

gauge the carrier's costs of regulatory compliance and proceedings from the name or description of the charge.

The other elements of AT&T's line item charge are equally mystifying. Take, for example, the interstate access charges AT&T's fee purportedly recovers. With the release of the Commission's *CALLS Order*,<sup>59</sup> ILECs' interstate access charges were greatly reduced and ILECs recover much of the revenue from those charges through their SLCs. Yet AT&T apparently now finds itself compelled to add a new fee to recover those reduced costs, which are clearly a direct cost of AT&T's service. This hardly comports with the expectations of consumers or regulators.

Other IXC line items referenced in NASUCA's petition suffer from the same TIB deficiencies. Sprint's "Carrier Cost Recovery Charge" recovers various costs "including . . . other regulatory compliance items, and certain property taxes."<sup>60</sup> Likewise MCI's "Carrier Cost Recovery Charge" recovers costs the company incurs "with regard to . . . federal regulatory fees" and to recover the company's expenses incurred "with regard to . . . universal service funds . . ."<sup>61</sup> BellSouth's "Carrier Cost Recovery Fee" is identical to AT&T's fee, except BellSouth omits property taxes, but adds "billing expenses."<sup>62</sup>

**B. The CMRS Carriers' Line Items Do Not Meet Or Exceed The *TIB Order's* Principles and Guidelines.**

CMRS carriers appear to disagree whether, and to what extent, the *TIB Order* applies to them. Cingular and VZW recognize that the *TIB Order* applies to CMRS carriers as well as

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<sup>59</sup> *In the matter of Access Charge Reform*, CC Docket No. 96-262 et al, *Sixth Report and Order in CC Docket No. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, FCC 00-193 (May 31, 2000).

<sup>60</sup> NASUCA Petition, p. 13.

<sup>61</sup> *Id.*, p. 14. Presumably, MCI's Carrier Cost Recovery Charge incorporates the costs of administering the company's collection and remission of federal USF contributions, which was addressed in the Commission's Contribution Order. See *id.*, p. 8-9, citing Contribution Order, ¶¶ 40, 54. However, lumping these administrative expenses into a line items that recovers various other costs runs afoul of the concerns expressed by the Commission in the TIB Order, and the guidelines themselves.

<sup>62</sup> *Id.*, p. 15.

IXCs.<sup>63</sup> Cingular noted that the three principles set forth in the *TIB Order* apply to CMRS carriers and wireline carriers alike, and that three specific guidelines set forth in the *TIB Order* apply to CMRS carriers. VZW, however, claims that only two of the guidelines apply.<sup>64</sup>

Importantly, VZW also asserts that the *TIB Order*'s principle that bills contain full and non-misleading charges does not apply to CMRS carriers.<sup>65</sup> This is glaringly wrong. The *TIB Order* specifically provides that *all of its principles apply to both wireline and wireless carriers*.<sup>66</sup> Moreover, the Commission's full and non-misleading charges principle is the source of the guidelines that VZW admits apply to it (*i.e.*, clear identification of the service provider and toll free number for questions and disputes). If the principle did not apply to wireless carriers, then the guidelines implementing that principle should likewise not be applicable to CMRS carriers.

In contrast, Nextel and US Cellular imply that CMRS carriers are not constrained by the *TIB Order* in any way. Nextel claims that the Commission "specifically concluded that CMRS carriers . . . may recover their costs in any lawful manner, including through a non-misleading line item rate element" and that "nothing precludes [CMRS carriers] from recovering costs from their customers . . . through a separate rate element or item."<sup>67</sup> US Cellular claims the Commission "sought comment on whether the specific 'truth in billing' rules now applied to wireline carriers should also be applied to wireless carriers," but "declined to adopt such rule changes in the years since 1999, and specifically declined to do so in the 2002 [Contribution]

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<sup>63</sup> Cingular Comments, pp. 8-12; Nextel Comments, pp. 7-11; US Cellular Comments, pp. 4-5; VZW Comments, pp. 4-5.

<sup>64</sup> Cingular Comments, p. 8. These three guidelines, as NASUCA noted in its petition, are: (1) clearly identifying the name of the service provider associated with each charge; (2) prominent display of a toll free number customers may call with questions or disputes; and (3) identification of separate charges resulting from regulatory action via standardized labels. *Id.*, pp. 8-9. VZW claims only the first two guidelines apply to wireless carriers. VZW Comments, p. 5. This is an apparent error in reading the *TIB Order*.

<sup>65</sup> VZW Comments, p. 22.

<sup>66</sup> *TIB Order* ¶¶ 13; 17-18.

<sup>67</sup> Nextel Comments, p. 7. Later in its comments, Nextel does recognize that the *TIB Order* provides "general guidance on the manner in which carriers may recover their regulatory costs." *Id.*, p. 10.

Order.” Further, US Cellular claims the Commission “found no reason to adopt general regulation of wireless bills in 1999 or in 2002, when it modified wireless billing practices with respect to universal service line items.”<sup>68</sup>

US Cellular and Nextel are patently wrong in suggesting that the *TIB Order* does not constrain CMRS carriers from putting any line item they want, in any amount they want, on customers’ bills. As NASUCA noted – and as Cingular and VZW concede – all the principles set forth in the *TIB Order* apply to CMRS carriers.<sup>69</sup> Moreover, at least some of the guidelines regarding full and non-misleading bills apply to wireless carriers. Likewise, the Commission made it clear that its decision not to apply all of the guidelines to CMRS carriers did not mean that its discussion in support of the other guidelines was irrelevant to the wireless industry. For example, the Commission wrote: “...notwithstanding our decision at this time not to apply these several guidelines to CMRS carriers, we note that such providers remain subject to the reasonableness and nondiscrimination requirements of section 201 and 202 of the 1934 Act.”<sup>70</sup>

Finally, the Commission did not suggest that the wireless industry enjoyed an unconditional exemption in perpetuity from certain guidelines established in the *TIB Order*. Should the Commission conclude that conditions warrant clarifying the *TIB Order* – as NASUCA and other commenters believe is necessary to address the spreading abuse of line items and surcharges – it clearly may make its guidelines applicable to CMRS carriers.

With regard to Cingular’s and VZW’s arguments, the Commission’s discussion of what types of line items could reasonably be expected to mislead or confuse consumers demonstrates that the carriers’ billing practices do not meet or exceed the *TIB Order*’s principles and guidelines. The CMRS carriers’ line items, especially “regulatory” line items like those

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<sup>68</sup> US Cellular Comments, p. 4.

