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' Petition for	)	
Declaratory Ruling	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.

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Dated: July 14, 2004

SUMMARY

The National Association of State Utility Consumer Advocates ("NASUCA") deserves credit for bringing its concerns about rate structure and line item billing issues to the Federal Communications Commission ("Commission"). As the sole agency authorized by Congress to regulate commercial mobile radio service ("CMRS") rates and rate structures, this petition for declaratory ruling is properly before the Commission. However, the action NASUCA proposes – to ban all line item cost recovery fees – is both legally and factually unsound, and must be rejected. The better approach for wireless consumers would be for the Commission to confirm its unified federal regulatory approach established in the Truth-in-Billing proceeding, and preempt state regulation of wireless carriers' operations that disrupt wireless carriers' ability to use nationwide service platforms.

Nextel operates a single network on its hundreds of Economic Area ("EA") spectrum licenses assigned by the Commission. Nextel also has a single, nationwide billing system and customer operations staff that provides consistent, uniform customer service and support throughout the United States. As a CMRS provider subject to the Commission's jurisdiction, moreover, Nextel has had to implement a variety of federal regulatory mandates, including wireless number portability ("WNP"), number pooling and Enhanced 911 ("E911"), all of which have resulted in Nextel incurring significant implementation costs. After carefully studying Commission Orders implementing WNP, E911 and number pooling, as well as the Truth-in-Billing Order and voluntary industry guidelines, Nextel determined that it and its customers would be best served by the addition of a separate, nationwide rate element – the "Federal Programs Cost Recovery

Fee" (or "FPCR") – through which Nextel would recover its costs of developing, implementing and providing number pooling, WNP and E911 services. Nextel discloses its FPCR rate element in its marketing literature, advertising, website and subscriber agreement. Nextel also sets out its FPCR rate element separate from mandatory pass-through line items on customer bills.

NASUCA's specific proposal to simply prohibit all carrier line item fees – other than those "expressly authorized by federal, state or local governmental authority" – is flawed and should be rejected. First, NASUCA's proposal fails the First Amendment standards for regulating both commercial and political speech. Second, NASUCA's proposal to prohibit line items ignores the Commission's 1994 decision to forbear from regulating wireless carriers' rates and the decade of consumer benefits that have resulted from this purposeful preemptive federal deregulation of wireless carrier rates. Third, the proposal is wrought with administrative problems and, as a practical matter, could not be enforced by the Commission.

For those reasons, Nextel urges the Commission to reject NASUCA's specific proposals for regulation of CMRS carriers' rates and rate structures. Instead, the Commission should utilize its plenary jurisdiction under Sections 2(b) and 332 of the Communications Act to confirm its exclusive authority over wireless carrier rate structures and billing issues – including those state regulations mischaracterized as "other terms and conditions" – in order to retain a uniform, national regulatory framework for the provision of wireless services.

Confirming the Commission's jurisdiction over wireless services is critical as a number of states are taking actions that inevitably affect wireless carrier rate structures.

These include state mandates on Nextel's presentation, disclosure and collection of its FPCR assessments, as well as mandates conflicting with federal standards for pass-through of federal Universal Service Fund mandatory contributions. This stream of state regulation threatens to undermine the Commission's plenary jurisdiction over CMRS rates and rate structures under Section 332 of the Communications Act, and to reverse the enormous benefits that fierce competition and nationwide rate plans have provided wireless consumers over the last decade. By filing its Petition with the Commission, NASUCA appears to recognize this need for a national, uniform regulatory framework for CMRS carrier operations, and Nextel believes that the Commission should use this opportunity to ensure that wireless consumers continue to enjoy the benefits of competition provided by the wireless industry over the last decade.

The Commission has ample authority to preclude invasive state activity in light of Section 332's express preemption of state regulation of CMRS rates and rate structure. Further, the Commission's preemptive authority extends to state regulations that interfere or conflict with the uniform federal regulatory scheme established by Congress in Section 332 or any implementing federal rules or guidelines established by the Commission. In this context, state-by-state regulations that conflict with federal rules or with each other – making carrier compliance with those rules expensive if not impossible – cannot be upheld under the uniform regulatory framework envisioned by Congress. Therefore, to protect against this state-by-state intrusion, the Commission should develop and enforce its own guidelines as to wireless operations, with particular emphasis on those impacting rates and rate structures.

Enforcement of federal guidelines governing CMRS operations must remain with the Commission or carriers will potentially face 50 varying interpretations of federal guidelines, thus defeating the very purpose of adopting a single set of rules. However, states are not without recourse if they believe a state-specific rule or request is necessary within the confines of their particular state. As it has done in other contexts, the Commission can establish a process whereby states present their proposed rule or requirement for Commission consideration prior to adoption. This would allow states to continue to protect their constituents, while properly balancing such state intervention with the benefits of a uniform, federal approach to regulating the multi-state operations of wireless carriers.

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.
AND NEXTEL PARTNERS, INC.

Pursuant to the May 25, 2004 Public Notice of the Federal Communications Commission ("Commission" or "FCC"),[1] Nextel Communications, Inc. and Nextel Partners, Inc.[2] (hereinafter "Nextel") hereby submit these comments on the National Association of State Utility Consumer Advocates' ("NASUCA") Petition for Declaratory Ruling ("NASUCA Petition") requesting a prohibition on "any separate monthly fees, line items or surcharges" unless the charge is "expressly authorized by federal, state, or local governmental authority."[3] The NASUCA Petition also seeks other restrictions on the ability of telecommunications providers to market and price their services.

As an initial matter, Nextel does not agree that the relief specifically sought by NASUCA can be granted as either a legal or policy matter. Nevertheless, NASUCA deserves credit for bringing commercial mobile radio service ("CMRS") rate structure

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1 *See Public Notice, National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format*, DA 04-1495, CG Docket No. 04-208 (rel. May 25, 2004); *see also* National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format; Comments Requested, 69 Fed. Reg. 33,021 (June 14, 2004) (setting July 14, 2004, comment date).

2 Nextel Partners, Inc. is a separate, affiliated company, based in Kirkland, Washington, that has exclusive rights to offer the same fully integrated, fully digital wireless communications from Nextel in rural and mid-sized markets in 31 states.

3 *See* National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling, CG Docket No. 04-208 (filed March 30, 2004) (hereinafter "NASUCA Petition").

and billing issues to the Commission for discussion. NASUCA brings its Petition to the Commission at a moment when a number of states are making judgments about the permissibility of wireless carrier pricing practices. In addition, some states are now imposing regulations on wireless carrier rate structures and billing invoices that conflict with federal standards. If left unchecked, this stream of state regulation threatens to undermine the Commission's plenary authority over CMRS rates and rate structures under Section 332[4] and reverse the enormous benefits that competition has provided wireless consumers over the last decade.

As NASUCA implicitly realizes, it is the Commission, and no other agency, that has exclusive jurisdiction over CMRS rates and rate structures. In this proceeding, the Commission has an opportunity to clearly delineate the state-federal jurisdictional boundaries dictated by Congress in Section 332. Accordingly, Nextel urges the Commission to confirm its exclusive authority to preempt efforts by states to regulate CMRS rates and rate structures and, if necessary, adopt federal guidelines for CMRS carriers' billing and other customer practices to preclude the adoption of additional state requirements that would interfere with wireless carriers' multi-state operations.

I. BACKGROUND

Nextel is the Nation's sixth largest provider of CMRS, including cellular telephone service, Direct Connect® (Nextel's walkie-talkie feature) and data services. Nextel covers 294 of the top 300 metropolitan areas in the United States, and currently

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[4] *See* 47 U.S.C. § 332(c)(3); *see also 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*, 14 FCC Rcd 19898, 19907 (1999) (hereinafter "Southwestern Bell") ("[W]e find that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.").

serves over 13 million customers.[5] These services are provided through a national network of integrated cell sites, Mobile Switching Centers ("MSCs") and associated networking equipment that provide a consistent, uniform wireless service. In addition, Nextel has a single, uniform billing system and customer operations staff that provides consistent, uniform customer service and support throughout the United States.

Nextel competes fiercely with the other five nationwide providers of wireless service, as well as with numerous regional and local wireless providers.[6] As noted in CTIA – The Wireless Association's ("CTIA') 2003 Annual Survey of the CMRS industry, "98 percent of the U.S. population now lives in markets served by three or more operators, 93 percent in markets served by four or more operators, 83 percent in markets served by five or more operators, and 66 percent in markets served by six or more operators."[7] These statistics show that wireless consumers have a plethora of choices among wireless services, technologies and service providers. Furthermore, with the national rollout of wireless number portability ("WNP"), wireless consumers can now take their phone number to another provider should their current wireless service prove unsatisfactory.

The intense competition in the CMRS industry provides further incentive for Nextel to offer high-quality wireless services, as well as a good overall Nextel service

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5 *See* Nextel Reports Strong First-Quarter 2004 Results, BUSINESS WIRE, April 22, 2004 (noting that Nextel ended the First Quarter 2004 "with approximately 13.4 million subscribers").

6 *See* CTIA's Wireless Industry Indices – Semi-Annual Data Survey Results, A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Year-End 2003 Results, at 5 (rel. May 2004) (hereinafter "CTIA 2003 Survey") (noting that "more than 180 wireless licensees separately compete to offer service in the U.S., including 23 companies that may be described as "large" or "mid-sized" operators and approximately 160 companies that may be described as small or smaller operators).

7 *Id.*

experience. As a result of its commitment to customer service, Nextel ranked first in an independent survey of wireless providers' customer care – a ranking that the company strives to maintain and improve.[8] Furthermore, Nextel has certified its compliance with CTIA's voluntary Consumer Code for Wireless Service ("CTIA Code" or "Code") that was developed by the industry in an effort to ensure that wireless customers have the information they need to make informed decisions, understand their services and how they are billed for them, and receive the highest level of customer service.[9]

Against this backdrop of intense competition and the industry's efforts to respond to consumer needs through the CTIA Code, various state and federal regulatory bodies have continued to impose regulatory mandates on wireless carriers. Among these mandates are WNP, number pooling and Enhanced 911 ("E911"). Due to the intense price competition among carriers, CMRS providers have no choice but to recover from consumers the cost of such mandates.[10] Furthermore, due to differing business models and technologies, each carrier faces a different set of economic issues when deciding how to implement and – more importantly – how to pay for the various upgrades necessary to comply with new government mandates.

