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VIA ELECTRONIC FILING

Honorable Michael K. Powell
Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Commissioners
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CG Docket No. 04-208

Dear Chairman Powell and Commissioners:

The National Association of State Utility Consumer Advocates ("NASUCA") has asked the Commission to prohibit telecommunications carriers, including wireless carriers, from recovering the costs of complying with government-mandated programs through line-item charges on customer bills. Alternatively, it has asked the Commission to propose rules governing line items. The Commission should deny NASUCA's request. As we explained more fully in our comments in this proceeding, in 1999 the Commission explicitly declined to adopt a "prescriptive approach" to how carriers recover costs of complying with federal regulatory mandates and stated instead that it prefers "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." *Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492, 7526 (¶ 55) (1999) ("*Truth-in-Billing Order*"). NASUCA has provided no basis for the Commission to reverse the deregulatory approach it adopted in the *Truth-in-Billing Order*, especially with regard to the wireless industry, which has become more and more competitive since 1999.

Whether the Commission continues to forbear from regulating wireless rate structures or instead proposes to adopt rules in this proceeding, the Commission should take the opportunity presented by NASUCA's petition to provide guidance about the extent to which states may lawfully regulate wireless carrier pricing under Section 332 of the Communications Act, 47 U.S.C. § 332. In recent years, a number of state legislatures, regulatory commissions, and courts have engaged in a level of oversight and enforcement that plainly crosses the line into rate and entry regulation, which is preempted by Section 332(c)(3)(A). Although NASUCA has properly presented its request to the Commission (as opposed to the states), some states have taken it upon

themselves to regulate wireless carrier rates and rate structures. Because the manner in which wireless carriers structure their rates and recover their costs of complying with government mandates is central to the rates they charge their customers, Section 332(c)(3) precludes such state regulation – and the Commission should reaffirm its prior decisions to this effect in this proceeding.

The Commission should also recognize that it has authority to preempt state regulation of wireless carriers beyond matters Congress has chosen to preempt. *See City of New York v. FCC*, 486 U.S. 57 (1988). In adopting Section 332(c)(3)(A), Congress did not *preserve* state authority over "other terms and conditions" of wireless service, but merely made clear that by preempting rate and entry regulation it was not prohibiting state regulation of other matters. Congress did not bar the Commission from exercising its own authority to preempt when warranted. Because Congress has directed in Sections 10, 11, and 332(c)(1), 47 U.S.C. §§ 160, 161, and 332(c)(1), that regulation should diminish as competition develops and competition is flourishing, the Commission should make clear that any rules it proposes are not a floor on which states may build, but represent a balance that states would upset by adopting additional requirements. If the Commission concludes that no rules relating to line items are warranted – as we think it should – the Commission should state that it would conflict with its conclusion that regulation is not warranted for states to adopt regulations regarding line items.

In short, the Commission should couple whatever action it takes in response to NASUCA's petition with preemption. With respect to the question of whether wireless carriers may recover their costs of complying with government mandates by means of line items, the Commission should confirm that this issue involves the rate structure of wireless carriers, and therefore states may not prohibit the use of line items. With respect to issues involving the matters such as the presentation of line items on bills or advertising, the Commission should state that any rules it proposes with respect to line items occupy the field and are not subject to expansion by the states, even if such rules may be viewed as regulation of "other terms and conditions" of wireless service. And if the Commission concludes that no such rules are warranted in light of the increasing growth of competition and the wireless industry's recent adoption of a Consumer Code to ensure that consumers have the information they need to choose among wireless carriers, the Commission should state that it would conflict with that conclusion for states to adopt such rules.

I. LEGAL AND REGULATORY BACKGROUND

1. Wireless Services Are Highly Competitive.

As the Commission is aware, the past ten years have seen a revolution in the availability, adoption, and competitiveness of wireless services. By 1994, the FCC had issued only two licenses to provide wireless service in each geographic area, so consumers had limited choice – and no choice at all in areas where one or both licensees

had not deployed systems. *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8866-67 (¶ 65) (1994). At that time, the FCC noted that wireless service had only a "ten percent penetration rate," although it also acknowledged that wireless providers "have recently begun to target their marketing strategies toward the mass consumer market" rather than focusing exclusively on business users. *Id*. at 8844 (¶ 3).

In 1999, the Commission reported that the wireless penetration rate had increased to 26 percent. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 14 FCC Rcd 10,145, 10,150 (1999) ("*1999 Competition Report*"). Although competition beyond the 1994 duopoly was on the horizon, "non-cellular mobile telephone operators" were "a relatively small portion of the whole sector" – the cellular duopolists retained "approximately 86 percent of mobile telephone subscribers." *Id*. at 10,145. That was because "new entrant buildout and coverage ha[d] not caught up to that of cellular." *Id*. at 10,150.