<sup>69</sup> NASUCA Petition, pp. 33-34.

<sup>70</sup> TIB, ¶19.

employed by wireline carriers, recover costs purportedly associated with a grab bag of regulatory programs. For example, AWS describes its regulatory line item as helping to fund its compliance “with various government mandated programs which may not be available yet to subscribers.”<sup>71</sup> ALLTEL’s line item “recoup[s] expenses incurred to provide government mandated services”<sup>72</sup> while Cingular’s “help[s] defray its costs incurred in complying with obligations and charges imposed by State and Federal telecom regulations.”<sup>73</sup> Leap and Nextel, at least, identify specific regulatory programs in the description of their regulatory line items – Nextel noting that its fee is “charged for *one or more* of the following: E911, number pooling and wireless number portability”<sup>74</sup> – while Leap advises that its fee “recoup[s its] costs for complying with regulations *related to* number pooling and local number portability.”<sup>75</sup>

Line items like those employed by AWS, ALLTEL and Cingular are *vague* and *ambiguous* – both qualities that were condemned by the Commission in the *TIB Order*. On this point, the Commission wrote:

In the Notice, we observed that telephone bills often contain vague or inaccurate descriptions of the services for which the customer is being charged. For example, many complaints we have received involve charges identified on local telephone bills simply as “monthly fee” or “basic access” without further explanation. The record in this proceeding persuades us that unclear or cryptic telephone bills exacerbate consumer confusion, as well as the problems of cramming and slamming.

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We contemplate that sufficient descriptions will convey enough information to enable a customer reasonably to identify and to understand the service for which the customer is being charged. Conversely, descriptions that convey ambiguous or vague information, such as, for example, charges identified as “miscellaneous,” would not conform to our guideline.<sup>76</sup>

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<sup>71</sup> NASUCA Petition, p. 18-19.

<sup>72</sup> *Id.*, p. 19.

<sup>73</sup> *Id.*, p. 20.

<sup>74</sup> *Id.*, p. 21 (emphasis added).

<sup>75</sup> *Id.*, p. 20.

<sup>76</sup> TIB Order, ¶¶ 39-40.

Like the wireline carriers' line items that recover costs associated with "regulatory compliance, the CMRS carriers' line items, especially those that purport to recover costs associated with various government programs are, practically speaking, no different from a line item entitled "Miscellaneous."<sup>77</sup> Such a line item violates the *TIB Order*.

Many of the CMRS carriers' line items fail to comply with the *TIB Order* in yet another respect, namely the suggestion that the charges are mandated by the government. In the *TIB Order*, the Commission indicated that:

A full, accurate and non-misleading description of the charge would be fully consistent with our [standardized label] guideline. In contrast, we would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate.<sup>78</sup>

Each of these carriers explains that its regulatory line item is to fund compliance with "government *mandated* programs" or "*obligations imposed* by the federal government."

The carriers might argue that their descriptions of the line items indicate that the "programs" are mandated, but do not suggest that the "charges" are mandated by those programs. This hypertechnicality does not serve the carriers well. They imply that the Commission required accurate disclosure that there is a program, but allowed carriers to give the false impression that the charges are mandated. The nuances of the argument would certainly be lost on the average consumer. The Commission should not endorse carriers' confusing and misleading consumers; it should reject them.

Some of the comments opposed to NASUCA's petition actually support NASUCA's contention that the carriers' regulatory line items are misleading and that the carriers' disclosures

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<sup>77</sup> In fact, a line item entitled "miscellaneous" would be preferable to one entitled "federal regulatory compliance fee" or such like. A line item described as "miscellaneous" is objectionable because it fails to provide any information about what the consumer is being billed for. This is, the Commission rightly noted, bad. Line items that recover a grab bag of operating costs under the moniker "regulatory fee" are worse. Consumers still don't know what they're being billed for but they're led to believe that it's the government's fault. With these regulatory line items consumers are not only left confused, they are also misled and invited to direct the ire that results toward "Big Brother" rather than the carrier that opts to recover its operating costs through a line item.

<sup>78</sup> *Id.*, ¶ 57.

and disclaimers do not cure their deficiencies under the *TIB Order*. For example, the Coalition for a Competitive Telecommunications Market (“Competitive Coalition”), made up of resellers of IXC services, opposed NASUCA’s petition in favor of the Commission improving its consumer education programs and more aggressive enforcement actions. The Competitive Coalition noted, however, that consumers should not be expected to rely on carriers’ literature regarding their charges.<sup>79</sup> NASUCA agrees. Moreover, the Competitive Coalition suggested that if consumers rarely consult carrier websites, it is “unimaginable” that they peruse Commission orders regarding what regulatory costs are allowed to be recovered through line items. Again, NASUCA agrees. Finally, the Competitive Coalition suggested that consumer confusion regarding carriers’ regulatory line items stemmed from the sheer number of charges appearing on consumer bills.<sup>80</sup> Yet again, NASUCA agrees.

**C. The Commenters Ignore The *Advertising Joint Policy*.**

All the commenters asserting that carriers’ regulatory line items are not misleading or deceptive ignore the relevance of the *Advertising Joint Policy*<sup>81</sup> cited in NASUCA’s petition in assessing whether a carrier’s communication with its customers is misleading or deceptive.<sup>82</sup> AT&T, the Competitive Coalition and VZW at least address the *Advertising Joint Policy*, but wrongly claim it is irrelevant.

AT&T asserts that: (1) the *TIB Order* suggested that the *Advertising Joint Policy*’s “truth in advertising” criteria would not apply to the billing practices in question because it rejected adding “safe harbor language” or other descriptive language on customer bills; (2) the

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<sup>79</sup> Competitive Coalition Comments, p. 3.

<sup>80</sup> *Id.* To be fair, on the last point the Competitive Coalition suggests that the sheer number of regulatory line items appearing on customer bills is the “direct result of government action.” *Id.* Here NASUCA parts company with the Competitive Coalition’s observations.

<sup>81</sup> *In the Matter of Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, File No. 00-72, FCC 00-72, Policy Statement (rel. March 1, 2000) (“*Advertising Joint Policy*”).

<sup>82</sup> Petition, pp. 39-42.

Commission chose not to apply the *Advertising Joint Policy*'s standards when it issued its *TIB Reconsideration Order*;<sup>83</sup> and (3) the TIB standards are more stringent than those contained in the Advertising Joint Policy and AT&T meets both.<sup>84</sup> AT&T's arguments are unavailing.