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[8] *See* Nextel Ranking Highest in Customer Service Performance by J.D. Power and Associates, BUSINESS WIRE, Aug. 28, 2003. Nextel's first place ranking was shared with another national wireless provider.

[9] *See* CTIA Consumer Code for Wireless Service, *available at* http://files.ctia.org/pdf/The_Code.pdf (hereinafter "CTIA Code"). Nextel voluntarily adopted the CTIA Code on September 9, 2003. See http://files.ctia.org/pdf/Nextel_PR.pdf.

[10] *See* Debra J. Aron, Ph.D., *The Financial and Public Policy Implications of Key Proposed Telecommunications Consumer Protection Rules on California Wireless Carriers and Customers: Economic Analysis*, at 4 (Feb. 2003), available at http://www.pacificresearch.org/pub/sab/techno/wireless/AronPaper.pdf ("In a highly competitive market in which overall economic profit margins are continually being driven toward zero, firms faced with a cost increase have only the option of eventually leaving the market, or passing cost increases on to consumers.")

As a result of these mandates and Nextel's commitment to implementing them in a timely manner, Nextel has incurred and continues to incur significant costs. After carefully analyzing different ways to recoup these implementation costs, Nextel determined that it and its customers would be best served by the addition of a separate rate element[11] – the "Federal Programs Cost Recovery Fee," ("FPCR fee" or "FPCR rate element") -- effective on January 1, 2002, through which Nextel would recover its costs of developing, implementing and providing telephone number pooling, WNP and E911 services.[12]

Prior to adding this new rate element to customers' bills, in December 2001, Nextel provided notice to customers explaining the reasons for the fee, the amount it would charge and the date it would be imposed (*i.e.*, beginning with the following month's invoice). This description was also included in all January and February 2002 bills, along with a January 2002 bill insert, to ensure that customers received all relevant information regarding the fee. To further highlight the fact that the FPCR fee is not a tax, Nextel placed an asterisk ("*") on the bill adjacent to the fee. The explanation immediately following the asterisk expressly states that the FPCR rate element is a "Fee[] Nextel elects to collect to recover its costs of funding and complying with Government mandates and initiatives."[13]

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[11] "Rate elements" are "the "basic building blocks of rate structures," each "of which represents one or more service functions for which a rate is applied." *AT&T Private Line Rate Structue and Volume Discount Practices*, *Notice of Inquiry and Proposed Rulemaking*, 74 F.C.C.2d 226, 229 (1979).

[12] Nextel currently charges an FPCR fee of $1.55 per month. Nextel Partners currently charges an FPCR fee of $2.83 in its service areas to defray regulatory costs across a smaller subscriber base.

[13] The "*" also accompanies other fees, taxes and assessments, such as the Federal Universal Service Fund ("USF") fee, that are imposed on Nextel and passed through to its end-users.

Nextel's advertisements, marketing materials and the Nextel website also include disclosures of the FPCR fee. For example, all of Nextel's print advertising that includes a reference to rate plan prices provides notice of the FCPR fee to highlight that it will be charged in addition to the monthly access charge. Nextel's sales representatives were also provided with comprehensive information regarding both the nature and purpose of the fee, along with the current amount, and the Nextel website provides a comprehensive overview of both the purpose and current amount of the FPCR rate element.[14] All of these disclosures and processes Nextel has put in place with its FPCR fee ensure not only that customers are aware of and understand the fee, but also that Nextel is compliant with all applicable Commission rules and regulations.

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14 See Nextel website, available at http://www.nextel.com/phones_plans/plans/fees.shtml. The website currently contains the following information on the FPCR:

> **Federal Programs Cost Recovery Fee**
> The Federal Programs Cost Recovery Fee is a monthly fee of $1.55 (or $2.83 in some markets) per unit, per month that reflects Nextel's cost of complying with Federal Communications Commission (FCC) rules and initiatives advancing Enhanced 911, Telephone Number Pooling, and Wireless Number Portability. *The fee is not a tax or fee mandated by the government.*
>
> > Enhanced 911 is a technology that will help emergency response agencies determine the location of anyone who dials 911 from their enhanced wireless phone. Nextel is upgrading its network and handsets in order to meet federal requirements and ensure that the most advanced 911 technology is available to customers.
> >
> > Telephone Number Pooling will allow Nextel to assign customers new telephone numbers more efficiently. This will, in turn, help to conserve the nation's numbering resources and potentially reduce the need for new area codes in the United States.
> >
> > Wireless Number Portability will enable you to keep the same phone number when changing to a new service provider within the same local area. This will work for both cellular and landline services. Network upgrades and changes are necessary for Nextel to offer this convenience to customers in compliance with federal requirements.

II. NEXTEL HAS IMPLEMENTED ITS FPCR RATE ELEMENT IN A MANNER THAT IS UNDERSTOOD BY CONSUMERS AND IN COMPLIANCE WITH FEDERAL AND STATE LAW

A. Nextel's FPCR Rate Element Comports With the Specific Commission Orders Allowing Cost Recovery for E911 Implementation, Number Pooling and WNP and the Principles Outlined in the Truth-in-Billing Order

Prior to implementing the FPCR fee, Nextel carefully researched and analyzed the Commission's *Truth-in-Billing Order*,[15] as well as individual Commission Orders dealing with the recovery of costs for expenses incurred due to the costs of implementing number pooling, WNP and E911. As further detailed below, nothing in these Orders prohibits the use of a line item to recover the costs of these Commission mandates. On the contrary, the Commission specifically concluded that CMRS carriers, such as Nextel, may recover their costs in any lawful manner, including through a non-misleading line-item rate element. Given that wireless carriers are not subject to rate regulation, nothing precludes them from recovering costs from their customers either through higher monthly access charges, higher per-minute charges, or through a separate rate element or item.[16]

For example, when the Commission imposed its E911 obligation on CMRS carriers, it acknowledged that substantial expenditures would be required in order to upgrade networks to send location and call back information to Public Safety Answering Points ("PSAPs"). These costs, the Commission noted, include "engineering and

[15] *Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492 (1999) (hereinafter "Truth-in-Billing Order"). As NASUCA recognizes in its Petition, the Commission specifically examined wireless carrier line items in the Truth-in-Billing proceeding. *See* NASUCA Petition at 25-26.

[16] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994) (hereinafter "Second Report and Order") ("[E]nforcement of Section 203 [the requirement to file tariffs] is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.").

construction work on switches, protocols, and network architectures," and certain ongoing costs for maintenance of equipment and databases.[17] In deciding that PSAPs would not be required to cover the carriers' costs of implementing E911,[18] the Commission concluded that such cost recovery mechanisms were not necessary for wireless carriers since their "rates are not regulated…"[19] In other words, since there is no regulation of wireless carrier rates, the Commission concluded, "[t]here is no question that wireless carriers can increase their rates, if they wish, to recover any additional costs incurred in implementing E911 . . . ."[20]

Similarly, the Commission recognized that implementation of thousands-block number pooling would impose costs on carriers, and that those carriers not subject to rate regulation – including all CMRS carriers – were entitled to recover their costs in "any lawful manner."[21] The same holds true for WNP implementation where the Commission concluded that "[c]arriers not subject to rate regulation – such as competitive LECs, CMRS providers, and non-dominant IXCs . . . may recover their carrier-specific costs directly related to providing number portability in any lawful manner consistent with the

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17 *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 18676, 18758 (1996).

18 Initially, the Commission had required PSAPs to pay for the carriers' implementation costs. Later, the Commisison reversed this decision, concluding that PSAPs and carriers would each be responsible for their own E911 upgrade costs. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Second Memorandum Opinion and Order*, 14 FCC Rcd 20850, 20859 (1999).

19 *Id.*

20 *Id*. at 20872.

21 *See Number Resource Optimization, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200*, 17 FCC Rcd 252, 257 (2001).

obligations under the Communications Act."[22] Nextel, like other carriers, has been incurring WNP costs for several years as systems were put in place, new processing capabilities were added and network integration was – and continues to be – optimized. In addition, Nextel continues to incur substantial ongoing personnel and processing costs, given the enormous complexity of porting a phone number from one carrier to another.

Overarching each of these Commission decisions is the larger *Truth-in-Billing Order*. In that Order, the Commission decided that wireless carriers should have the freedom to recover their regulatory costs through a separate rate element if they choose to do so and to decide how to respond to market forces.[23] The Commission also concluded that there was no need to require carriers to provide additional, lengthy descriptions about the nature of their chosen cost recovery fees, but rather that standardized line item labels the Commission proposed for future adoption would provide consumers with sufficient information to make informed choices among competing carriers.[24] Further, the Commission determined that it was misleading for any carrier to imply that the regulatory fees that it chose to pass onto its subscribers as a separate rate element were "mandatory" pass-through charges.[25] Finally, the Commission confirmed that unreasonable and discriminatory line item rate elements associated with regulatory mandates remained subject to challenge at the Commission under Sections 201(b) and 202.[26] In taking all of

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22 *Telephone Number Portability, Third Report and Order*, 13 FCC Rcd 11701, 11774 (1998).

23 *See Truth-in-Billing Order*, 14 FCC Rcd at 7526-28.

24 *See id*. at 7526. The Commission also determined that there was no need to require periodic notification to customers to provide additional explanation of any charges resulting from federal regulatory action.

25 *Id*. at 7527-28.

