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

In the Matter of	)	
	)	
Truth-In-Billing and	)	
Billing Format	)	CG Docket No. 04-208
	)	
National Association of State Utility	)	
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Monthly	)	
Line Items and Surcharges Imposed	)	
By Telecommunications Carriers	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc. ("SBC") hereby submits these reply comments in response to comments filed in the above-captioned docket. Most commenters agree that the NASUCA petition should either be dismissed or denied outright.

I. INTRODUCTION AND SUMMARY

As the record demonstrates, all commenters agree that consumer bills should contain clean and non-misleading descriptions of carrier charges. Consumers should be able to readily determine from their bills the services for which they are being billed and all charges, including surcharges, associated with those services. Where commenters differ is on what regulations are necessary to achieve these goals.

Supporters of NASUCA argue that consumers are dissatisfied with and frustrated by the myriad of charges on their bills. Further, they argue that because of line-item fees and surcharges, it is difficult for consumers to compare prices. But as most commenters in this proceeding have shown, a complete ban on the use of line-items or surcharges is not the solution.

First, NASUCA has not substantiated any of its allegations that carrier billing descriptions are misleading or have in any way harmed consumers. Second, NASUCA does not seek a clarification of existing law — the point underlying the declaratory ruling process — but

the establishment of new regulations that contradict the Commission's Truth-in-Billing Order. Third, NASUCA's proposed remedy for the alleged, but unproven, violations of the Commission's TIB rules would violate carriers' First Amendment rights of commercial free speech because it isn't narrowly tailored to address the FCC's interests. Accordingly, NASUCA's petition should be denied.

II. MOST COMMENTERS AGREE THAT THE USE OF LINE ITEMS AND SURCHARGES IS FULLY CONSISTENT WITH THE TIB RULES.

SBC agrees with commenters that NASUCA has failed to substantiate its claims that carriers line-item charge and surcharge descriptions are misleading and confusing to consumers.[1] The fact that carriers use varying labels to describe line-item charges and surcharges does not render them per se unreasonable or necessarily confusing to consumers. The fact that all line-items and surcharges are not government mandated does not render such charges inherently unreasonable. Even the fact that some consumers may not understand their line-item charges does not render such charges per se unreasonable.

The test for reasonableness is not whether a line-item charge could be lumped into a carrier's rate, or is government mandated, but rather, whether the description of the line item is full, clear and non-misleading.[2] As the Commission expressly stated in the *TIB Order*, carriers are required to ensure that their billing descriptions "convey enough information to enable a customer *reasonably* to identify and to understand the service for which the customer is being charged."[3] (emphasis added) As long as this standard is met, whether the bill contains a single

[1] AT&T Comments at 10; BellSouth Comments at 8-10; Cingular Wireless Comments at 8-10; Verizon Comments at 8-10.

[2] 47 C.F.R. § 64.2401(b).

[3] *Truth-In-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, ¶40 (1999) (*TIB Order or Further Notice*).

charge or multiple charges,[4] a carrier's billing descriptions are lawful under the Commission's rules.

For its part, SBC has met that standard and more. First, SBC's descriptions of its billed charges are clear and non-misleading. While it is true that SBC carriers use different descriptions for their subscriber line charges, each description still accurately and clearly describes the substance and nature of the charge — again all that is required under the TIB rules. Second, SBC has sought to ensure that its customers have other avenues available to them to understand the nature and substance of SBC's charges. For example, SBC often provides its customers with billing messages when there is a rate increase to assist customers in understanding their billed charges. SBC also provides consumers information regarding its line-item charges during telemarketing calls and in response to consumer-initiated billing inquiries. Additionally, SBC has increased the content on its home webpage to include explanations of fees, surcharges and rates and continues to look for new ways to educate its customers.[5]

NASUCA and its supporters contend that they are not advocating a complete ban on line-item charges and surcharges, but only those that are not expressly government mandated. But it is evident that NASUCA doesn't even quite understand what it is requesting. Most carrier line-item charges and surcharges, including the very ones NASUCA claims would not be subject to the ban it proposes, are *permissible*, not mandated charges under federal and state rules. Given this fact, how could NASUCA reasonably argue that a carrier should be able to itemize a universal service charge, but not a NANP charge. Neither are mandated by the FCC, albeit both

[4] Whether charges are itemized or lumped together, the carrier's obligation does not change. Either way, carriers must fully explain what the charges are intended to recover. If customers do not understand the description of a charge when the charge is itemized, they are no more likely to understand the description when lumped into a single rate. Further, as Verizon, USTA and others accurately point out in their comments, because regulatory charges have different origins and do not apply to all services, lumping all charges into one lump-sum figure could prove even more confusing to consumers.