NASUCA did not cite the *Advertising Joint Policy* for specific "safe harbor language" that should be in carriers' bills, but rather for the standards the Commission should consider in determining whether a consumer is likely to be misled or deceived by carriers' regulatory line items. As for the Commission's "decision" not to address the *Advertising Joint Policy* in its *TIB Reconsideration Order*, omitting a reference to a policy hardly constitutes a rejection of its principles in the billing context. As the Commission made clear in that decision, "[t]his Order addresses only those new arguments raised in the petitions for reconsideration" – none of those arguments raised any issues that would have been impacted by the *Advertising Joint Policy*.<sup>85</sup>

Finally, AT&T contradicts itself when it claims that applying the *Advertising Joint Policy*'s "net impression" standard to each bill message would be "regulatory intervention of the worst kind."<sup>86</sup> Obviously, any particular bill message is subject to review under the *TIB Order*. AT&T presumably understands and accepts that. What it cannot accept, apparently, is use of the "net impression" standard for determining whether a consumer is likely to be misled by any particular bill message. AT&T's argument proves the point: the "net impression standard" is necessary to help the Commission determine whether a reasonable consumer is likely to be confused, misled or deceived by a carrier's regulatory line item charge.

VZW and the Competitive Coalition both assert that the *Advertising Joint Policy* simply

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<sup>83</sup> *In the Matter of Truth-in-Billing and Billing Format*, Order on Reconsideration, CC Docket No. 98-170, FCC 00-111 (rel. March 29, 2000) ("*TIB Reconsideration Order*").

<sup>84</sup> AT&T Comments, pp. 20-23.

<sup>85</sup> *TIB Reconsideration Order*, ¶ 2. The arguments on reconsideration dealt with: (1) identifying new service providers; (2) identifying deniable and non-deniable charges; (3) bundled services; (4) clearly identifying providers; (5) provision of toll-free numbers; and (6) the Commission's regulatory flexibility analysis. *Id.*, ¶¶ 3-12.

<sup>86</sup> AT&T Comments, pp. 22-23.

does not apply because it addressed advertising, not billing.<sup>87</sup> This is a distinction without a difference. Both activities involve communications from carriers to customers (or potential customers) regarding their rates and services. What makes an advertisement misleading or deceptive is very likely to make a billing statement misleading or deceptive.

The distinction VZW and the Competitive Coalition attempt to draw between advertising and billing is ironic because it contradicts commenters' argument that the Commission review the constitutionality of NASUCA's proposed restriction on billing practices pursuant to Supreme Court decisions dealing with advertising. If advertising and billing are both commercial speech between carriers and customers, subject to the same constitutional protections, then the same standard for determining when that communication is misleading or deceptive should be applied in both contexts.

#### **D. Other Arguments Defending "Regulatory" Line Items Ring Hollow.**

Commenters put forth several other arguments specifically attempting to justify carriers' regulatory line items. None of these arguments withstand any critical analysis.

##### **1. The Telecommunications Industry's Costs of Regulatory Compliance Are Not So Unlike Other Industries' Costs.**

Several commenters claim that regulatory line items are common in competitive industries. BellSouth notes that other industries use line items to recover specific types of expenses (airline security fees, cable franchise fees, shipping and handling fees). Sprint claims that it is not unusual for companies to include surcharges as part of their overall prices, especially for costs they cannot control (airline fuel surcharges, car dealership delivery fees, natural gas companies' purchased gas charges).<sup>88</sup> There are some critical points that undercut the carriers' assertions.

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<sup>87</sup> VZW Comments, pp. 27-28; Competitive Coalition, p. 9.

<sup>88</sup> BellSouth Comments, pp. 10-11; Sprint Comments, p. 12.

Car dealerships and mail order sellers refer to their surcharges as “delivery fees” or “shipping and handling” – they do not suggest to buyers that the government is responsible for either the fee or the fee amount. Likewise, airline fuel surcharges are called just that, “fuel surcharges;” the airlines do not try to pin the blame on government. The carriers also overlook that fact that many of the surcharges used in other industries require government approval. Airlines recover “passenger facility charges” (not security fees) from their passengers, but airlines do not establish or set the charges – airport authorities and the Federal Aviation Administration (“FAA”) do.<sup>89</sup> Similarly, natural gas companies recover purchased gas increments or assessments only after their respective utility commissions have approved the increments and their amount.<sup>90</sup> Cable franchise fees similarly pass through local government franchise fees imposed on cable companies.

CTIA offers its own, irrelevant observation in defense of carriers’ regulatory line items. CTIA claims that, “unlike unregulated entities,” carriers have no control over the timing of costs associated with meeting government requirements.<sup>91</sup> This is not true. All businesses are regulated, to some degree, by the government.<sup>92</sup> Likewise, no business controls the timing or the costs of government regulations that apply to them. Yet other business’ customers do not see the

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<sup>89</sup> Airports must apply for, and receive, FAA approval to impose and use “passenger facility charges,” and as part of the approval process, the airport authority must meet with users (*i.e.*, airlines) to negotiate the amount of the charge and the purposes to which it is applied (such charges are typically used to fund airport construction, improvements or security). Only after the charge has been approved by the FAA may airlines impose it on their passengers. Also unlike the regulatory line items at issue, airlines act as collection agents for these charges, passing them back to fund the airport’s projects (for information regarding airport passenger facility fees, see <http://www.faa.gov/arp/financial/pfc/pfcereg.cfm?ARNav=pfc>).

<sup>90</sup> *See, e.g.*, Rules for the Government and Construction of the Filing of Tariffs, 150 W. Va. Code State Reg. §2-13.2.

<sup>91</sup> CTIA Comments, p. 3.