26 *Id*. at 7528.

these actions, the Commission explained that it struck a "reasonable balance between the needs of consumers for access to accurate and truthful information regarding these line-item charges and any burden or cost such requirements may impose on carriers."[27]

In the Truth-in-Billing proceeding, the Commission also studied a number of specific proposals regarding carrier recovery of regulatory costs. On one hand, the Commission considered a proposal that would have required carriers to "combine all regulatory fees into one charge[.]" On the other hand, the Commission considered a recommendation that would have "prohibited [carriers] from separating out any fees resulting from regulatory action."[28] In analyzing these rigid prescriptive approaches, however, the Commission found that "[o]ur goal is to enable customers to make comparisons among different service providers in connection with these charges, but that we expect that this end will be accomplished through several means."[29] Accordingly, the Commission declined at the time to mandate a rigid cost recovery requirement, instead expressing its preference "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."[30]

With both the *Truth-in-Billing Order* providing general guidance on the manner in which carriers may recover their regulatory costs and the individual Commission Orders specifically allowing cost recovery for E911, number pooling and WNP implementation, Nextel considered very carefully the manner in which the FPCR fee

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27 *Id*. at 7530.

28 *Id*.

29 *Id*. at 7527.

30 *Id*. at 7526.

would be presented to consumers. Nextel concluded that the cost of these federally mandated programs should appear as a separate line item so customers would understand the origin of these costs. Moreover, by separating out the fee, Nextel could more easily revise the amount to reflect changes in its implementation costs. Therefore, given that the Commission has very clearly stated that carriers may recover their E911, pooling and WNP costs, and given that Nextel has incurred (and continues to incur) substantial costs to comply with each mandate, Nextel's FPCR fee is consistent with all applicable Commission Orders.

B. Nextel's FPCR Rate Element Complies With The Voluntary CTIA Code and Is Clearly Understandable

In addition to ensuring that the FPCR fee complies with all applicable Commission Orders, Nextel also has taken a number of additional, voluntary steps to ensure that its customers know and understand the FPCR fee. As explained above, Nextel provides its customers advance notice of any changes to the fee, as well as an additional simultaneous notice/reminder in the month that the change takes affect. These notices provide a detailed explanation of the fee and Nextel's reasons for recovering it from its customers.

As an initial signatory of the CTIA Code,[31] Nextel has taken further steps to provide information about the FPCR fee and other non-government mandated fees to customers – both prior to and during their service relationship with Nextel. For example, the first principle of the Code requires that Nextel disclose in collateral and in other disclosures at the point of sale "whether any additional taxes, fees or surcharges apply,"

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[31] Nextel Communications, Inc. has certified its compliance with the CTIA Code, and displays the CTIA Wireless Service Quality Seal on its website. Nextel Partners, Inc. is not a member of CTIA, and therefore has not signed a CTIA certification pledge. Nonetheless, Nextel Partners, Inc. complies with each principle in the Code, including its requirement regarding disclosure of the FPCR fee.

and "the amount or range of any such fees that are collected and retained by the carrier."[32] The Code's fifth principle requires the very same disclosures in advertising while the sixth principle requires carriers to separately identify "taxes, fees and other charges collected by the carrier and remitted to federal[,] state or local governments" from cost recovery fees,[33] thus protecting against customer confusion over the origin of particular fees and surcharges. Building on the Code's requirements, Nextel provides customers additional opportunities to obtain information about the FPCR fee by listing both the fee's purpose and current amount on the Nextel website, along with a description of all other national fees that appear on customer bills.[34]

III. STATE LEGISLATION AND REGULATIONS THREATEN NEXTEL'S ABILITY TO PROVIDE ITS CUSTOMERS A CLEAR, CONCISE STANDARIZED BILLING STATEMENT THAT COMPORTS WITH COMMISSION REGULATIONS AND THE CTIA CODE

As the Commission is well aware, CMRS providers operate in an environment that is far different from the "wireline world." Unlike wireline networks, which were constructed and operate pursuant to political boundaries, wireless networks and wireless communications do not stop at state boundaries. Instead, all CMRS carriers operate on radio frequencies ("RF") that traverse numerous state, local and regional boundaries. As noted earlier, Nextel operates a single network of integrated cell sites, MSCs, frame relay and asynchronous transfer mode ("ATM") networking and dispatch application processors ("DAPs" or "server farms") that provide a consistent, uniform wireless service

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32 *See CTIA Code* at § One.

33 *Id.* at §§ Five and Six.

34 Because Nextel operates on a nationwide basis, providing service in most states and in thousands of localities across the country, Nextel cannot possibly list every potential state, county or local fee or tax that may appear on Nextel invoices. Therefore, Nextel's web site describes those fees and surcharges that are uniform across the country.

(both cellular and Direct Connect) in every market where Nextel operates nationwide.[35] Similarly, Nextel has a single, uniform billing system, back-office administrative support network and customer operations staff to ensure that Nextel's services are consistent, uniform and reliable from state to state and market to market. This uniformity provides consumers certainty and a better understanding of their Nextel products and services. It also allows Nextel the ability to provide a more consistent and reliable service to all of its customers.

Congress understood the multi-state nature of CMRS when, in 1993, it added Section 332(c)(3)(A) to the Communications Act, which preempted state rate and entry regulations.[36] In doing so, Congress "replaced traditional regulation of mobile services with an approach that brings "mobile service providers under a comprehensive, consistent regulatory framework and gives *the Commission* flexibility to establish appropriate levels of regulation for mobile radio service providers."[37]

Despite the federal regulatory scheme developed by Congress (and initially implemented by the Commission) and the resulting successes it has generated for

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35 Nextel holds hundreds of Extended Area ("EA") licenses issued by the Commission. Many of these EA licenses cross state boundaries (*e.g.* EA 3, which encompasses portions of Massachusetts, New Hampshire and Rhode Island and EA 10, which includes portions of Connecticut, Massachusetts, New Jersey and New York). Therefore, it is unsurprising that Nextel constructed its network to operate across state boundaries on a nationwide basis.

36 *See* 47 U.S.C. § 332(c)(3)(A).

> 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 rates charged by any commercial mobile service or any private mobile service*, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Id. (emphasis added). *See also* Omnibus Bud. Rec. Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("1993 Budget Act"), codified in principal part at 47 U.S.C. § 332.

37 *See Second Report and Order*, 9 FCC Rcd at 1417 (emphasis added).

wireless consumers, some states have begun to consider their own wireless regulations. Accordingly, there is now a patchwork of state-by-state regulation that threatens to undermine the seamless, national offering of CMRS services that carriers have carefully constructed as a result of the 1993 Budget Act. NASUCA's Petition, therefore, comes at a critically important juncture for wireless carriers.

State legislators and regulators, with increasing frequency, are considering and adopting regulations for wireless carrier operations and replacing the uniform, federal deregulatory regime with their preferred form of regulation that is often far more restrictive. Where these forms of regulation conflict with the statute or existing Commission rulings, or cannot be implemented without effectively negating the uniform, national deregulatory framework that Congress established and the Commission implemented, the Commission must provide the states with direction.

Apart from the uncertainty that state regulation of wireless carrier practices breeds, the trend for state commissions or legislatures to second-guess the wisdom of the Commission's broadly successful deregulatory approach in the highly competitive wireless market is troubling from the perspective of maintaining a national framework for wireless carrier operations.[38] Even in cases where a state is not seeking – directly or indirectly -- to regulate wireless carrier rates, the sheer number of varying state regulations that wireless carriers may face creates the inevitable situation where a wireless carrier with national or regional operations cannot possibly comply with each

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[38] It is particularly troubling where a state is unable to demonstrate any need for prescriptive wireless rules. For example, California forged ahead with its broad-ranging rules despite a wireless industry complaint rate that – according to the California commission's own records – hovered at 0.062% in 2002, the year the Commission proposed its most onerous rules. That complaint rate, moreover, was down 20% from the previous year. Even more striking is Nextel's complaint rate in the 2002-2003 time frame was a mere 0.000004 complaints per customer per month. *See, e.g., Opening Comments of Nextel of California on New Draft Decision of Commissioner Wood*, filed August 25, 2003, in California Public Utilities Commission Docket R.00-02-004.

regulation, as they are inconsistent either in general or in specific ways. For example, California recently adopted rules dictating the place within a bill where a carrier must disclose its cost recovery fee(s) as well as state and federal USF fees.[39] Should another state decide that it prefers a different location or presentation than that mandated by the California Public Utilities Commission's ("CPUC"), carriers would have to abandon their single, uniform billing platforms or face enforcement actions.

Furthermore, not only are state regulations potentially conflicting – creating impossible (or certainly very expensive) compliance situations for carriers -- some of the regulations further complicate customers bills and provide no consumer benefit while at the same time increasing the cost of producing and presenting customer invoices. California, for instance, recently required the inclusion, *verbatim*, of nearly a page of information that simply tells the customer how to contact either the Commission or the CPUC. Specifically, every carrier operating in California would be required to add the following disclosure "in clear and readable type" to their California invoices:

> If you have a complaint you cannot resolve with us, write the California Public Utilities Commission at Consumer Affairs Branch, 505 Van Ness Ave., San Francisco, CA 94102, or at www.cpuc.ca.gov, or call 1-800-649-7570 or TDD 1-800-229-6846.
>
> If your complaint concerns interstate or international calling, write the FCC at Consumer Complaints, 445 12th Street SW, Washington, D.C. 20554, or at fccinfo@fcc.gov, or call 1-888-225-5322, or TTY 1-888-835-5322.

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39 *See* CPUC Rules, Rule 6 (g) ("All mandated government taxes, surcharges and fees required to be collected from subscribers and to be remitted to federal, state or local governments shall be listed in a separate section of the telephone bill entitled "Government Fees and Taxes," and all such charges shall be separately itemized."). The comment section accompanying Rule 6(g) also provides: "The federal subscriber line and number portability charges are not remitted to government, and the federal USF, and property and income taxes are not required to be collected from subscribers, therefore it is appropriate to exclude these from the "Government Fees and Taxes" portion of the bill." Ostensibly, these charges would, therefore, have to be listed in an entirely separate portion of the bill.

