is the great leveler and will always produce better results than regulation. Reduced to the simplest form, if consumers want bill formats different than what they are receiving today, the market will produce them. Regulation will only impede this progress and should be flatly rejected.

² Petition at 24.

³ NASUCA does suggest that some carriers may be overbilling for certain line items and that in some instances it is unsure what fees the carrier is billing to recover.

⁴ *Truth-in-Billing and Billing Format*, CC Docket No. 98-105, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492 (1999) (“*TIB Order*”); 47 C.F.R. §§ 64.2400, 2401.

⁵ The fact of the matter is that there is no one-size-fits-all solution. A bill that may be confusing to one individual may contain information that another individual believes to be the minimum necessary for accurate billing.

II. THE RELIEF SOUGHT BY THE PETITION IS UNLAWFUL

A. Granting the Petition Would Violate the First Amendment

The Petition seeks a very broad prohibition against a carrier's communication with its customers. Specifically, NASUCA asks that the Commission declare it unlawful for carriers to expand their billing practices to include definitional line items for certain types of fees and charges. Such action, if adopted, would clearly limit the communication between carriers such as BellSouth and their customers. The courts have long held that "[e]ffective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech."⁶ There can be no doubt that prohibiting a carrier's right to provide separate line items for specific types of fees on bills to its customers restricts both the carrier's right as a speaker and the customer's right to receive the information. BellSouth acknowledges that this speech is commercial speech and subject to regulation; however, such regulation must pass the test the Supreme Court established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

Under *Central Hudson*, any government restriction of commercial speech must be tested against a four-part framework to see if the restriction violates the First Amendment. First, the commercial speech must concern a lawful activity and not be misleading. Once past this threshold question the government may restrict the speech only "if it proves (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially

⁶ *U.S. West, Inc. v FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999).

advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.”⁷

As demonstrated below, the line item charges in question are lawful and are not misleading and therefore protected by the First Amendment. BellSouth will not address whether the Commission has a substantial state interest and if the relief sought by the Petition advances that interest because the final prong – that the regulation be no more extensive than necessary – is clearly not met.

The relief sought by the Petition seeks the restriction on all line item charges, no matter how lawful or non-misleading, unless federal, state, or local government specifically mandates the charges. This rule, if implemented would serve as a prior restraint on any line item that a carrier would desire to place on its bill. This would be true even if the customer and the carrier agreed to the charges. Such broad brush draconian restrictions assure that, if granted, the declaratory ruling would have no chance of withstanding judicial review. Accordingly, the Petition must fail.⁸

⁷ *Id.* at 1233; *Central Hudson*, 447 U.S. at 566.

⁸ The Petition tries to side step the important constitutional issues by claiming that the relief it seeks is not a restriction on speech but a restriction on carriers’ conduct. *See* Petition at 63-64. The Petition relies on Commissioner Furtchgott-Roth’s dissent in the *TIB Order*. This reliance is misplaced for two reasons. First, even a quick read of Commissioner Furtchgott-Roth’s dissent makes clear that he is discussing regulating the underlying conduct of the universal service fund fee itself, not how the billing of the fee occurs on the a customer’s bill. Indeed, his final analysis casts serious doubt on whether standard language for specific cost recovery mechanisms was constitutional. Second, even if the Commissioner had concluded that the same type of relief requested by the Petition is conduct and not speech – which he did not – his dissent is not authoritative to the Commission or courts that would review the restrictions placed on carriers if the Commission granted the Petition.

B. The Petition Is Procedurally Flawed

The relief sought by the Petition, if granted, would violate the Constitution's First Amendment and, therefore, no further analysis by the Commission is necessary to deny NASUCA's request. Even if NASUCA could amend its Petition to address the constitutional issues, the Petition itself is an improper mechanism to undertake the regulation NASUCA seeks. While the Commission certainly has the authority to issue a declaratory ruling on matters, it does so only at its discretion and is limited in exercising that discretion only to terminating a controversy or removing uncertainty.⁹ NASUCA never alleges a matter to be uncertain or in controversy but instead argues that carriers' billing practices are misleading and that the Commission should change its rules to address these alleged improprieties. This claim, in addition to being untrue, cannot be the basis for a declaratory ruling.¹⁰ Pursuant to the Administrative Procedures Act, the rule changes sought in the Petition can only be made pursuant to a properly noticed rulemaking proceeding. The Commission cannot provide relief in the form of changing the rules to suit NASUCA's request under the guise of a public notice for declaratory ruling. Accordingly, even if the Commission wanted to entertain the rules changes that NASUCA seeks, it must do so through a rulemaking proceeding.