<sup>92</sup> Virtually all manufacturers must comply with OSHA regulations. All businesses that emit air pollutants or discharge pollutants into waters of the United States must comply with often extremely onerous federal and state regulations controlling air and water pollution. Businesses seeking to build new or expand existing facilities often need to comply with comprehensive land use, historic preservation or environmental protection regulations. All publicly-held corporations must comply with federal and state securities laws. Restaurants comply with local health regulations.

same plethora of line items that appear on carriers' monthly telephone bills, especially line items that are misleadingly attributed to, but not mandated by, government

For its part, NTCA suggests that regulatory line items are warranted "because there are new regulations and unfunded mandates adopted on a daily basis."<sup>93</sup> However, NTCA fails to identify any new regulations or unfunded mandates that would account for the rapid, recent growth of regulatory line items.<sup>94</sup> Furthermore, at least one carrier, Sprint, admitted in proceedings before the West Virginia commission that all of the regulatory costs being recovered in its Carrier Cost Recovery Charge are costs of doing business that Sprint has incurred for years and which were, until September 2003, recovered "to the maximum extent possible through usage charges or monthly recurring charges, or both."<sup>95</sup>

**2. Carriers Regulatory Line Items are Hardly Public Service Announcements.**

**a. Regulatory line items are imposed not to educate consumers but to enhance carriers' profits.**

Some commenters suggest that carriers are motivated to use regulatory line items by their desire to inform their customers of the true costs of government regulation. NASUCA has reason to be skeptical.

For example, the West Virginia consumer advocate challenged both AT&T's Regulatory Assessment Fee and Sprint's Carrier Cost Recovery Charge before the state commission.<sup>96</sup> Sprint's pleadings and responses to the consumer advocate's discovery made it quite clear that profit, not customer education, was the motivating factor in establishing its fee. For example, in response to the consumer advocate's show cause petition, Sprint stated that it:

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<sup>93</sup> NTCA Comments, p. 3.

<sup>94</sup> NASUCA is unaware of any new mandates, other than the Commission's November 2003 order directing carriers to provide wireless and intermodal number portability.

<sup>95</sup> *Sprint Communications*, Answer, WVPSC Case No. 03-1610-T-SC, pp. 10-11.

<sup>96</sup> *AT&T of West Virginia*, Recommended Decision, WVPSC Case No. 03-1005-T-SC (April 23, 2004; Final May 13, 2004); *Sprint Communications*, Recommended Decision, WVPSC Case No. 03-1610-T-SC (July 26, 2004; Exceptions filed Aug. 10, 2004).

*[A]dmits that it, as well as the rest of the interexchange industry, has been under severe financial pressures for the past several years. Declining revenues have resulted from vigorous price competition among carriers, including the regional Bell Operating Companies . . . as well as from the rapid growth of substitutes for wireline long distance services, such as wireless and e-mail services. Against this backdrop, Sprint continually searches for market-based opportunities to improve its revenue position.*<sup>97</sup>

Sprint also confessed that the “*opportunity afforded by the introduction of similar charges by its competitors*” impelled it to impose its charge.<sup>98</sup> Not once in its filings did Sprint indicate that its charge was intended to educate its customers (for \$12 a year) of Sprint’s regulatory burden.

AT&T likewise indicated that its decision to begin imposing its Regulatory Assessment Fee was brought on by its financial position rather than a desire to educate its customers. As noted in NASUCA’s petition, AT&T’s “Frequently Asked Questions” regarding the line item explained: “In the competitive environment we are in, we cannot continue to absorb these [access charges, property taxes and expenses associated with regulatory proceedings and compliance].”<sup>99</sup> Like Sprint, AT&T’s motivation was purely remunerative.

**b. The carriers’ regulatory line items do not convey accurate information to consumers about the cost of government regulation.**

A central premise of NASUCA’s petition is its undisputed assertion that the line items at issue purport to recover costs attributable to a plethora of sources. Carriers’ “regulatory” line items usually cite federal programs, but some cite state programs as well.<sup>100</sup> Usually carriers’ line items cite telecommunications regulations but non-telecommunications regulations are also

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<sup>97</sup> *Sprint Communications*, Answer, WVPSC Case No. 03-1610-T-SC, ¶ 26 (emphasis added); see also *id.*, p. 11.

<sup>98</sup> *Id.*, p. 11.

<sup>99</sup> Petition, p. 13 Fn. 25 & Attachment B.

<sup>100</sup> Petition, pp. 12-22.

cited.<sup>101</sup> Some carriers even include costs attributable to other carriers in their regulatory line items.<sup>102</sup> Regulatory line items such as these hardly educate consumers.

Moreover, the carriers do not provide consumers with any information indicating how much of their monthly fee is attributable to one of the multiple programs identified. Instead consumers are merely billed a fixed amount, \$0.41 to \$2.83 per month (per account, sometimes per handset) for CMRS customers and generally \$0.99 per month for IXC's customers,<sup>103</sup> and are told this amount recovers their carrier's regulatory costs. A wireless customer is not likely to grasp the overall cost of wireless number portability from the dollar or two included on a monthly bill, nor will an IXC's customer appreciate the cost of interstate TRS by paying \$0.99 per month. Consumers who investigate carriers' regulatory line items might discover that carriers' charges vary, but would have no way of knowing what accounts for the differences nor could this consumer make economically rational choices based on the information.

### **3. The Carriers Fail to Demonstrate their Regulatory Line Items' Relationship to Costs.**

Some CMRS carriers claim their regulatory line items are reasonable and recover no more than the costs imposed by various Commission programs.<sup>104</sup> Estimates of the carriers' costs of implementing wireless programs vary but one thing is certain – no regulatory body has reviewed the CMRS carriers' cost data to verify the carriers' claims that their line items recover only their direct costs of compliance and nothing more.

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<sup>101</sup> *Id.*

<sup>102</sup> AT&T and BellSouth purport to recover access charges as part of their "regulatory" surcharges. Petition, pp. 12; 15.

<sup>103</sup> See Competitive Coalition Comments, p. 3 (conceding that most IXCs are charging fairly uniform rates for regulatory line items).

<sup>104</sup> AWS Comments, pp.6-9; Cingular Comments, pp. 16-22; Leap Comments, pp. 8-10; VZW Comments, pp. 31-33. NASUCA finds it interesting that none of the carriers actually attempted to quantify their individual costs directly resulting from the regulatory programs in question in order to justify the amounts of their regulatory surcharges. Even more interesting is the fact that the IXCs did not even bother to assert that their regulatory line items are reasonably related to the costs of the regulatory programs they purportedly recover.

AWS for example, asserts that implementing Phase II E911 has “required expenditures in the hundreds of millions of dollars,” that its number pooling costs “have been substantial” and that it “spent tens of millions of dollars to . . . establish network . . . to support that mandate . . . and support costs for LNP will easily rise into the hundreds of millions of dollars.”<sup>105</sup> Cingular cites industry-wide cost estimates prepared by the Progress & Freedom Foundation, an industry “think tank,” to justify its regulatory line items.<sup>106</sup> Cingular also asserts that the Center for Public Integrity’s (“CPI”) cost estimates cited in NASUCA’s petition are not appropriate when analyzing Cingular’s regulatory line item because it is “assessed for the recovery of compliance costs related to multiple government programs.”<sup>107</sup> Cingular is not claiming that CPI understated the per customer/per month costs to implement wireless number portability, only that Cingular’s line item charge cannot be compared to CPI’s estimate of the costs of one discrete regulatory program.