> Note: The CPUC handles complaints of both interstate and intrastate unauthorized carrier Changes ("slamming"). The California consumer protection rules are available online, at www.cpuc.ca.gov. [40]

If state regulatory regimes conflict in major or even in seemingly minor ways, the wireless carrier is placed in the impossible situation of attempting to satisfy these conflicting requirements, to the extent reasonably possible given the inherent limitation in system platforms, without destroying the national uniformity that is so much a part of wireless service and marketing today. Two particular examples of regulations that pose a conflict with Commission rulings on wireless carrier rates and regulatory cost recovery are particularly alarming. First, recent legislation in Minnesota effectively bars wireless carriers from passing through to their Minnesota customers changes in the mandatory contribution to the federal USF program unless the customer, apparently at each instance of a change, affirmatively opts to accept the change.[41] As the court that just granted a Temporary Restraining Order on the statute's enforcement observed, Minnesota's Article 5 is not a generally applicable state contract nor a consumer protection law.[42] Rather, its terms are directed solely at wireless carriers and changes to substantive terms of wireless carrier contracts.[43] In studying the law's effects on wireless carriers' ability to collect

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[40] CPUC Rules, Rule 6(k).

[41] See 2004 Minn. Sess. Law Serv. Ch. 261, Article 5 (H.F. 2151) (West 2004) (hereinafter "Article 5"). Article 5, in relevant part, requires that if a wireless carrier seeks to make a "substantive change" in a customer's contract, the carrier would have to provide 60 days written notice and the change would only become effective if the customer affirmatively accepts the change "prior to the proposed effective date in writing or by oral authorization . . .. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract term shall apply." *Id*.

[42] On June 29, 2004, the U. S. District Court for the District of Minnesota entered a temporary restraining order preventing the state of Minnesota from enforcing Article 5's provisions, pending consideration of a preliminary injunction. *See Cellco Partnership d/b/a Verizon Wireless v. Hatch*, 2004 WL 1447914 (D.Minn. June 29, 2004).

[43] *See id*. at *2 (noting that Article 5 is "directed only at providers of cellular services").

USF fees from customers, the court concluded that the plain language of the statute "appears to conflict with federal policy" of allowing wireless carriers to recoup their mandatory USF fees directly from their customers.[44] The court observed that "[i]f Article 5 does not amount to rate regulation, it is very close."[45]

Second, portions of the CPUC's far-ranging new "consumer bill of rights" similarly prevent wireless carriers from exercising their ability under Commission rules and policies to recover changes in their mandatory federal USF contributions from their customers in California. For example, California Rules 8(a), 8(b), and 1(h) all expressly prohibit rate increases in various circumstances: Rule 8(a) requires "at least 25 days" advance notice of all changes to "subscribers' service agreements or non-term contracts" that could result in higher rates; Rule 8(b) altogether prohibits rate increases during the term of term contracts; and Rule 1(h) provides that the formula used to "establish a rate in a term contract" may not change during the term of the contract.[46] These prohibitions plainly regulate wireless carrier rates.[47]

These provisions are also particularly troubling because they represent the antithesis of the "*neutral application* of state contractual or consumer fraud laws."[48] In

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44 *See id*. at *3.

45 *See id*.

46 *See* CPUC Rules; Rules 8(a), 8(b) and 1(h).

47 Additionally, Rule 3(f) of the CPUC's rules prohibits carriers from charging an early termination fee within the first 30 days of service in the event the customer chooses to cancel the contract. Prohibiting carriers from charging this fee, which is a specific rate element necessary for the carrier to recover the significant cost of adding a customer to the network, directly regulates carriers' rates and rate structures in violation of Congress' preemption of state rate regulation.

48 *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, 19902-03 (1999) (hereinafter "Southwestern Bell").

other industries, service providers are free to change their rates for the services they provide so long as they do so consistent with the terms of any applicable contract and generally applicable law. The Minnesota and California rules, in contrast, render changed rates *per se* “unreasonable,” in contravention of federal agency and court determinations that states lack the authority to judge the reasonableness of carrier rates for wireless services.

Such state regulations impair substantially the delivery of wireless services. Wireless carriers that operate nationally either will surrender the economies of scale and scope that comes from a national, interstate operation, or, alternatively they will be forced to adopt the most restrictive state regime and apply it nationally. There is no consumer benefit to either approach.[49]

The Commission should – as both a legal and public policy matter – dispel the notion that states have wide ranging authority to regulate wireless carrier operations, including the rate elements a wireless carrier establishes to recover its regulatory compliance expenses. As demonstrated by recent events in Minnesota and California, wireless carriers face a mounting toll of inconsistent state requirements that range from the very prescriptive to the very flexible. The Commission, as a matter of law and policy, has historically relied upon market forces to regulate wireless carrier behavior in the highly competitive wireless market. State regulation in this area is not filling a void. Rather, it is replacing the Commission’s judgment with the judgment of fifty state

[49] Neither is it consistent with the advancing technology trend evidenced by the explosion of Internet Protocol communications and the Commission’s initiation of a rulemaking that, among other things, recognizes the inherently interstate nature of IP communications and the need for a coherent federal framework for the encouragement of new IP services and applications. *See, e.g., IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004).

regulatory bodies and fifty state legislatures, whose interests are not in maintaining a uniform, national deregulatory framework for wireless operations. NASUCA appears to recognize the need for Commission action as well, and Nextel is pleased that the Commission has this opportunity to settle these issues in a manner that preserves its light regulatory touch while properly preempting states' attempts to interfere with the federal regulatory scheme.

IV. THE NASUCA PROPOSALS ARE UNLAWFUL AND ADMINSITRATIVELY UNFEASIBLE

While Nextel supports Commission action on the NASUCA petition and is pleased that NASUCA recognized that the Commission is the appropriate regulatory agency to resolve questions about wireless carriers' billing practices, NASUCA's specific proposal to simply prohibit all carrier line item fees – other than those "expressly authorized by federal, state or local governmental authority" -- is flawed and should be rejected. First, NASUCA's proposal fails the First Amendment standards for regulating both political and commercial speech. Second, NASUCA's proposal to prohibit line items such as Nextel's FPCR fee ignores the Commission's 1994 decision to forebear from regulating wireless carriers' rates and ignores the decade of consumer benefits that have resulted from wireless carrier rate deregulation. Third, the proposal is fraught with administrative problems and, as a practical matter, could not be enforced by the Commission. For these reasons, the Commission should reject NASUCA's specific proposals for regulation of wireless carriers' billing practices.

A. The NASUCA Proposals Violate the First Amendment

NASUCA asks the FCC to prohibit wireline and wireless carriers from using line items with cost-recovery fee labels and corresponding explanatory disclosures based on an assumption that all such labels and disclosures are misleading to consumers. This proposed prohibition cannot satisfy the *Central Hudson* test for commercial speech or the strict scrutiny standard for content-based restrictions of political speech because, among other reasons, there is no credible evidence that Nextel's descriptive fee label and disclosure mislead consumers. NASUCA also has not demonstrated that the FCC has a substantial government interest in restricting Nextel's truthful and non-misleading speech, or that the proposed restriction narrowly addresses consumer confusion without unnecessarily suppressing protected speech. Accordingly, the FCC should reject NASUCA's proposal because its adoption would violate Nextel's rights under the First Amendment of the U.S. Constitution.

1. NASUCA's Proposal Impermissibly Seeks to Limit Truthful, Non-Misleading Commercial Speech

For commercial speech to be protected under the First Amendment, (1) the commercial speech "must concern lawful activity and not be misleading"; (2) the government's asserted interest must be "substantial"; (3) the speech restriction or regulation must "directly advance[ ] the governmental interest asserted"; and (4) the speech restriction or regulation must be "not more extensive than is necessary to serve [the asserted governmental] interest."[50] The government has the exceptionally high burden to justify regulation of non-misleading commercial speech.[51]

Under the first prong of the *Central Hudson* test, evidence of actual consumer deception is necessary when a governmental body seeks to enjoin allegedly misleading

[50] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 556 (1980).

[51] *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-17 (2000).

commercial speech.[52] Accordingly, if the FCC were to adopt NASUCA's proposal, it would have to provide substantial evidence that Nextel's FPCR fee and explanation of the fee *actually* mislead consumers; mere speculation or is not enough.[53]

Here, NASUCA has provided no such evidence. It alleges that all carriers' cost-recovery fee labels and disclosures, including Nextel's, are misleading, but bases this assertion only on conjecture. NASUCA's speculation is not at all probative of whether or how Nextel's FPCR fee and disclosures actually mislead customers. It is the "purely hypothetical," anecdotal showing of harm that the Supreme Court has rejected in the past and it is an insufficient evidentiary basis upon which to ban Nextel's truthful, non-misleading fee label and disclosures.[54]

Under the second prong of the *Central Hudson* test, the "asserted governmental interest [must be] substantial."[55] NASUCA has not demonstrated that the FCC has a "substantial interest" in prohibiting truthful, non-misleading commercial statements that inform consumers of fees that are collected by carriers to implement state and federal

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52 *Peel v. Attorney Registration & Discipline Comm'n*, 496 U.S. 91, 108 (1990) (rejecting government's complete speech ban on attorneys' use of labels claiming "certification" status where the government failed to submit any evidence that the labels actually misled consumers into believing all references to "certification" implied the accreditation was government-issued).

53 *Id.*; *Ibanez v. Florida Dep't of Bus.& Prof. Reg.*, 512 U.S. 136, 142 (1994) ("[M]ere speculation or conjecture" of deception will not suffice; rather "[the] governmental body must demonstrate that the harms it recites are real"); *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (same). The Supreme Court has emphasized that, if commercial speech is to be protected to any meaningful degree, the government may not simply use "rote invocation of the words 'potentially misleading' to supplant [its] burden." *Id.* at 146. S*ee, e.g. Ibanez,* 512 U.S. at 148-49 (striking limitations on a lawyer's use of the "CPA" and "CFP" labels on her commercial communications where the regulating board could only point to hypothetical harms and provided no evidence that such speech was deceptive); *Edenfield*, 507 U.S. at 771 (striking Florida ban on protected speech where the government provided only anecdotal evidence and no survey evidence showing that the advertisements created the dangers alleged); *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985) (striking restrictions on attorney advertising where state's argument was based on unsupported assertions and no evidence).

54 *See Peel*, 496 U.S. at 108; *Ibanez*, 512 U.S. at 148-49.