⁹ 47 C.F.R. § 1.2; 5 U.S.C. § 554; *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Build Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises, Memorandum Opinion and Order*, 6 FCC Rcd 3336, 3342, ¶ 26 (1991); *Petition for Declaratory Ruling that Any Interstate Non-Access Service Provided by Southern New England Telecommunications Corporation Be Subject to Non-Dominant Carrier Regulation, Order*, 11 FCC Rcd 9051, 9052, ¶ 4 (1996) (noting that the Commission may issue a declaratory ruling to "resolve a controversy or uncertainty with respect to the Commission's existing rules").

¹⁰ *Id.*

NASUCA also argues within the Petition that the fees charged by many carriers are not just and reasonable pursuant to Section 201 and 202 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Disputes as to rates charged by carriers are also improper issues for a declaratory ruling. If a customer believes that the rates and fees charged for services rendered are not just and reasonable, the customer can file a complaint with the Commission and the Commission will conduct an investigation of the alleged improper rate or fee. The Commission, therefore, must give no relevance to NASUCA's unsubstantiated claims that carriers' fees are unjust and unreasonable and in violation of Sections 201 and 202.

III. THE ALLEGATIONS IN THE PETITION ARE WRONG

The Petition provides examples of fees charged by interexchange ("IXC") and wireless carriers.¹¹ Although the stated relief sought is overly broad,¹² the Petition appears to be focused on a particular type of fee common to the IXC industry. Specific to BellSouth, the Petition takes exception to BellSouth's carrier cost recovery fee ("CCRF"). NASUCA claims that it is similar to other carriers' fees and is misleading to the consumer. BellSouth does not speak for the other carriers, nor does it speak as to the similarities or dissimilarities between its carrier cost recovery fee and the fees of other carriers that the Petition claims are of the same cloth. BellSouth does

¹¹ The Petition includes BellSouth in its examples of alleged billing improprieties. The reference is to a line item included on BellSouth Long Distance, Inc.'s ("BSLD") bill. BSLD is a separate affiliate carrier, as currently required by Section 272 of the Telecommunications Act of 1996, that provides intrastate and interstate telecommunications services.

¹² Indeed, even if the relief were not patently illegal, it is so completely overbroad that it could be viewed as allowing only one charge on the bill for all services rendered with a possible separate charge for applicable taxes. For example, call detail for individual interstate calls is commonly broken down by line item, showing the called number, duration of the call, rate for the call, and total charge for the call. This is a fee for services that is clearly not mandated by federal, state, or local government. Thus, if the Petition were granted, call detail would be prohibited. This sort of illogical result requires that the Petition be summarily dismissed.

state, however, that the BellSouth carrier cost recovery fee is not misleading, improper, or in violation of any statute or Commission rule. To the contrary, NASUCA's allegations are false and undeserved.

A. The Fees that BellSouth Charges Its Customers Are Lawful and Are Not Misleading

NASUCA does not dispute that BellSouth, as well as other carriers, has the right to recover costs and even collect a profit.¹³ The origin of its objections, therefore, is the method used to bill customers for the services that are rendered. NASUCA claims that the carrier cost recovery fee misleads customers by making them believe that they are incurring lower costs for the services than they actually have to pay. The fallacy of this claim is made clear by looking no further than the notifications provided by BellSouth to customers at every phase from marketing to billing.