[5] SBC is aware of the value of clear communications with its customers and is currently in the process of standardizing its billing labels and practices across its 13 states. Notably, SBC relied on input from consumer focus groups in revising its billing format.

are – as NASUCA even admits — reasonable costs that carriers should be able to pass to consumers. NASUCA can't, which is precisely why its proposal must be rejected.

Moreover, NASUCA fails to even consider the infeasibility of rolling certain charges into one packaged rate. SBC and many other carrier rates are tariffed at the state and federal level. Certain fees and surcharges, such as universal service, change on a frequent basis, while others differ depending on location. Even assuming that carriers could legally roll all charges into a total package rate,[6] NASUCA's proposal would not be in the public's interest. It would force carriers to constantly revise their tariffed rates and/or have multiple tariffed rates in effect for the same service, which would prove confusing to consumers and administratively burdensome for carriers and regulators alike.

Curiously, NASUCA does not even address what could happen if all carriers were required to include non-mandated charges in their rates. In the *TIB Order*, the Commission specifically expressed concern that precluding carriers from using line-item charges could facilitate carriers' ability to bury costs in lump-sum figures.[7] Further, the Commission questioned whether carriers could even describe a lump-sum figure that includes multiple charges in a clear manner.[8] SBC agrees with most commenters that these concerns continue to be valid today.[9] Rather than address these concerns, NASUCA asks the Commission to eliminate billing practices that arguably provide consumers with the greatest degree of information about the nature and substance of their charges.

The Commission must not be swayed by NASUCA and its supporters' assertions that carriers' use of line-item charges and surcharges inhibits consumers from price shopping. As the

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[6] As USTA correctly notes, it may be legally impermissible for a carrier to recover a federal surcharge or fee in a local rate or vice versa. USTA comments at 8-9.

[7] *TIB Order*, ¶55.

[8] *Id.*

[9] *See* Verizon at 9-10; USTA at 5.

record reflects, consumers are savvy.[10] Consumers know to ask what their bottom-line monthly rate will be and, in SBC's experience, often ask questions about the specific charges included in their monthly rate. Armed with such information, consumers have all the requisite information to price shop. Given that consumers price shop in innumerable other contexts where the total charge (i.e. with all fees and taxes included) exceeds the advertised rate,[11] SBC fails to understand why NASUCA believes consumers are incapable of determining all fees associated with telecommunications services and then comparing those fees among multiple providers.

Notably, NASUCA fails to realize that *all* consumers will not understand their bills. Many costs associated with federal or state regulatory action are complex. Cost recovery issues have been and will be for the foreseeable future critical issues the Commission must resolve. Many consumers are not actively involved in, nor follow, such proceedings, and thus may have some difficulty in understanding why carriers pass along certain charges, the overall need for such charges, etc. Unquestionably, carriers must do their part to provide clear and non-misleading descriptions of all billed charges, but as Chairman Powell recently noted, consumers must be equally vigilant in understanding the regulatory actions that affect the pricing of their services.[12]

III. AS MOST COMMENTERS DEMONSTRATED, THE COMMISSION CANNOT ADOPT NASUCA'S PROPOSED BAN ON THE USE OF LINE ITEMS VIA A DECLARATORY RULING.

SBC agrees with Verizon, BellSouth, Cingular Wireless, USTA, MCI and other commenters that the Commission is precluded from adopting NASUCA's proposed ban via a

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[10] *See* MCI Comments at 8-9; Cingular Wireless at 15; USTA at 7.

[11] For example, additional fees and surcharges are included with cable services, satellite services, airline tickets, and vacation packages to name a few.