In contrast, the Commission's *2004 Competition Report* on the wireless industry indicates that roughly 250 million people, or 87 per cent of the U.S. population, live in counties with five or more wireless service providers; 216 million people, or 76 percent of the population, live in counties with six or more choices; and 84 million people, or almost 30 percent of the population, can choose from seven or more different providers, an increase of 16 percent in the last year. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 2004 FCC LEXIS 5535, *54(¶ 49) (2004) ("*2004 Competition Report*"). The wireless penetration rate had also increased to 54 percent – to more than 160 million wireless phones. *Id*. at *4 (¶ 5). This demonstrates that there has been remarkable growth in the wireless industry over the last ten years, as well as healthy competition that has benefited consumers.

To serve the growing number of wireless customers, carriers have made substantial investments of capital and resources to develop national networks and processes. These national networks offer efficiencies and economies of scale central to both improving the overall customer experience and reducing rates. As a practical matter, this means that carriers do not promote or adjust their plans on a state-by-state basis. Rather, wireless services today are designed, marketed, sold, and provisioned without regard to state borders.

2. Congress Directed Wireless To Be Regulated At The Federal Level, And With A Light Hand.

Because "[n]o state lines divide the radio waves," Congress has long recognized that "*national* regulation is . . . essential to the efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 279 (1933) (emphasis added). Indeed, through a number of enactments, Congress has specifically

encouraged the development of wireless competition on a national basis by centralizing regulatory authority in the FCC and ordering it to deregulate as competition developed.

Congress began in 1993 with a revolutionary amendment to the Communications Act to underscore the need for a *uniform* federal regulatory framework governing the emerging wireless industry. Specifically, to remove any doubt that the Commission had adequate authority to implement a unified, national framework, Congress amended Section 2(b) of the Act to eliminate the traditional limitation on federal authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service" insofar as they relate to the provision of commercial mobile service. 47 U.S.C. § 152(b) (emphasis added). *See also* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong*," 50 Fed. Comm. L.J. 547 (May 1998).

As part of the 1993 enactment, Congress also added a new Section 332(c)(1) to the Act. While Section 2(b) makes clear the expansive nature of Commission authority over the provision of wireless services, Section 332(c)(1) *limits* the extent to which that authority should be exercised. More specifically, Congress provided that the Commission could decide which of the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers. In making that decision, Congress directed the FCC to consider whether the provision was necessary to ensure that rates are "just and reasonable," whether enforcement of the provision was "necessary for the protection of consumers," and whether the "public interest" favored enforcement or forbearance. Congress also mandated that the Commission study "competitive market conditions" to determine which statutory provisions should apply.

Moreover, Congress later used Section 332(c)(1) as the model for Section 10, the general forbearance provision added to the Communications Act in 1996. Section 10 directs the Commission to forbear from enforcement of any statutory provision or regulation applying to any common carrier if, after analysis of competitive conditions and the same three factors listed in Section 332(c)(1) – whether rates are just and reasonable, whether consumers will be protected, and whether the public interest favors forbearance – the Commission concludes that enforcement is not warranted. In 1993, Congress stated that the FCC could not forbear from enforcement of three provisions – Section 201, which requires rates to be "just and reasonable," Section 202, which prohibits "unreasonable discrimination," and Section 208, which authorizes parties to file complaints about such matters with the FCC. The FCC subsequently observed that Congress's 1996 enactment of Section 10 meant that the agency could forbear from those provisions as well. *See Personal Communications Industry Association's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, 16865 (¶ 15) (1998), *recon. denied*, 14 FCC Rcd 16340 (1999). Thus, the enactment of Section 10 broadened the Commission's forbearance authority even beyond the broad authority provided in 1993. The enactment of Section 10 also made forbearance

mandatory ("the Commission shall forbear") – previously, Congress had provided in Section 332(c)(1) that the Commission "may" choose to forbear from enforcement of certain provisions.

In 1996, Congress further amended the Communications Act to require the Commission to conduct a biennial review of all of its telecommunications regulations and 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. 47 U.S.C. § 161. In multiple orders, the FCC has implemented the congressional directions to favor competition over regulation.[1]

A final aspect of the 1993 amendments is also relevant here. Specifically, Congress stated that by preempting state commission authority over rate and entry regulation, it was not eliminating pre-existing state authority over "other terms and conditions" of wireless service. However, in light of Congress's fundamentally deregulatory vision for the wireless industry, the phrase "other terms and conditions" should be interpreted narrowly.

Commission precedent appears to recognize that fact. In *Southwestern Bell Mobile Systems*, the Commission construed the "rates" side of the statutory divide between "rates and entry" and "other terms and conditions" *broadly*:

> [W]e find that the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS [commercial mobile radio service] 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.

Southwestern Bell Mobile Systems, Inc., 14 FCC Rcd 19898, 19907 (¶ 20) (1999). Correlatively, the phrase "other terms and conditions" must be interpreted *narrowly*. *Southwestern Bell* does just that, suggesting that the states may properly enforce only "state contractual or consumer fraud laws" of "*neutral application*." *Id.* at 19903 (¶ 10) (emphasis added).

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[1] *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1475 (¶ 165) (1994) (forbearing from application of Sections 203, 204, 205, 211, and 214 to wireless industry); *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414, 17416-17 (¶ 6) (2000) (enumerating numerous other provisions of Title II that Commission has found inapplicable to wireless carriers).