55 *Central Hudson*, 477 U.S. at 566.

directives. On the contrary, the Commission specifically concluded that the use of such line-items may be appropriate for wireless carriers to recover their costs of regulatory compliance.[56]

Nor has NASUCA shown that the third prong of the *Central Hudson* test – that the regulation "directly advances the governmental interest asserted" – is satisfied.[57] There is an insufficient nexus here between the remedy NASUCA seeks and the means to accomplish that task. NASUCA baldly asserts that its proposal to completely ban cost-recovery fee labels and disclosures is the only way to stop "misleading and deceptive" charges.[58] But NASUCA's assertion relies only on unsupported assumptions, claiming that a case-by-case approach is inadequate because, in its view, the FCC's review of each challenged carrier practice would overwhelm the Commission.[59]

This argument is without merit. The Commission's existing enforcement powers and procedures would advance more directly NASUCA's interest in addressing its concern about misleading consumers by focusing on the challenged labels and disclosures, without suppressing other carriers' protected and non-misleading speech. The Commission is well positioned, having previously adopted its Truth-in-Billing rules, to ensure that carriers are in compliance with these requirements and providing information that is clear and not misleading. In addition, individual review of carriers' practices, when challenged, is an integral component of the Commission's

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56 *Truth-in-Billing Order*, 14 FCC Rcd at 7527.

57 *See Central Hudson*, 477 U.S. at 566.

58 *See* NASUCA Petition at 37.

59 *Id.* at 23-24 ("It would be administratively impossible to look at each carrier, or each carrier's fee, to determine whether the fee is sufficiently and accurately described" and "whether consumers are adequately informed of the fee").

responsibilities in enforcing its own rules (*e.g.*, the Truth-in-Billing requirements). Claiming an administrative burden does not justify infringing on Nextel's and other carriers' First Amendment rights.

Even assuming, *arguendo*, that all the other prongs of *Central Hudson* could be met, the Commission would face an insurmountable hurdle on the last prong. Under that requirement, the government proponent, must *additionally* demonstrate that the proposed speech restriction is "narrowly tailored," and "is not more extensive than is necessary to serve [the asserted governmental] interest."[60] In this case, NASUCA ignores reasonable solutions in favor of a complete prohibition on line-item cost-recovery fees.

Where there exist "availabl[e] options, all of which could advance the Government's asserted interest in a manner less intrusive to [the speaker's] First Amendment rights," the speech restriction is unconstitutional because it is "more extensive than necessary."[61] Further, where such "less burdensome alternatives" are available, the more restrictive regulation (i.e., the prohibition on line-item cost recovery fees) does not have the constitutionally required reasonable "fit" between the ends and means.[62] Here NASUCA proposes a restriction that would ban all line-item cost-recovery fees and disclosures that are not expressly mandated by the government, regardless of whether they actually confuse consumers. NASUCA seeks this ban without explaining how suppressing truthful, misleading information about factors affecting the ultimate cost of monthly telecommunications bills would benefit consumers more than

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60 *Central Hudson*, 447 U.S. at 569.

61 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

62 *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, n.13 (1993).

providing them with truthful information about the bases of these costs.[63] A less restrictive – and, therefore, constitutional – way to address alleged consumer confusion about line-item rate elements is accomplished through the enforcement of Commission-imposed guidelines such as those adopted in the Truth-in-Billing proceeding or, as explained in Section V. *infra*, additional federal guidelines governing wireless carriers' billing practices.

2. NASUCA's Proposal Is An Impermissible Content-Based Restriction on Political Speech

In addition to restricting commercial speech, NASUCA's proposal treads on carriers' political speech rights. According to the U.S. Supreme Court, political speech includes *all* speech that raises or discusses matters of public concern.[64] NASUCA seeks to prohibit wireline and wireless carriers from using truthful disclosures to describe and explain the basis of cost recovery fees that carriers impose to recover the costs of complying with government mandated regulatory programs and policies. This truthful information to consumers about how government programs affect telecommunications costs is certainly an issue of public concern.

A restriction, such as NASUCA's proposed ban, that targets speech based on its content can only survive if it satisfies strict scrutiny.[65] Further, content-based restrictions attempting to suppress *political* speech are subject to an even more careful review when

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63 *See, e.g., Peel*, 496 U.S. at 106 (rejecting government's assertion that its interest in avoiding any possibility of misleading some consumers with the suppressed speech outweighed the cost of providing other consumers with relevant information also conveyed via the suppressed speech).

64 *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999) (defining political speech as "a matter of public concern").

65 *Bartnicki v. Vopper*, 532 U.S. 514, 545 (2001) (fact that statute regulates the content or subject-matter of speech is "alone enough to trigger strict scrutiny"); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153, 1161 (9th Cir. 2003) ("[I]f the statute describes speech by content then it is content based.").

applying the strict scrutiny standard.[66] Accordingly, content-based restrictions that attempt suppression of political speech must "be narrowly tailored to promote a compelling Government interest;" and "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[67] NASUCA's proposal falls far short of both requirements.

NASUCA fails the narrowly tailored requirement because the proposed speech restriction would ban truthful, non-misleading protected speech. Nextel has sought to ensure that its explanatory disclosures about the FPCR fee clearly and conspicuously explain the origins and reasons for the fee to consumers so that they understand the different costs that impact their overall wireless monthly bill and the reasons for such costs. Invoice disclosures truthfully explain that Nextel incurs costs as a result of complying with government mandates for number portability, number pooling, and E911, that it passes these costs to its customers in the FPCR line-item fee, and that the fee is not a tax or mandated by a government. These disclosures address issues of public concern; there is nothing misleading about them.

NASUCA also fails strict scrutiny because it has offered no proof that its proposed regulation is the least restrictive means available to address consumer confusion. Indeed, and as discussed previously with regard to commercial speech, NASUCA has submitted no credible evidence that all other means of addressing this problem are unworkable.[68] Mere conjecture that individual review of carriers' practices

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[66] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-11 (2000) (underscoring the necessity for careful review of such restrictions because "[p]olitical speech is the primary object of First Amendment protection").

[67] *Playboy Entertainment Group*, 529 U.S. at 813.

[68] See NASUCA Petition at 23-24.

is not a viable alternative fails to establish that a complete speech ban of all cost-recovery fee disclosures is necessary.[69] Because NASUCA's proposal would unconstitutionally abridge Nextel's right to use its truthful, non-misleading FPCR fee label and informative disclosures about issues of public concern, the proposal to ban line-item cost recovery fees must be rejected.

B. The NASUCA Proposals Constitute Unlawful Rate Prescription as Applied to CMRS Carriers

In addition to violating the First Amendment, NASUCA's proposals also constitute unlawful CMRS rate and rate structure prescription. Among other things, the NASUCA Petition requests that the Commission declare "the carrier practices complained of to be unreasonable, unjust and unlawful," and prohibit "carriers from imposing any separate monthly fees, line items or surcharges unless: (a) such surcharge is mandated by federal, state or local law, and (b) the amount of such charge conforms to the amount expressly authorized by federal, state, or local governmental authority."[70] In other words, NASUCA asks the Commission to expressly regulate the rates and rate structures of CMRS carriers.

In 1994, pursuant to the authority granted by Congress in establishing the federal regulatory framework for CMRS, the Commission forbore from imposing, among other things, Section 205 of the Communications Act on wireless carriers.[71] In making that

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69 *See Playboy Entertainment Group,* 529 U.S. at 819 (striking down content-based regulation when the government fails to provide substantial survey-type evidence proving there were no less-restrictive alternatives).

70 NASUCA Petition at 68.

71 *See* 47 U.S.C. § 205 (granting the Commission authority to "determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair and reasonable").

determination, the Commission stated that, "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers that lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs."[72] In addition, the Commission has also noted that "this approach produces better results for CMRS consumers than assuring reasonable rates through tariffing and the application of the filed rate doctrine."[73]

The decision to forbear from CMRS rate regulation was a deliberate and successful policy decision designed to foster competition among CMRS carriers and thereby "regulate CMRS through competitive market forces" rather than through rate regulation or other forms of regulation.[74] The Commission consistently and uniformly has rejected requests by states to impose any sort of rate or other regulatory constraints on CMRS carrier rates.[75] Furthermore, regulation of a carrier's rates is not limited to pure rate setting by a regulator. Instead, it is well settled that the "rates charged by"

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72 *Second Report and Order*, 9 FCC Rcd at 1478.

73 *Wireless Consumers Alliance, Inc., Memorandum Opinion and Order,* 15 FCC Rcd 17021, 17033 (2000) (hereinafter "Wireless Consumers Alliance Order").

74 *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless, Memorandum Opinion and Order*, 17 FCC Rcd 8987, 8998-99 (2002), *aff'd, Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied, Orloff v. FCC*, 72 USLW 3633 (U.S. Dist.Col. Jun. 28, 2004)(No. 03-1347); *see also Southwestern Bell*, 14 FCC Rcd at 19907 (1999) (stating that "the congressional policy to favor competition over regulation, where in the public interest, is also clearly reflected in the enactment of the Telecommunications Act of 1996"); *Petition of the New York State Public Service Commission to Extend Rate Regulation, Report and Order*, 10 FCC Rcd 8187, 8190 (1995) (noting that "OBRA reflects a general preference in favor of reliance on market forces rather than regulation").

75 The Commission has rejected every state request – seven in all – to regulate the rates for CMRS service within its borders. *See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order*, 10 FCC Rcd 7486 (1995); *Petition of the Connecticut Dept. of Public Utility Control to Retain Regulatory Control of the Rates and Wholesale Cellular Service Providers in the State of Connecticut, Report and Order*, 10 FCC Rcd 7025 (1995), *aff'd sub nom., Conn. Dep't of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

CMRS providers, "include[s] both rate levels and structures."[76] As the Commission itself has recognized:

> [T]he term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.[77]

Thus, "[r]ates do not exist in isolation" but rather are made up of the components of what it costs to provide the services to which they are attached.[78]

NASUCA's proposal to prohibit line item cost recovery fees fits squarely within the Commission's rate regulation authority. If the NASUCA request was granted, all carriers – including CMRS – would be required to "reintegrate" the costs of government mandates and all other fees "not expressly authorized" into their monthly rates. Even assuming that Commission regulation of wireless rates is in the public interest -- a conclusion clearly at odds with a decade of successful wireless price competition -- such a reversal on wireless rate regulation cannot be entertained in response to NASUCA's Petition for Declaratory Ruling. Rather, the Commission would have to conduct a notice and comment rulemaking proceeding to consider reversing its 1994 decision to forebear from CMRS rate regulation. CMRS carriers have relied on the 1994 forbearance decision, in large part, to establish their business plans and strategies. In addition, the

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[76] *Southwestern Bell*, 14 Rcd at 19907.