[12] Notably, Chairman Michael Powell recently spoke out on this matter, stating that "If you look carefully, like all things, it's usually (disclosed somewhere)," Powell said."But I do think it is something that a consumer has to be vigilant about." Todd Wallack, *FCC chief worries about fees/Phone competition may be hindered, Powell says,* SAN FRANCISCO CHRONICLE, July 13, 2004 at D1.

declaratory ruling.[13] A declaratory ruling is only appropriate to remove an uncertainty or to terminate a controversy, neither of which are present here.[14] There is no ambiguity as to whether the Commission's policies and rules permit carriers to use line items. Indeed, in the *TIB Order*, the Commission not only expressly permitted carriers to do so, but *rejected* proposals to limit their use. Specifically, the Commission stated:

> "We decline at this time to mandate such requirements, but rather prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates, or to list the charges in separate items.[15]

Further, as the record reflects, the Commission in other contexts has expressly given carriers the flexibility to use line items. In the Universal Service proceeding, for example, the Commission stated,

> "carriers that elect to recover their contribution costs through a separate line item may not mark up the line item above the relevant contribution factor….We stress that this rule only applies to carriers that choose to recover their contribution costs through a line item."[16]

Similarly, in the Local Number Portability Order, the Commission expressly permitted carriers to recover their LNP fees in any lawful manner,[17] which would include line-item charges.

NASUCA's proposal, therefore, could not be interpreted as a clarification, but only as a request for the Commission to overturn its express rulings that line items are permissible and adopt new rules restricting their use. Given that the Commission could only issue such rules via

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[13] *See* Verizon at 5-6; Cingular Wireless at 7-8; BellSouth at 5; AT&T at 5-6; USTA at 4-5.

[14] 7 C.F.R. § 1.2.

[15] *TIB Order*, ¶55.

[16] *Federal State Joint Board on Universal Service*, 17 FCC Rcd 24952 (2003).

[17] *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701 at ¶136 (*LNP 3rd R&O*).

a rulemaking proceeding,[18] SBC agrees with the majority of commenters that NASUCA's Petition must be rejected for this reason alone.

IV. MOST COMMENTERS AGREE THAT CARRIER BILLING PRACTICES CAN BE ADDRESSED WITHOUT INFRINGING UPON FIRST AMENDMENT RIGHTS.

NASUCA touts customer confusion, customer frustration and customer inability to comparison shop as the key justifications for a ban on carriers' use of line-item charges and surcharges, except where such charges are mandated. Notwithstanding the fact that the Commission has already squarely addressed and rejected these arguments, even if additional action is warranted, the broad prophylactic restrictions on commercial speech proposed by NASUCA are wholly unnecessary to address these concerns.

Most commenters agree that a ban on the use of line-item charges or surcharges would be impermissible under the First Amendment.[19] In fact, only one commenter attempted to justify the proposed ban under the First Amendment, but ultimately conceded that such a ban on line items would likely prove unsuccessful.[20] As the record makes clear, line items and surcharges convey information to the public about the nature of government regulation, carrier action and/or carrier services, and thus constitute commercial speech under the First Amendment.[21] The FCC, thus, could only impose the restriction proposed by NASUCA if it justifies the restriction under the *Central Hudson* test.[22]

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[18] 5 U.S.C. § 553.

[19] *See* BellSouth at 3-4; MCI at 11-13; Verizon at 10-13; Leap Wireless International Comments at 14-15.

[20] Public Utilities Commission of Ohio Comments at 6-8.

[21] *See* MCI at 12; Verizon at 11; BellSouth at 3.

[22] *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Therein, the Supreme Court explained the 4-part analysis for commercial speech.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances

SBC agrees with Verizon, MCI, Leap Wireless and BellSouth that the Commission would have a heavy burden justifying a restriction on the use of line items and surcharges under the First Amendment.[23] Speculative harm is not enough to override the protections afforded under the First Amendment and NASUCA has failed to provide any evidence that the challenged line item charges and surcharges are misleading or have caused consumer harm. As the Supreme Court has held, "[i]f the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden to demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[24]

But even if the Commission were to conclude that certain line-item charge and surcharge descriptions are misleading, SBC agrees with Verizon that a complete ban on line-item charges, unless mandated by a government, would not survive First Amendment scrutiny. Under the First Amendment, any restriction on commercial speech must be "no more extensive than necessary to serve [the stated] interest." [25] While the government is not required to use the least restrictive means, the courts have held that it must use a means that is "narrowly tailored" to its desired objective.[26] And where less burdensome alternatives exist, and the government nevertheless imposes a restriction on speech, the Supreme Court has held that such action could "signal that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."[27] As the record reflects, other key

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the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

[23] *See* BellSouth at 3-4; Leap Wireless at 14-15; Verizon at 12; MCI at 13.

[24] *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 146 (1994).