Of all the carriers, only Leap provides any detail about how it calculated its fee.<sup>108</sup> However, Leap’s claims still require the Commission to make a leap of faith – to accept that Leap’s line item recovers only its direct costs of compliance, without ever reviewing the inputs and assumptions underlying the carriers’ numbers. If the Commission is going to be blamed by consumers for the regulatory line items carriers are charging, then the Commission ought to satisfy itself that the charges are reasonably and directly related to the carriers’ compliance costs.

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<sup>105</sup> AWS Comments, pp. 6-9.

<sup>106</sup> Cingular Comments, p. 19. As for Cingular’s reference to the Progress and Freedom Foundation’s estimates of the costs of compliance, suffice it to say that regardless of who is estimating the cost, two things are apparent: (1) no one knows how much any carrier’s actual cost of compliance is, since wireless carriers are not required to account to anyone; and (2) most importantly, since all wireless carriers operate under the same mandates, allowing recovery of these costs through separate surcharges allows less efficient carriers to gain an advantage over more efficient carriers. This is because the less efficient carrier can still match the rates offered by the more efficient carrier and recover the difference in “regulatory assessment” surcharges.

<sup>107</sup> *Id.*, p. 20. Here Cingular is making NASUCA’s point that the regulatory line items are misleading and unreasonable. Since Cingular is purportedly recovering multiple programs’ costs in one, lump sum charge, it is “inappropriate” (*i.e.*, impossible) to determine how much of the line item relates to any one particular program.

<sup>108</sup> NASUCA notes that Leap’s is among the lowest regulatory line items.

NASUCA's concern is not unwarranted; it knows, as the Commission does too, that carriers sometimes overstate their costs of regulatory compliance.<sup>109</sup>

#### 4. The Various Arguments of Verizon Wireless Must Be Rejected

For its part, VZW advances several arguments that are simply strange. First, VZW argues that “while the *TIB Order* was intended to define specifically what would constitute a violation of Section 201 in the billing context for covered carriers,” NASUCA’s petition is inappropriate because “NASUCA has relied only on claims that carriers have violated the *TIB Order*.”<sup>110</sup> VZW’s logic is not just circular – it is schizophrenic. The company also asserts that an enforcement action under Section 201 cannot be brought by a petition for declaratory ruling.<sup>111</sup> This observation is irrelevant since NASUCA is not bringing an enforcement action under Section 201 but rather is arguing that carriers are engaging in an industry-wide practice that violates this section of the Act. Finally, VZW suggests that where competition exists, there can be no violation of Section 201.<sup>112</sup> That the Commission considers the presence of competition in determining whether a violation of Section 201 of the Act occurred hardly means that competition renders Section 201 a nullity.

Finally, VZW complains that the wireless industry is “being singled out” for taxation, and pays 16.2% of its revenues for “government-initiated programs” compared to only 6.93% for “the typical main street business.”<sup>113</sup> Regardless of how oppressed the wireless industry is by government (which granted wireless carriers the licenses which are the basis of their business), the point is that all wireless carriers suffer under the same mandates. Once again, allowing

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<sup>109</sup> See Petition, p. 51 Fn. 134.

<sup>110</sup> VZW Comments, pp. 31-32.

<sup>111</sup> *Id.*, p. 31.

<sup>112</sup> *Id.*, pp. 32-33.

<sup>113</sup> VZW Comments, p. 8. VZW apparently based its comments on a study by Scott Mackey, dated July 19, 2004. NASUCA has not been able to obtain a copy of this study since it is available only on a subscription basis. As a result, NASUCA has no idea of how the author defines “a typical main street business.” However, even assuming the study’s factual assertions are correct, they do not justify cost recovery from customers by means of separate line-items or surcharges.

recovery of compliance costs by means of separate line-items or surcharges provides less efficient carriers an advantage over more efficient carriers. Moreover, there is nothing inherent in the level of government taxation that renders a surcharge or line item a more or less appropriate cost-recovery vehicle.

#### **5. State Commissions Do Not Support Surcharges.**

USCA's assertion that most state public utility commissions support surcharges is specious.<sup>114</sup> In contradiction of USCA's assertion, the National Association of Regulatory Utility Commissioners ("NARUC") filed comments opposing monthly surcharges that are not mandated or specifically authorized by law or regulation to be passed on to the consumer.<sup>115</sup> Moreover, the California, Indiana, Iowa and Ohio commissions filed individual comments supporting NASUCA's petition or assertions of customer confusion over line item surcharges.<sup>116</sup>

### **IV. BANNING LINE ITEMS THAT ARE NOT MANDATED OR AUTHORIZED BY GOVERNMENT ACTION DOES NOT VIOLATE THE FIRST AMENDMENT.**

#### **A. NASUCA Seeks To Prohibit Certain Carrier Conduct.**

NASUCA requests that the Commission prohibit – or rather restrict – certain billing practices by carriers, *i.e.*, imposing monthly line items on customers, except in those instances where the government has expressly mandated or authorized the particular charge and the charge bears a close relationship to the amount authorized.<sup>117</sup> In this sense, NASUCA is asking the Commission to regulate carriers' conduct.

Some commenters claim NASUCA seeks to regulate carriers' speech rather than conduct.<sup>118</sup> This is not true and U.S. Supreme Court rulings support NASUCA. The Supreme Court recognizes the difference between conduct and speech. As the Court has noted, "the

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<sup>114</sup> USCA Comment, pp. 11-12.

<sup>115</sup> NARUC Comment, p. 1.

<sup>116</sup> CPUC Comment, p. 7; IURC Comment, p. 1; IUB Comment, pp. 2-3; OH PUC Comment, pp. 2, 6.

<sup>117</sup> Petition, p. 68.

<sup>118</sup> Most commenters passed over the issue of whether NASUCA is asking the Commission to regulate conduct, rushing on to the assumption that what the Commission would be regulating is carrier "speech."