To begin with, BellSouth's advertising campaigns relating to the plans with which the CCRF is associated include a clear and plain disclosure that the plan is subject to the CCRF. Additionally, once a customer requests BellSouth's services, he or she is mailed a welcome package that includes a letter notifying the customer of the CCRF. Additionally, the package includes a Service Agreement that explains how to get to a BellSouth website that includes more information about the fee. Finally, the customer's bill includes a separate line item prominently displaying the fee as part of the overall charge for services. If at any time the customer has questions about the fee or how or when it will be applied, a toll free number is included in the

¹³ Petition at 38. NASUCA does contend that the charges are unjust and unreasonable under Section 201 and 202 of the Communications Act; however, it offers only anecdotal support with no substantive facts to make this claim. Moreover, this claim is inconsistent with NASUCA's overall premise that carriers are undercharging for per minute rates and then charging the additional line item fees to cover the undercharged rates.

welcome package and on the bill to allow the customer to call BellSouth with questions. BellSouth is confused as to how this fee could be misleading to customers, especially in today's IXC market when a customer can change carriers with a simple phone call. Thus, if a customer remains confused after being told in the advertising material about the fee, and then again in the welcome packet material, and then again after calling BellSouth to inquire about the fee, and yet again after seeing the line item on the bill, he or she can simply change carriers in as quickly as 24 to 48 hours. It is therefore ridiculous to conclude that BellSouth's customers are being charged fees that they have no basis to know about and no control over. Customers maintain control by voting with their feet, and if they don't like their current carrier's way of doing business they can easily select from a multitude of others.

B. BellSouth Has Fully and Carefully Followed All Commission Rules and Orders When Billing Its Customers

NASUCA alleges that the line item fees currently billed by many carriers do not comply with the Commission's Truth in Billing ("TIB") rules.¹⁴ BellSouth takes great exception to this claim. BellSouth works extensively on ensuring complete regulatory compliance and the TIB rules are an important part of this compliance. Regardless of how the Petition twists the reality to create an illusion that supports its conclusions, as the actual facts relate to BellSouth there is no doubt that all of BellSouth's billing practices comply with the TIB rules.

The language of the rule is specific as to the billing requirements placed on a service provider. It states:

(b) *Descriptions of billed charges.* Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific

¹⁴ *TIB Order*; 47 C.F.R. §§ 64.2400, 2401.

enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.¹⁵

BellSouth's CCRF is identified on the bill in a separate line item that has a brief and clear description. Additionally, BellSouth provides a Residential Pricing and Service Guide, which is available on the Internet and can be provided in paper form to requesting customers, that provides very detailed descriptions of services and the terms and conditions of the services offered. The Pricing and Service Guide states:

2.18.5 Carrier Cost Recovery Fee

The Company will assess residential Customers who have presubscribed to the Company as their primary interexchange carrier a Carrier Cost Recovery Fee *to recover certain costs associated with state-to-state access charges, expenses associated with regulatory proceedings and compliance, and billing expenses.* Except as described below, a Carrier Cost Recovery Fee of \$0.99 will be applied per billing account in each month in which a residential Customer has Company long distance interstate or international charges, such as monthly service charges or direct dialed usage charges, on an invoice. The fee will apply in full for any portion of a billing period in which the Customer has applicable interstate or international charges. The Carrier Cost Recovery Fee will not apply to Customers subscribing to BellSouth® Unlimited Plan, BellSouth® Unlimited Talk plan, BellSouth® Unlimited MultiLine plan, BellSouth® Basic Unlimited Plan, BellSouth® Basic Unlimited Value Plan or BellSouth® Unlimited Savings Value Plan promotion. *This fee is not a tax or charge imposed or required by any government entity.*¹⁶

BellSouth asks what more in the form of a description it could make to ensure that the charge is clear and non-misleading. Not only does it inform the customer of the purpose of the charge, but

¹⁵ 47 C.F.R. § 64.2401(b).