[25] *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

[26] *Rubin v. Coors Brewing Co*., 514 U.S. 476, 487 (1995).

[27] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996).

alternatives are available to address the "alleged" harms raised by NASUCA,[28] which the Commission must consider prior to adopting NASUCA's proposed restriction on protected commercial speech.

The first and most obvious alternative is for the Commission to complete the pending *Further Notice* in the TIB rulemaking proceeding. Therein, the Commission requested comment on three issues, all of which are directly relevant to NASUCA's concerns:

(1) whether its proposed standardized labels would (a) adequately identify the charges, and (b) provide consumers with a basis for comparison among carriers, while ensuring that the description is succinct,

(2) whether there are other labels the Commission should adopt for line items that are more appropriate; and

(3) how carriers should identify line items that combine two or more charges into a lump sum.[29]

As these inquiries make clear, the overriding purpose of the proceeding is to adopt standardized labels for line-item charges associated with federal regulatory action that consumers will understand. Certainly NASUCA would agree that any adopted labels would be sufficient and non-misleading under the Commission's TIB rules. While the labels ultimately adopted by the Commission may not encompass all line-item charges and surcharges imposed by carriers, in the Order the FCC would have the opportunity to further address and clarify, to the extent necessary, the types of labels and descriptions it believes would *not* comply with its TIB rules.

Due to the lapse in time since initiation of the *Further Notice*, and the comments generated in this proceeding, it may be prudent for the Commission to refresh that record. Some commenters here have proposed alternatives – alternatives that importantly do not restrict commercial speech — to address NASUCA's concerns. The Ohio PUC, for example, proposes that the Commission require carriers to include non-mandated line-item charges and surcharges

[28] *See* Cingular Wireless at 22; Coalition for Competitive Telecommunications Comments at 4-5;

[29] *Further Notice*, ¶ 72.

in a section of the bill separate from any mandated charges.[30] While SBC does not necessarily agree with this proposal, such issues are reasonably related to the issues already raised in the *Further Notice* and should be addressed in the context of that proceeding.

Second, the Commission could more proactively exercise its enforcement authority against carriers that fail to comply with its existing rules. The TIB rules are clear: carriers must provide truthful and non-misleading descriptions of all billed charges. The Commission has stated that it stands ready to take action against carriers that engage in unreasonable billing practices[31] and should do so. NASUCA claims that such an approach is infeasible because of the large number of telecommunications carriers; however, such reasoning has not precluded the Commission from proactively enforcing its rules in other consumer-related contexts. The Commission, for example, has established an informal complaint process to adjudicate slamming complaints,[32] and indeed, just last week, proactively issued a News Release informing consumers that they can file a complaint if they believe they have been slammed.[33] Similarly, the Commission, in conjunction with the FTC, has a process in place to address telemarketing complaints.

The fact is, if the Commission finds through an informal or formal complaint process that a particular carrier's billing practices do not comply with the its TIB rules, that finding will impact other carriers' billing practices. SBC, for example, has adjusted certain of its carrier verification and telemarketing procedures in light of Commission orders in certain complaint cases. Similar action here, where appropriate, would put the industry on notice, sending a clear message as to the types of billing practices the Commission finds unreasonable.

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[30] *See* Public Utilities Commission of Ohio at 8-10.

[31] *TIB Order*, ¶57.

[32] 47 CFR § 1.719

[33] FCC News Release, *The FCC Taking the Profit Out of Slamming*, at 2 (Aug. 5, 2004).

Third, while NASUCA and its supporters argue that market forces alone are insufficient to control carrier billing practices, the marketplace unquestionably operates as a check on carrier billing practices. The majority of the charges challenged by NASUCA involve providers of long distance and/or CMRS services. Because those markets are robustly competitive, carriers have every incentive to operate in a reasonable manner to capture and retain market share. To do so, these carriers must distinguish themselves not only by the products and services they provide, but by their billing practices. Carriers that engage in unreasonable billing practices run the risk of losing customers which they can ill-afford in highly competitive markets. Thus, market forces, particularly in combination with the other alternatives mentioned and the Commission's existing rules, are more than sufficient to address the consumer harms NASUCA purports exist.

V. CONCLUSION

For the foregoing reasons, SBC requests that the Commission dismiss NASUCA's Petition for Declaratory Ruling or in the alternative deny the relief requested therein.

Respectfully Submitted,

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