Court recognizes the difference between conduct and speech. As the Court has noted, “the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.”<sup>119</sup> The Commission as well recognizes the difference between conduct and speech, in the context of carriers’ billing practices, and recognizes that conduct may be regulated directly, more easily than speech.<sup>120</sup> The carrier billing practices at issue here – charging customers monthly line items, even those purportedly associated with government action – are conduct, not speech. NASUCA is not asking the Commission to regulate the content of carriers’ speech – carriers would not be told what to say concerning government regulation, its costs, its wisdom, or anything else – they would instead be prohibited from billing customers for such costs as line items unless certain conditions are met.

VZW argues that “written communications about commercial information such as a customer’s charges is clearly commercial speech, not conduct.”<sup>121</sup> “To qualify as a regulation of conduct,” VZW claims, “the government’s regulation must be unrelated to expression.”<sup>122</sup> If this argument were true, then any attempt to regulate public utilities’ rates and charges is an attempt to regulate the utilities’ “speech” and is subject to challenge as an infringement of the utilities’ First Amendment rights. This obviously cannot be correct.

In addition, VZW argues that “the restriction on *non-government mandated* line item charges is an attempt to regulate directly the communicative impact of line item charges on consumers and thus is by definition related to expression.”<sup>123</sup> VZW claims that NASUCA’s

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<sup>119</sup> *Greater New Orleans Broadcasting v. U.S.*, 527 U.S. 173, 193 (1999).

<sup>120</sup> *TIB Order*, Furchtgott-Roth Dissent, p. 97, citing *44 Liquormart v. Rhode Island*, 517 U.S. 484, 507, 512 & 520 (1996); see also Petition, pp. 63-64.

<sup>121</sup> VZW Comments, p. 15, citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 670 (1985).

<sup>122</sup> *Id.*, citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

<sup>123</sup> *Id.* (emphasis added). The emphasized portion of the quoted passage highlights the schizophrenic – and confusing – nature of the carriers’ billing practices and their comments opposing NASUCA’s petition. Most of the commenters suggest that their regulatory line items are passing on the costs of government mandates (regulatory programs) on to their customers. A number of the carriers’ line items (e.g., AWS, VZW, ALLTEL, Cingular,

argument to the contrary has no basis because what NASUCA seeks “is a prohibition against including written line item charges (*i.e.*, speech, not conduct) in bills.” Here, VZW is merely begging the ultimate question – by asserting that including written line item charges in bills is speech – rather than justifying its distinction.

Subsequent arguments put forth by VZW are not only logically flawed, they are bizarre. First, VZW turns NASUCA’s petition on its head by asserting that “NASUCA is not seeking a prohibition against charging customers their line items.”<sup>124</sup> Then VZW claims that NASUCA “suggests that these charges should be added to the carriers’ monthly and usage charges (*i.e.*, the conduct).”<sup>125</sup> In other words, carriers’ monthly and usage charges are “conduct” but line items (regulatory or otherwise) are not. For good reason, VZW fails to explicate this distinction.

**B. Even If The Line Items Are Considered “Speech,” The Restriction NASUCA Seeks Is Both Constitutional And Appropriate.**

Even assuming NASUCA’s petition seeks to regulate carriers’ “speech” rather than “conduct,” the restriction NASUCA seeks does not violate carriers’ First Amendment rights. The carriers’ regulatory line items are not “political” speech. Virtually all the commenters concede that, if the line items are speech, they are “commercial” speech which may be regulated, even prohibited. The First Amendment does not protect commercial speech that is misleading – specifically the “regulatory” line items at issue. Only if the Commission concludes – in contrast to its reasoning in the *TIB Order* – that the carriers’ line items are not misleading does it need to engage in the last three prongs of the *Central Hudson* test for determining the validity of restrictions on commercial speech that is not misleading or related to unlawful activity.

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Western Wireless) speak of “government mandated” programs. *See* Petition, pp. 18-23. On the other hand, many carriers include disclaimers that the line items are neither mandated nor taxes. *See id.*, pp. 12-13.

<sup>124</sup> VZW Comments, p. 15.

<sup>125</sup> *Id.*, pp. 15-16. VZW again grossly mischaracterizes NASUCA’s petition. NASUCA simply requests that those costs that are the result of government regulation should be recovered in the carriers’ usage and monthly rates unless the government has expressly mandated or authorized carriers to recover such costs in line items (in which case carriers could elect to recover such costs in usage or monthly rates or in separate line items).

However, even under that analysis, the restriction NASUCA seeks does not violate the carriers' First Amendment rights.

### 1. Carrier Line Items are Not Political Speech.

CTIA and Nextel assert that the carriers' line items are "political" speech and that the restriction NASUCA seeks is an impermissible restriction on such speech.<sup>126</sup> The carriers' arguments surpass credulity.

The line items in question hardly, as CTIA claims, "highlight the expense" of carriers' compliance with government regulation. The line items themselves, which merely include a monthly charge and a label, clearly do not convey any information other than commercial speech. Nor do carriers' disclosures or descriptions of the charge (where one is actually provided)<sup>127</sup> when coupled with the charge transform the line item into protected speech, political or otherwise. As a factual matter, charging customers a dollar a month or so and describing the charge as recovering costs to comply with "various government-mandated programs," etc. tells customers virtually nothing about the expense of government regulation. As a matter of political speech, if the regulatory line items are intended to prompt irate customers to express their opinions that government should eliminate or reduce telecommunications regulation, then carriers' efforts are particularly inept. Carriers omit all the information customers would need to communicate their ire to government or to bring about changes in

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<sup>126</sup> CTIA asserts that the regulatory line items in question "highlight the expense associated with complying with regulatory obligations" and "prompt consumers to contact lawmakers and to support or oppose existing programs . . . and their extension," CTIA Comments, p. 20, citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (the regulatory line items "likely . . . deserve greater protection than that accorded to traditional commercial speech," noting that commercial speech can also convey a political message). The association claims that the restriction NASUCA seeks on such line items would "silence these political statements." *Id.*, pp. 20-21. Similarly, Nextel suggests that the "truthful" information contained in the carriers' regulatory line items provides "information to consumers about how government programs affect telecommunications costs" and is "certainly an issue of public concern." Nextel Comments, p. 24.

<sup>127</sup> AWS, for example, provides no information regarding what its \$1.75 regulatory line item recovers on customers' bills.

government policy. If carriers were *really* interested in having consumers question the purposes of government programs, they would include bill inserts or messages to that effect.