¹⁶ BellSouth Residential Services Pricing and Service Guide, section 2.18.5 (effective May 24, 2002), available at http://www.tariffs.net/tariffs/481/Res_Pricing_Guide.pdf (emphasis added). This link can be found on the website referenced in the Service Agreement that is part of the welcome package.

it also specifically states that it is not a tax or government imposed charge. Indeed, this statement – that the fee is not a tax or government imposed charge – is included on applicable BellSouth advertisements and fulfillment material. Moreover, customers are notified before they purchase applicable services that the CCRF will apply and the CCRF will be 99 cents. Thus, there can be little doubt that the description of the fee provides enough information so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.

C. BellSouth’s Billing Practices Are Common to the Telecommunications and Other Industries

NASUCA contends that even if the fee is for justified costs of the carriers, such costs are simply the normal costs of doing business and should be included in the carriers’ rate per minute instead of appearing as a separate line item. Ironically, this argument of rolling all costs into one charge is in direct opposition to the openness the TIB rules were trying to create. Additionally, it is not consistent with industry practice. Many carriers charge fees that are broken into separate line items on their bills. Not only do carriers provide separate line item call detail for each individual call billed,¹⁷ but most carriers offer monthly plans that include a fixed monthly recurring charge (“MRC”). The amount of the fee typically determines the amount of per minute charges. For example, one plan may have an MRC of five dollars with a per minute rate of five cents while another may have an MRC of two dollars with a per minute rate of seven cents. Customers prefer these types of plans because they allow them to better manage their calls, depending on whether they are a heavy or light user of long distance services. These types of

¹⁷ See *supra*, note 12 (discussion of how even individual calls are broken out by line item).

plans and billing practices are common among the largest carriers and reflect a long established trend of carriers' relationships with their customers.

Moreover, even outside of the TIB rules, in addition to the telecommunications industry, it is common practice within many industries to provide separate line item charges for specific types of expenses. This is especially true if the costs are for expenses that relate to charges separate from the specific service provided. For example, airlines commonly charge security fees. These fees are for the added cost of security for airports. Another example is cable television companies. They regularly charge a line item franchise fee on their bill. While it could certainly be argued that these fees are simply the cost of doing business for these companies, they break these fees out in separate line items for billing purposes to distinguish them from service charges. Similarly, almost every business that incurs shipping and handling expenses separates these fees on a customer's invoice. This common practice is a fully acceptable means of displaying this expense as separate from the costs of providing the actual goods or services to the customer. Telecommunications services should be no different than other industries when it comes to separating these types of fees from the charges associated with the services themselves.

D. Competition, Not Regulation, Must Dictate Market Practices for Billing Services

At its core, the NASUCA Petition misses the fundamental point of what the Commission's aim should be, which is to regulate where regulation is needed and to step back when competition fills the gap. In many instances, differing parties can argue the competitiveness of markets. In the market related to the Petition, however, there is no argument – the interstate and wireless telecommunications markets are among the most competitive in the

world. Competitors in these markets will either find and cater to the customers' desires and demands or they will die. Such competition ensures that competitors are providing customers with the proper information to allow them to shop and compare services. And competition, not regulation, is the best motivator of carriers' behavior. Regulation in a competitive market only adds unnecessary costs to the service and limits what competitors can provide to the customer. Competition has been tried and tested time and again and always prevails as the best way to ensure that consumers receive the services they want at the best possible price. The Commission, therefore, should not seek to resolve a problem that does not exist.

IV. CONCLUSION

BellSouth fully supports providing clear and understandable bills to its customers. Indeed, it seeks to do that by providing detailed descriptions of the rates and fees it charges for the services it renders. Moreover, BellSouth works hard to ensure that it meets all of its obligations under the Commission's TIB rules. These factors are evident in BellSouth's bills.

The markets for interstate and wireless services are competitive and need no government intervention to ensure that consumers receive the services they want on bills that reflect the services they receive. NASUCA, however, asks the Commission to step into this competitive environment and enforce its will on the public. This is not only unnecessary but unlawful under

the First Amendment of the Constitution and federal law. Accordingly, the Commission should dismiss the Petition and deny all relief that it seeks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 14th day of July 2004 served the parties of record to this action with a copy of the foregoing **OPPOSITION TO PETITION** by electronic mail and/or by placing a true and correct copy of the same in the United States

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