[77] *Id.*

[78] *Bastien v. AT&T*, 205 F.3d 983, 986 (7th Cir. 2000) (*citing AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998)). Rate structures are, of course, integral to the calculation of rates. Thus, for example, when rates are calculated based on volume thresholds or times of day, volume breakpoint or hours when particular rates take effect are not themselves rates, but still have a direct effect on the rates that customers pay. Therefore, it is unsurprising that the Commission has prevented states from regulating rate structures as well as rates.

1994 forbearance decision has provided substantial benefits to consumers in the form of extensive service choices and lower costs. Accordingly, that forbearance decision cannot simply be ignored as part of this NASUCA proceeding; it must be addressed before the Commission can – if it chooses to – act on NASUCA's specific proposal.

C. The NASUCA Proposals Are Administratively Infeasible

Notwithstanding the substantial legal impediments, the NASUCA proposals are also administratively infeasible. Under the terms of NASUCA's proposal, carriers would be prohibited from passing through any "separate monthly fees, line items or surcharges unless the charge is both: 1) "mandated by federal, state or local law;" and 2) the charge "conforms to the amount expressly authorized by [the] federal, state or local governmental authority." NASUCA's proposal, however, provides no guidance as to how the Commission should interpret or enforce this provision.

In the United States, there are at least 7,600 jurisdictions that have the power to levy taxes.[79] If the definition of "governmental authority" is interpreted to include other political subdivisions, such as unincorporated districts that have the power to impose other fees and assessments, the number of tax or fee assessing jurisdictions in the United States could be as high as 30,000.[80] In order to enforce NASUCA's proposals, the Commission would have to compile a list of all U.S. tax or fee imposing jurisdictions, the telecommunications related taxes or fees that they impose, as well as information regarding whether the jurisdiction "expressly authorize[s]" a carrier to pass the tax or fee

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79 *See* Heather Fleming Phillips, *Congress Struggles With E-Commerce Tax Issue*, DENVER POST, June 18, 2001, at C1 (noting that taxing jurisdictions in the United States include "not only states, cities and counties, but taxing areas that cover hospital, library and even mosquito-spraying zones").

80 *See* Editorial, *No Internet Sales Taxes*, ORANGE COUNTY (CAL.) REG., Nov. 19, 2001 (stating that the "United States currently has more than 30,000 state and local tax jurisdictions").

along to the end user. This would include, among other things, state and local laws governing E911 fees, city and county ordinances or agreements that impose rights-of-way use fees, and city or county ordinances or regulations that impose per-line taxes on wireless or wireline services.

The Commission also would have to constantly monitor local and state taxes and fees, as new taxes/fees are regularly added to wireless customers' bills (particularly in this era of state and local budget constraints) and other taxes/fees may change on a regular basis. In stark contrast to enforcing its own rules and regulations governing carriers' billing and disclosure practices, as Nextel proposes herein, the Commission is not equipped to undertake the time-consuming and unnecessary task that would result from the NASUCA proposal. Moreover, adding the personnel and processes that would be necessary to accomplish NASUCA's proposal is not justified in light of the serious legal implications of the proposal.

V. THE COMMISSION SHOULD ADOPT FEDERAL GUIDELINES GOVERNING CMRS INDUSTRY PRACTICES AND THEREBY PREEMPT STATE REGULATIONS THAT INTERFERE WITH THE MULTI STATE OPERATION OF CMRS CARRIERS

A. The Commission Has Broad Authority over the Regulation of CMRS Carriers.

Although Nextel disagrees with the specific solution proffered by NASUCA, it does believe the Petition provides the Commission with an opportunity to resolve a number of problems currently threatening the continued success of wireless competition. First, the Commission should clarify that matters such as line item cost recovery fees are rates and rate structure issues wholly within the Commission's jurisdiction and that states do not have any authority to encroach on that exclusive authority by adopting additional (or different) requirements. Nextel provides a proposal in these comments for Commission clarification. Second, the Commission must immediately prevent states from impermissibly regulating wireless carriers' nationwide operations.

1. The Commission Plainly Has Full Authority Over CMRS Rates and Rate Structures.

As reflected in the legislative history and the provisions of the 1993 Budget Act, Congress plainly intended that wireless carriers make the investments necessary to build and operate on a nationwide basis in a deregulated, competitive, market-driven environment.[81] As part of this direction, Congress modified both Section 2(b) and 332 of the Communications Act to establish the Commission as the exclusive forum for the regulation of wireless carrier rates and market entry qualifications.[82] Section 332 expressly denies states "any authority to regulate the entry of or the rates charged by any commercial mobile service . . . carrier."[83] While Section 332(c)(3)(A) acknowledges limited state authority to regulate "other terms and conditions of wireless services,"[84] it is plain that a state may not engage in rate and entry regulation under the guise of regulating "other terms and conditions."[85] As the Commission has determined, "it is the substance,

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81 Nextel's view of the legislative effects of the 1993 Budget Act is likely unique, as Nextel, then known as Fleet Call, was singled out in the legislation for "regulatory parity" treatment with cellular operators. In exchange for giving up its status as a "private carrier" not subject to any state carrier regulation, Nextel was given a transition period to become a Commercial Mobile Service provider, to have the same general rights and obligations as cellular carriers. These rights included freedom from rate regulation and entry barriers and the ability to develop its services nationwide.

82 *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-97 (1993).

83 47 U.S.C. § 332(c)(3)(A).

84 *Id.*

85 *See, e.g.*, *Bastien*, 205 F.3d at 988 (holding that a customer complaint over service quality was "really an attack on rates charged for services").

not merely the form of the state [provision], that determines whether it is preempted under Section 332."[86]

The line between prohibited rate regulation and permissible state regulation of terms and conditions has been clarified by a number of federal court and Commission decisions. In *Bastien v. AT&T Wireless Services, Inc*, for example, the Seventh Circuit preempted a state law challenge to AT&T Wireless's alleged practice of "sign[ing] up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections."[87] The court determined that "Bastien's complaint, although fashioned in terms of state law actions, actually challenges the rates and level of service offered"[88] and that the challenge was inconsistent with Section 332. Further, the Seventh Circuit quoted an earlier Supreme Court holding that "a complaint that service quality is poor is really an attack on the rates charged for service."[89] Thus, state regulation of wireless carrier service quality is equivalent to Section 332-barred rate regulation.

The Commission's decisions in the *Southwestern Bell Mobile Systems, Inc.* and *Wireless Consumers Alliance* cases provide specific guidance on the scope of Section 332 preemption. *Southwestern Bell* sought Commission preemption under Section 332 of state law challenges to a wireless carrier practice of "rounding up" charges for calls to the nearest whole minute. In rejecting the petition, the Commission found that Section 332

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[86] *Wireless Consumers Alliance Order,* 15 FCC Rcd at 17037 (addressing preemption of state law claims for damages against carriers).

[87] *Bastien*, 205 F.3d at 985.

[88] *Id.* at 990.

[89] *Id*. at 988 (quoting *Am. Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 223 (1998)).

did not "create a general exemption for the CMRS industry from the *neutral application* of state contractual or consumer fraud laws."[90] Significantly, however, the Commission emphasized that "Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates or rate structures of CMRS providers."[91] The Commission also clarified that the term "rates" in Section 332 comprises not only rate levels ("how much may be charged" by CMRS providers), but also the "rate structures" employed (the manner in which CMRS services are "subject to charges by CMRS providers").[92]

In *Wireless Consumers Alliance*, the Commission considered whether Section 332(c)(3)(A) prohibits state courts from awarding damages against wireless carriers in actions under state tort, contract, and consumer fraud laws. There the Commission determined that damage awards do not *always* amount to rate regulation, reasoning that "there is no necessary correspondence between the indirect effect that monetary liability *may* have on a company's behavior and the direct effect that a statute or regulatory rate requirement *will* have on that behavior."[93] The Commission further explained:

> For example, if a company is found monetarily liable for false advertising, it will presumably alter its advertising. The impact on its prices and other behavior, however, is uncertain. The indirect and uncertain effects of monetary damage awards based on tort and contract law do not correspond to the mandatory corporate actions that are required as a result of legislative or administrative rate regulation activities.[94]

[90] *Southwestern Bell* at 19903.

[91] *Id.* at 19901.

[92] *Id.* at 19906.

[93] *Wireless Consumers Alliance Order*, 15 FCC Rcd at 17034 (emphasis added).

[94] *Id.*

Wireless Consumers thus distinguished between the *indirect* impact of permissible tort and contract actions with an "uncertain" effect on wireless carrier prices, and regulatory requirements with an impermissible "*direct effect*" on the prices that wireless carriers must charge their customers.

The Commission also found – quoting the Supreme Court – that damages could sometimes be awarded under state laws of general applicability without passing on the "reasonableness of a rate or, indeed, the reasonableness of any carrier practice."[95] Consistent with its determination in *Southwestern Bell*, however, the Commission emphasized that Section 332(c)(3) preempts state authorities from determining "whether a price charged for a CMRS service was unreasonable."[96] While the drawing of lines as to what constitutes a rate or rate structure sometimes involves difficult judgments, there is no question that it is the Commission, and not individual state commissions or state legislatures, that is in the best position to make these determinations.[97]

Indeed, the actions recently taken by state legislators and regulators in California and Minnesota are emblematic of how state actions can interfere with wireless carriers' ability to set their rates and to change their rates or rate structures consistent with the contracts their customers have signed. The Commission should rely upon its exclusive jurisdiction over wireless rates under Section 332 to preclude states from directly or

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[95] *Id.* at 17038 (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976)).

[96] *Id.* at 17036.