Nor are the commenters' sweeping assertions that regulatory line items are political speech supported by the case law they cite. Nextel, for example, claims that, "according to the Supreme Court, political speech includes *all* speech that raises or discusses matters of public concern."<sup>128</sup> The decisions Nextel cites contain no such sweeping definition of political speech. More importantly, such a definition would be at odds with Supreme Court pronouncements in other cases. For example, the Court rejected an argument that a regulation prohibiting "Tupperware" presentations in university dormitories constituted an impermissible restriction on free speech because the presentations included information touching on such subjects as how to be financially responsible and how to run an efficient home, noting:

No law of man or of nature makes it impossible to sell housewares without teaching home economics or to teach home economics without selling housewares. . . . *Including these home economics elements no more converted [the seller's] presentations into educational speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. . . .* [C]ommunications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues . . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."<sup>129</sup>

Similarly, the Court concluded that a contraceptives' manufacturer's informational pamphlets that promoted its products remained commercial speech –

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<sup>128</sup> Nextel Comments, p. 24 (emphasis original), citing *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999). Indeed, the *Connick* Court reversed lower courts' decisions that a disgruntled assistant district attorney's questionnaire to other employees regarding the functioning of the DA's office "relate to the effective functioning of [that office] and are matters of public importance and concern." *Connick*, 461 U.S., at 143 ("the District Court got off on the wrong foot in this case" by considering the questionnaire to touch upon matters of public concern).

<sup>129</sup> *Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 474-75 (1989) (emphasis added)(citations omitted).

notwithstanding the fact that they contained discussions of important public issues such as venereal disease and family planning.<sup>130</sup> The Court wrote:

We have made clear that *advertising which “links a product to a current public debate” is not thereby entitled to the constitutional protection afforded noncommercial speech. . . .* A company has the fully panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. *Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.*<sup>131</sup>

Finally, regarding a New York commission’s order prohibiting electric utilities’ advertisements promoting the use of electricity, the Court wrote that the state “restricts only commercial speech, that is expression *related solely to the economic interests of the speaker and its audience.*”<sup>132</sup> That commercial speech could address broader, social interests without being transmuted into political speech was also made clear by the Court: “Commercial expression not only serves the economic interest of the speaker but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”<sup>133</sup>

In considering the commenters’ claims that regulatory line items are protected political speech, the Commission should take its cue from the *TIB Order*. There, the Commission rejected suggestions that standardized labeling requirements for certain regulatory costs (*i.e.*, USF contributions, the SLC and local number portability) would violate the First Amendment. The Commission concluded that its guidelines were proper under the *Central Hudson* analysis

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<sup>130</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983)(emphasis added).

<sup>131</sup> *Id.*, at 68 (citations omitted); *see also Edenfield v. Fane*, 507 U.S. 761, 767 (1993)(“commercial speech is ‘linked inextricably’ with the commercial arrangement that it proposes . . . so the State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself”).

<sup>132</sup> *Central Hudson*, 447 U.S., at 561 (emphasis added).

<sup>133</sup> *Id.*

applied to commercial speech.<sup>134</sup> To NASUCA's knowledge, no one appealed the *TIB Order* on First Amendment grounds. The line items are at most commercial speech.

**2. Restricting Carriers' Line Items is Not an Impermissible, Content-Based Regulation of the Time, Place or Manner of Protected Speech.**

VZW asserts that the restriction NASUCA seeks on regulatory line items is an impermissible, content-based regulation of the time, place or manner of protected speech.<sup>135</sup> Even if NASUCA's proposed restriction is content-neutral, VZW claims, "the government may impose . . . reasonable . . . time, place and manner" restrictions on protected speech only if those restrictions are "justified without reference to the content of the speech . . . are narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information."<sup>136</sup>

VZW's argument rests upon a faulty premise: that the proposed restriction on carriers' line items should be analyzed as a "time, place, or manner" restriction of protected speech. The line items at issue are not protected speech, occurring in a public place or forum, and the standard VZW urges does not apply. According to the Supreme Court, the "time, place, or manner" test VZW advocates "was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum.'"<sup>137</sup> Cases applying this test all involve the concept of protected speech or expressive conduct in public places or public forums and, under limited circumstances, private property.<sup>138</sup> The constitutional analysis of

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<sup>134</sup> See *TIB Order*, ¶¶ 61-65.

<sup>135</sup> VZW Comments, pp. 20-21, citing *Reno v. ACLU*, 521 U.S. 844 (1997); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Incidentally, VZW concedes that this latter standard is essentially the same standard applied to regulation of commercial speech under the *Central Hudson*. *Id.*

<sup>136</sup> *Id.*, pp. 20-21 (citations omitted).

<sup>137</sup> *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 566 (1991), citing *Rock Against Racism*, 491 U.S. , at 791.

<sup>138</sup> See, e.g., *Rock Against Racism*, 491 U.S. 781 (regulation to control noise levels at a concert bandshell in a public park); *Community for Creative Non-Violence*, 468 U.S., at 293 (regulation prohibiting camping in a national park); *Boos v. Barry*, 485 U.S. 312 (1989)(regulation restricting picketing criticizing foreign governments within 500 feet of foreign diplomatic facilities); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672

“time, place or manner” restrictions does not apply where government regulates commercial speech.<sup>139</sup> On this point the Court is clear:

With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. . . . *By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible.*<sup>140</sup>

### **3. NASUCA’s Proposed Restriction on Carrier Line Items is a Permissible Regulation of Commercial Speech.**

Most commenters concede that carriers’ line items constitute commercial speech, opposing NASUCA’s petition on the grounds that the restrictions it seeks are an unreasonable restriction on commercial speech.<sup>141</sup> Assuming the Commission agrees that NASUCA’s proposal impacts carriers’ speech, rather than conduct, the commenters’ characterization of that speech as commercial is clearly in accord with Supreme Court rulings. The Court consistently defines “commercial speech” as “speech which does no more than propose a commercial transaction.”<sup>142</sup> Commercial speech is “expression *related solely to the economic interests of the speaker and its audience.*”<sup>143</sup> Furthermore, commercial speech is “linked inextricably” with the commercial arrangement that it proposes, “so the State’s interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.”<sup>144</sup>

As commercial speech, the line items are subject to the analysis first laid down by the Supreme Court in *Central Hudson* and applied ever since. Under the *Central Hudson* test, four

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(1992)(regulation prohibiting solicitation and distribution of materials in airport); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)(ordinance prohibiting homeowners’ placement of most signs on their property).