[97] For example, the state of California appears to believe that regulating carriers' late payment penalties, interest paid on deposits, early termination fees and pass-through of regulatory costs are not issues that impact carrier rates and rate structures. *See* CPUC Rules at §§ 5(c), 6(g) and 7(a). Quite the contrary, such state regulations do impact a carriers provision and pricing of wireless services and, therefore, are wholly within the Commission's jurisdiction.

indirectly interfering with wireless rates and rate structures, including adopting restrictions on the use of line item cost recovery fees.

2. The Commission Has Unique Jurisdiction Over CMRS Regulation Extending Beyond Rates and Rate Structures.

As previously discussed, Congress did more in the 1993 Budget Act than merely split jurisdiction between the Commission and the states by assigning "rates and entry" to the federal agency and "other terms and conditions" to the states. Congress did something unusual in the 1993 Budget Act – it amended Section 2 of the Communications Act. Section 2 functions as the "jurisdictional allocator" in the Act for matters involving communications by wire or radio, for the most part assigning jurisdiction to the Commission in Section 2(a) for interstate and foreign communications, and carving out from the Commission's jurisdiction in Section 2(b) "regulations for or in connection with intrastate communication service by wire or radio."[98] In 1993, Section 2(b) was amended to state:

> Except as provided in sections 223 through 227 inclusive, *and Section 332*, and subject to the provisions of section 301 title VI, nothing in this Act 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 communication services by wire or radio of any carrier . . . .[99]

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98 A 1914 Supreme Court decision in Houston, *East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914) (better known as the "Shreveport Rate Cases") established the far-reaching scope of permissible regulation by the Interstate Commerce Commission under the Commerce Clause of the Constitution. There, the Court ruled that federal power over railroad shipping and shipping rates extended to "all matters having such a close and substantial relation to interstate traffic." *Id.* at 351. The Court made plain that the authority of the Congress was paramount even though "intrastate transactions of interstate carriers may thereby be controlled." *Id.* at 353. The Communications Act was modeled on the same framework as the Interstate Commerce Act. Commentators have noted that, in the legislative process leading up to the passage of the Communications Act of 1934, the National Association of Regulatory Utility Commissioners lobbied for language that prevented the new agency from using a *Shreveport* rationale to regulate aspects of intrastate telephone services. Perhaps as a result, Congress codified a dual regulatory scheme in which state and federal regulators were given authority to act within their own area of authority and competence.

99 47 U.S.C. § 152(b).

In other words, this change to the states' jurisdiction relating to the regulation of wireless services, provides the Commission with additional authority to regulate wireless activities – including the "other terms and conditions" of those activities – even if the regulation would impact intrastate wireless communications.

Further, amended Section 332(c)(3) provided a substantive grant of authority to the Commission: "Notwithstanding sections []2(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 radio service or any private mobile service . . ."[100] This enactment effectively expanded the scope of federal power over wireless services, while at the same time it removed substantive jurisdiction from the states for any traditional form of regulation.[101] Thus, the traditional dual jurisdiction inquiry is unnecessary for wireless services, as Congress in 1993 federalized the provision of wireless services, which is evident from the structure and form of the changes to Sections 2(b) and 332(c)(3).

Commission implementation of Section 332's provisions in the mid-1990s provides further illumination of this point. A number of state commissions asserted that particular forms of state regulation of wireless carriers were necessary and should be permitted in order to protect consumers in their states. In every case the Commission wisely determined, upon review of the record in each proceeding, that none of the states had demonstrated that continuation of their wireless regulations in fact would perform

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[100] 47 U.S.C. §332(c) (3)(A).

[101] As explained herein, Nextel believes a reasonable interpretation of the "other terms and conditions" language of Section 332 allows states to regulate wireless carriers in the manner they regulate other businesses active in each state -- through laws of general applicability.

these functions any better than a unified federal deregulatory regime. Rather, the Commission found – in every instance – that the state regulatory schemes were unnecessary and disruptive to the uniquely federal framework created by the 1993 Budget Act.[102] In rejecting the California's petition to retain regulatory control over CMRS rates, the Commission specifically noted that:

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear ***substantial*** hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [sic] a burden to the development of this competition. ***Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity***.[103]

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[102] *See Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order*, 10 FCC Rcd 7486, 7488 (1995) ("California Order"), *Order on Reconsideration*, 11 FCC Rcd 796 (1995); *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 Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996); *Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Report and Order and Order on Reconsideration*, 10 FCC Rcd 7824 (1995); *Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana*; *Report and Order*, 10 FCC Rcd 7898 (1995); *Petition of New York State Public Service Commission To Extend Rate Regulation, Report and Order*, 10 FCC Rcd 8187 (1995); *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services, Report and Order*, 10 FCC Rcd 7842 (1995), *Order on Reconsideration*, 10 FCC Rcd 12427(1995); *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 (1995).

[103] *California Order*, 10 FCC Rcd at 7488 (*citing Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411 (1994)) (emphasis added). Importantly, since 1994 when the Commission denied the CPUC's request, wireless service in California has flourished. Subscribership has grown from approximately 1.1 million subscribers in 1992 to over 20 million subscribers as of December 2003. In addition, prices have dropped approximately by approximately 75% (from 53 cents per minute in 1994 to just 12 cents per minute in 2002) and the number of carriers competing in most California markets has grown from 2 to at least 6. *See* Thomas W. Hazlett, *Cellular Telephone Regulation in California: A Critique of Peter Navarro's Paper Submitted to the California Public Utilities Commission* (Nov. 3, 2003), *available at* http://www.analysisgroup.com/TC_CTIA_11_03_03.pdf (noting carrier growth and price decreases following deregulation of wireless service in California); Carla Lazzareschi, *Regulators Take Aim at High Cellular Rates*, LA TIMES, Oct. 23, 1992, at D1 (stating that Southern California had an "estimated 800,000

Nextel of course does not claim that Congress has preempted all possible state regulation of wireless carriers, essentially rendering "other terms and conditions" meaningless and leaving wireless carriers "free to breach their contracts and engage in fraudulent conduct."[104] Rather, under the framework Congress enacted, state consumer protection laws of *general applicability*, including state law causes of action for "breach of contract, consumer fraud, or false advertising," generally are not preempted so long as states do not use these general laws as a means to regulate CMRS providers' rates or rate structures.[105]

The Ninth Circuit's decision in *Ting v. AT&T*[106] supports this common-sense distinction. The court noted that the "FCC now defers to the market unless the market is seriously flawed," but found that "state laws of general applicability" could be considered part of the general competitive landscape.[107] Thus, state regulation with respect to carriers must be "neutral" in application,[108] and may not regulate areas preempted by federal law, such as CMRS carrier rates, through the back door of service quality regulation. Indeed, the court underscored that state regulation inconsistent with those

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of the state's 1.1 million cellular subscribers in 1992"); Federal Communications Commission, Wireline Competition Bureau, Industry Analysis & Technology Division, *Local Telephone Competition: Status as of Dec. 31, 2003*, Table 13 (rel. June 18, 2004) (stating that as of December 2003, there were 20,360,454 wireless subscribers in the State of California). Despite these successes, the CPUC has attempted to recreate its regulatory umbrella under the guise of "other terms and conditions" regulation.

[104] *Gilmore v. Southwestern Bell Mobile Systems L.L.C.*, 210 F.R.D. 212, 223 (N.D. Ill. 2001).

[105] *See Southwestern Bell*, 14 FCC Rcd at 19901.

[106] *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2002).

[107] *Id.* at 1145.

requirements "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[109] and violates the Supremacy Clause.

3. The Commission Has Authority to Issue Narrowly-Tailored Consumer Protection Regulations With Respect to Wireless Services and Decide That No Additional State Regulation is Warranted.

Even if the Commission were to choose not to rely solely upon its exclusive jurisdiction under Sections 2(b) and 332 to prohibit both direct and indirect state regulatory regimes that adversely affect wireless rates and the ability of wireless carriers to operate using nationwide service platforms, the Commission has full authority to use a traditional preemption analysis to arrive at the same result. Relying on its broad regulatory authority over wireless carriers and their operations, the Commission could adopt a set of narrowly tailored consumer protection regulations and conclude that no additional state regulation is warranted.

The Commission's authority to preempt state regulations where it has broad Congressional authority over the regulation of an industry is well established. This is true even where Congress itself has not specifically preempted state action. Although section 332(c)(3) is sometimes described as though it *preserves* state and local regulation of "other terms and conditions" of wireless service, it merely provides that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service."[110] Thus, in enacting section 332(c)(3), Congress did not

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108 *Id*. at 1146.

109 *Id*. at 1136 (*citing Hines v. Daviowitz*, 312 U.S. 52, 67 (1941)).

110 47 U.S.C. § 332(c)(3)(A).

itself preempt regulation of other terms and conditions of wireless service, but it also did not bar the Commission from preempting it.

As the Supreme Court has repeated, "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' *for '[a] pre-emptive regulation's force does not depend on express congressional authority to displace state law*.'"[111] Rather, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[112] "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has exercised the legislative power."[113]

In *City of New York v. FCC*, the Supreme Court upheld the Commission's decision to preempt local franchising authorities from promulgating technical standards governing cable service. The localities defended their right to "set stricter standards" based on Congress' statement that a statutory provision giving the Commission authority to adopt technical standards did "'not affect the authority of a franchising authority to establish standards . . . which are not inconsistent with standards established by the FCC.'"[114] The Court did not disagree with the localities that *Congress* had not preempted local technical standards, but it explained that the localities had "disregard[ed] the

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111 *City of New York v. FCC*, 486 U.S 57, 64 (1988), *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)(emphasis added).

112 *City of New York*, 486 U.S. at 63-64, *quoting Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

113 *City of New York*, 486 U.S. at 64.

114 *Id*. at 68, 69 (*quoting* H.R. Rep. No. 98-934 (1984) at 70).

Commission's own power to pre-empt" in upholding the Commission's decision to preempt the local standards.[115]

The Commission may similarly preempt state regulation of wireless carriers. The Commission plainly has broad authority in this area. Section 332(c)(1) provides that all of the provisions of Title II of the Communications Act apply to providers of commercial mobile service, unless the Commission specifies otherwise, and Title II, of course, grants broad authority, extending to "[a]ll charges, practices, classifications, and regulations for and in connection with" the provision of service.[116] Also, as noted above, section 2(b) does not constrain the Commission in the wireless arena.

In addition, Congress has instructed the Commission to prefer competition to regulation. Section 332(c)(1)(A)(ii) instructs the Commission to forbear from regulation where "enforcement of such regulation is not necessary for the protection of consumers."[117] The biennial review provision similarly directs the FCC to "repeal or modify any regulation" that "is no longer necessary in the public interest as the result of meaningful economic competition between providers" of the service.[118] The Commission has followed those instructions by and large and generally has regulated the competitive wireless market with an appropriately light hand.

The Commission previously has not hesitated to use preemption as a powerful tool to establish and maintain competitive markets, such as in preempting state regulation of customer premises equipment. In *North Carolina Utilities Commission v. FCC*, the

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115 *Id*. at 69 (emphasis added).

116 47 U.S.C. § 201(b).

117 47 U.S.C. § 332(c)(1)(A)(ii).

118 47 U.S.C. § 161.

Fourth Circuit determined that the Communications Act preempts state regulation of telephone terminal equipment used for both interstate and local communication when such regulation conflicts with federal rules governing the same equipment.[119] In particular, the court noted that the:

> [A]im of the Communications Act, after all, is not limited to achievement of a minimally efficient, nondangerous national network. Instead, Congress has declared its purpose to be the creation of "a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.. . . . If it is admitted as we think it must be that the FCC has full statutory authority to regulate joint terminal equipment to ensure the safety of the national network, then we can discover no statutory basis for the argument that FCC regulations serving other important interests of national communications policy are subject to approval by state utility commissions.[120]

The Commission also has used its preemption authority to allow and to encourage new services to develop outside of the stifling range of state regulation. For example, when the New York State Commission on Cable Television ("NY Commission") required multipoint distribution system ("MDS") operators to obtain a franchise from the local municipality as a means of limiting the growth of MDS, the Commission determined that the regulation by the NY Commission had had an adverse effect on the development of MDS.[121] The U.S. Court of Appeals for the Second Circuit upheld the Commission's orders preempting franchising regulations issued by the NY

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119 *See North Carolina Utilities Commission v. FCC,* 552 F.2d 1036 (4th Cir., 1977), *cert. denied.* 425 U.S. 992 (1978).

120 *Id*. at 1046-47 (confirming the Commission's authority to preempt state commission regulation over customer premises equipment used for both for interstate and intrastate communication).

121 Tellingly, the New York State Commission attempted to claim that its policies and regulations were not intended to discourage the grant of franchises and the growth of services. The court responded by observing: "the State Commission's contention is largely irrelevant since we must consider the effect rather than the purpose of the state regulation." *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 64 (2nd Cir. 1982)

Commission.[122] Given that the Commission's Congressional mandate was to promote the nationwide development of MDS, the court found that the Commission "did not act arbitrarily or capriciously or outside its jurisdiction in finding that "it has an immediate and preeminent interest in the development of MDS service as a whole.'"[123] Fundamentally, the court agreed that the NY Commission's policy of reducing the number of MDS receive points in New York could frustrate the development of interstate MDS service:

> To allow each State to impose regulations, which, like New York's effectively reduce the number of MDS receive points would impose an impermissible burden on interstate MDS service. Clearly, the State Commission's policy stands as an obstacle to the FCC's accomplishment of its objective of promoting the development of an interstate MDS network.[124]

While the burden of persuasion in preemption cases generally lies with the party seeking annulment of the state statute or regulation,[125] fundamentally, if every state can take its hand at regulating wireless carriers by importing its own particular view of "better" regulation, CMRS carriers have and will continue to face a barrage of inconsistent requirements that could, as in the MDS case above, stifle the nationwide development of wireless services.[126] Heavy-handed regulation by state commissions of the terms and conditions of wireless service thus conflicts with the scheme adopted by

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[122] *Id.* at 62.

[123] *Id*. at 65 (*citing Orth-O-Vision, Inc*., 69 F.C.C.2d 657, 669 (1978)).

[124] *New York Comm'n on Cable Television*, 669 F.2d at 66.

[125] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

[126] The Fifth Circuit Court of Appeals on June 30, 2004, used this exact conflict preemption analysis to strike down a Texas PUC state universal service assessment that was based upon both the interstate and intrastate revenues of telecommunications carriers operating in Texas. The court agreed with AT&T that the Texas tax on multi-jurisdictional carriers burdened those carriers more than purely interstate carriers and that thus, the tax was discriminatory and in conflict with Section 254(f) of the Communications Act. *AT&T Corp. v. Texas PUC*, No. 03-50454 (5th Cir, June 30, 2004).

Congress and administered by the Commission. In those circumstances, the FCC has clear authority and would be acting within the scope of that authority if it issued narrowly-tailored consumer protection regulations with respect to wireless carriers and decided that no additional state regulation were warranted. That approach makes sense because a highly competitive wireless market provides the best protection for consumers, and regulation of "terms and conditions of service" by numerous different states could substantially interfere with the successful operation of competitive market forces.

B. The Commission Can Create a "Safety Valve" for States That Seek to Impose a Regulation That Has a Direct Effect on Wireless Carrier Rates or Rate Practices, or the Commission's Wireless Policies.

As discussed previously, the Commission has plenary authority over CMRS carrier rates and rate structures, and broad authority over the regulation and functioning of the wireless industry generally. Accordingly, the Commission should be the agency that interprets and enforces its own guidelines as to wireless carrier rate practices, without any delegation of authority to state commissions. The Commission is in the best position to determine whether a particular regulation or policy directly affecting wireless carriers conflicts with the multi-state functioning of wireless operations or a specific Commission policy. The Commission, therefore, should be the sole arbiter in interpreting and determining the scope of Section 332 preemption and conflict preemption whenever these questions arise.[127]

Nextel does not propose to leave states without recourse in the event they are convinced a state-specific rule or requirement that directly affects wireless carrier operations is necessary within the confines of their particular state. The Commission can

[127] As previously stated, Nextel believes that states may enforce consumer protection and other business rules of general applicability against wireless carriers.

and should specify a process whereby states can present their proposed rule or requirement to the Commission for review *prior* to any new state rule or requirement taking effect. The Commission has experience with a wide range of cooperative arrangements with state commissions, for example, that might be used as a starting point for a workable state regulation review process.

One model that would not be workable, however, would be to use permissive guidelines, such as those that the Commission adopted to allow states to enforce Commission slamming rules.[128] While the Commission, as a nominal matter, requires state commissions seeking to enforce the Commission's slamming rules in the first instance to notify the Commission of the procedures each state would use to adjudicate complaints, the Commission determined that it would allow states to impose more stringent slamming requirements – including more stringent subscriber verification procedures – so long as they are consistent with the federal requirements.[129]

A similar approach, allowing states to view the Commission's uniform, national operating platform as a type of "floor," would defeat the purpose of adopting federal guidelines. States would inevitably promulgate inconsistent or more stringent requirements that would disrupt wireless carriers' ability to operate at a national level. This is not the national framework promised by Congress to wireless carriers in the 1993

[128] Section 258 of the Act prohibits the unauthorized change of a subscriber's long distance carrier, a practice known as slamming. The Commission implemented this provision by adopting a set of rules requiring the verification of preferred carrier changes and liability rules designed to take the profit out of slamming. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, First Order on Reconsideration,* 15 FCC Rcd 8158 (2000).

[129] "We confirm that, in the areas in which the states have jurisdiction, federal verification procedures constitute a 'floor,' and the states may choose to impose more stringent requirements, so long as they are consistent with the federal requirements." *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Third Order on Reconsideration*, 18 FCC Rcd 5099, 5140 (2003).

Budget Act and provided by the Commission in 1995 when it rejected a range of state commission petitions seeking to continue state-specific regulation of wireless carriers. In this area, at least, "consistent" state regulation cannot be stricter than federal policies or the promise of national operations for wireless carriers is defeated.

A better model the Commission should consider is its established process that permits state commissions to come before the Commission and request delegated authority to take actions otherwise inconsistent with the Commission's directions in matters of telephone number assignment and administration. Section 251(e) of the Act assigns plenary jurisdiction to the Commission of North American Numbering Plan and related telephone numbering issues in the United States. Despite this exclusively federal jurisdictional control over telephone numbering issues, the Commission cooperates with the states on a range of numbering resource optimization measures. State commissions, for example, can file with the Commission petitions requesting a specific delegation of authority to take actions not otherwise permitted under Commission numbering policies. In general, the Commission requires states seeking this authority to discuss their reasons for seeking delegated authority and the Commission encourages states to seek as narrow a delegation of authority as possible. The Commission routinely places state numbering petitions on public notice for comment and, in the case of specialized circumstances, the Commission sets forth in advance the criteria it expects any state to address in its petition for delegated authority.[130]

[130] *See Numbering Resource Optimization*, *Third Report and Order*, 17 FCC Rcd 252 (2001). In the case of Service Overlays, for example, the Commission articulated eight criteria it expected every state petition to address.

This approach of requiring states to lay out in a petition the scope of the requested delegation of authority and their justifications for a grant contains a number of positive aspects. Fundamentally and most importantly, a state petition process would allow the Commission and potentially affected wireless carriers the opportunity to assess the impact of a proposed regulation or enactment *prior* to its implementation. Interested parties can make their case for or against a proposed delegation, and the Commission has the flexibility to limit the delegation in a number of ways, including geographically, for a certain period of time, or place whatever conditions or requirements on the grant of authority as the Commission deems appropriate. Moreover, the Commission – unlike a state commission – can review the overall national impact of a particular state rule rather than focusing on the limited costs and benefits that may arise only within the borders of a particular state. This state petition process places the Commission in the position that Congress entrusted to it in the 1993 Budget Act – the agency charged with the development of competitive wireless services on a nationwide basis.

CONCLUSION

For the aforementioned reasons, Nextel urges the Commission to reject the NASUCA Petition, and instead confirm its exclusive authority to preempt state regulation that either directly or indirectly regulates CMRS rates and rate structures or interferes with the lightly regulated multi-state wireless marketplace that has benefited consumers for more than a decade.

Respectfully submitted,

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Dated: July 14, 2004