<sup>139</sup> See *Board of Trustees*, 492 U.S. 469, at 478 (two lines of authority – “time, place or manner” restrictions and restrictions of political speech – “do not of course govern” analysis of university’s restriction on commercial speech).

<sup>140</sup> *Bolger*, 463 U.S., at 65 (emphasis added)(citations omitted).

<sup>141</sup> VZW Comments, pp. 15-16; MCI Comments, pp. 11-12; Leap Comments, pp. 14-15.

<sup>142</sup> *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); see also *Board of Trustees*, 492 U.S., at 473.

<sup>143</sup> *Central Hudson*, 447 U.S., at 561 (emphasis added).

<sup>144</sup> *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

questions must be addressed: First, is the communication neither misleading nor related to unlawful activity.<sup>145</sup> Second, if the communication is neither misleading nor related to unlawful activity, then the question is asked whether the asserted government interest is substantial. Third, if the first two questions yield positive answers, then the court must determine whether the regulation directly advances the governmental interest asserted. Fourth, assuming the prior three questions are answered affirmatively, the court must determine whether the regulation is not more extensive than is necessary to serve that interest.<sup>146</sup> Under the *Central Hudson* test, the restrictions NASUCA seeks are clearly permissible and do not violate the carriers' First Amendment rights in such speech.

**a. The regulatory line items are misleading commercial speech.**

NASUCA does not suggest that the carriers' regulatory line items relate to unlawful activity. Rather, as previously discussed both herein and NASUCA's original petition, they are misleading both in content and in application. As the Court in *Central Hudson* noted:

The First Amendment's concern for commercial speech is based on the informational function of advertising. . . . *Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.*<sup>147</sup>

NASUCA has already discussed the numerous ways in which the carriers' line items are false, misleading or deceptive. The carriers' regulatory line items are misleading in several ways. First, the line items recover costs that have not been expressly allowed by the

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<sup>145</sup> If the communication *is* misleading or *is* related to unlawful activity, then the inquiry is over. No constitutional protection extends to commercial speech that is either misleading or related to unlawful activity. *Central Hudson*, 447 U.S., at 563 (citations omitted). Since the regulatory line items in question do not satisfy the first element of the *Central Hudson* test, the Commission need not apply the test's last three elements.

<sup>146</sup> *Central Hudson*, 447 U.S., at 564, 568.

<sup>147</sup> *Central Hudson*, 447 U.S., at 563 (emphasis added), citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 464-65 (1978); see also *Ibanez v. Florida Bd. of Accountants*, 512 U.S. 136, 142 (1994) ("only false, deceptive, or misleading speech may be banned. . . [c]ommercial speech that is not false, deceptive, or misleading can be restricted" if the State meets the remaining prongs of *Central Hudson's* test) .

Commission's orders. Second – and more importantly, the line items fail to convey accurate or even truthful information to consumers since they contain vague or ambiguous statements regarding what costs are being recovered by the carriers, often suggest that the surcharges are government-mandated, and lump together in one sum costs associated with a multitude of regulatory programs.

Regulatory line items that identify but aggregate several regulatory programs into one charge are little better than those that ambiguously recover costs of “government-mandated programs.” A \$2.83/month charge for costs associated with “one or more of the following: E911, number pooling and wireless number portability” at least identifies some of the programs at issue but it does not convey to a consumer how much of the customer's charge is attributable to each program. Moreover, at least in the case of E911, the Commission has not specifically authorized carriers to recover their implementation costs through surcharges. Furthermore, consumers in many states are already paying state E911 fees and are likely to be confused by a “Federal E911” charge.

The regulatory line items leave customers in the dark regarding just about every issue that may be of interest to them. The line items prompt consumer complaints of the sort regulators and consumer advocates hear all too often (*e.g.*, “My bill's too high” or “I don't know what this charge is about”). As the Commission knows, these kinds of complaints generally go nowhere. Either the customer cannot adequately describe his or her complaint to enable the regulator to address the issue or take action upon it, or the regulatory agency itself is unsure what programs are involved and whether it has jurisdiction to address the complaint.<sup>148</sup>

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<sup>148</sup> As the Commission knows, many states have – by statute – removed CMRS carriers from state commission regulatory oversight altogether. The response to a complaint about a wireless regulatory line item is likely to be “we don't regulate wireless carriers, take it up with the FCC.” It has been the experience of NASUCA members that few customers bother to take their complaints on to another agency, especially a federal agency..

Commission should adopt the restrictions urged by NASUCA because those restrictions satisfy the remaining three elements of the *Central Hudson* test.<sup>149</sup>

**b. The government's interest in accurately described and reasonably priced regulatory line items is substantial.**

Some commenters actually assert that NASUCA failed to demonstrate a "substantial" government interest in this matter.<sup>150</sup> The fact is that carriers are billing customers hundreds of millions, if not billions, of dollars annually and are blaming the government for it. In the detariffed, deregulated world in which the IXC's and CMRS carriers operate, there is no "check" to ensure that carriers are not over-recovering their purported regulatory compliance costs. In this context, the government's interest in ensuring that the line items are both accurate and reasonably related to the costs imposed by regulation is not only substantial, it is paramount.

In any event, the Commission has already spoken to this issue. In its *TIB Order*, the Commission previously articulated the substantial interest it has in protecting consumers from misleading or deceptive speech, and the substantial interest it has in establishing certain requirements regarding the manner in which line items are labeled and described.<sup>151</sup> At least some of NASUCA's opponents rightly conceded that the government's interest in these matters is substantial.<sup>152</sup>

**c. Banning misleading and overstated regulatory materially advances the government's interest.**

Likewise, the Commission has already articulated how requiring standardized labels that are consistent, understandable and that do not confuse or mislead consumers directly advances

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<sup>149</sup> Of course, if the Commission determines that the regulatory line items in question are truthful and non-misleading, then the declaratory ruling sought by NASUCA is not appropriate. The Commission could, however, treat NASUCA's petition as a request to initiate a rulemaking to amend, modify or repeal its TIB rules to address the regulatory line items in question and any regulation would need to comply with the final three elements of the Court's test in *Central Hudson*.

<sup>150</sup> US Cellular Comments, pp. 6-7

<sup>151</sup> See *TIB Order*, ¶¶ 62-65 (discussing substantial interest government has in standardized labels and preventing consumers from being misled or deceived).

<sup>152</sup> CTIA Comments, p. 18; RCA Comments, p. 9; BellSouth Comments, p. 3.