In the later *Wireless Consumers Alliance* case, the Commission found that Section 332 was designed to promote the wireless industry's "reliance on competitive markets in which private agreements and other contract principles can be enforced," but upheld the application to the wireless industry of state laws of general applicability barring misrepresentation and breach of contract. *Wireless Consumers Alliance*, 15 FCC Rcd 17021, 17034 (¶ 24) (2000) ("*WCA*"). The Commission also retains authority under Sections 201 and 202 to regulate the practices of wireless carriers, although it has wisely used that authority sparingly because wireless carriers "operate in a deregulated (i.e., non-tariffed), competitive market." *Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE*, 16 FCC Rcd 11558, 11563 (¶ 16) (2001).

3. The Wireless Industry Has Addressed Consumer Concerns By Means Of The CTIA Consumer Code.

While the Commission has the *authority* to adopt limited regulation and preempt any additional state efforts to re-regulate the wireless industry, the undersigned carriers do not believe that regulation is *necessary* at either the state or the federal level. The wireless industry itself has recognized that to implement the competitive vision of Congress and this Commission, consumers need accurate information permitting them to make informed choices between wireless service providers. For that reason, the industry developed the CTIA Consumer Code in 2003. CTIA's website lists the 33 wireless carriers, including all of the national carriers, that have fully implemented and adopted the Code. *See* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.

The CTIA Code already provides the consumer protection that is warranted. In particular, two provisions of the CTIA Consumer Code are directly relevant to the issues presented by NASUCA's petition. The first is Item One, a broad provision requiring that signatory carriers "Disclose Rates and Terms of Service to Consumers." Among the host of disclosures mandated by that provision is disclosure of "the amount or range of any . . . fees or surcharges that are collected and retained by the carrier." CTIA Consumer Code, at http://files.ctia.org/pdf/The_Code.pdf. Item Six addresses this issue even more directly, requiring carriers to "Separately Identify Carrier Charges From Taxes On Billing Statements":

> On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal, state or local governments. Carriers will not label cost recovery fees or charges as taxes.

Id. Again, nearly all wireless customers receive service from carriers that have agreed to abide by this provision, which directly advances the goal of providing consumers the information necessary to make informed decisions regarding competing services. The

CTIA Consumer Code thus already adequately addresses the issues raised by NASUCA's petition.

Because the Code was adopted just last year, it would be appropriate for the Commission to dismiss NASUCA's petition on the ground that it makes sense to wait and see whether regulation is warranted in light of the industry's voluntary steps. That would be similar to the approach the Commission recently took in *Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004). In that case, parties argued that Virginia Cellular should not be certified as an eligible telecommunications carrier entitled to receive universal service funds because wireless carriers generally are not subject to *mandatory* service quality standards. The Commission rejected that argument, concluding *inter alia*: "As evidence of its commitment to high service quality, Virginia Cellular has also committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, which sets out certain principles, disclosures, and practices for the provision of wireless service. . . . Therefore, we find that Virginia Cellular's commitment to provide better coverage to unserved areas and its other commitments discussed herein adequately address any concerns about the quality of its wireless service." *Id*. at 1576-77 (¶ 30). Similarly, it would be appropriate here to rely on the industry's adoption of the CTIA Code before determining that it is necessary to promulgate regulations.

If the Commission were to propose regulations in response to NASUCA's petition, it should propose rules that mirror Items 1 and 6 of the CTIA Code. Adopting such rules would have the effect of permitting consumers to challenge particular carriers' bills by filing complaints with the Commission alleging that the bills do not comply with carrier's promises to clearly disclose rates and to distinguish taxes from charges the carriers retain in a non-misleading manner. That would permit the Commission to resolve any disputes about how carriers recover their costs – a matter that, as explained below, is central to how a carrier structures its rates and therefore is a matter for this Commission to address and not a matter for the states to resolve.

4. States Have Nevertheless Begun To Broadly Regulate Wireless Services.

Although the wireless industry has become vigorously competitive and the wireless industry has adopted rules to ensure that consumers have the information they need, a wave of state regulation is rising. The California Public Utilities Commission recently adopted a comprehensive set of consumer protection rules – 13 rules, including 75 subprovisions – to govern wireline and wireless carriers alike, although a dissenting commissioner aptly characterized some of those rules as "blatant rate regulation . . . subject to federal preemption." *Order Instituting Rulemaking On the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, 2004 Cal. PUC LEXIS 240, *362 (2004) (Comm'r Kennedy, dissenting, joined by President Peevey). Most of those rules took effect on

December 6, 2004. The rules cover a wide range of matters – for example, they require carriers to provide the terms of rate plans they no longer offer on their websites, comprehensively govern the format of carriers' bills, and restrict carriers' ability to adjust their rates and enforce contract provisions governing deposits and early termination fees.

A recent enactment by the Minnesota legislature – Article 5 of H.F. No. 2151, 2004 Minn. Sess. Law Serv. 261 ("Article 5") – is also troubling. Aimed exclusively at wireless carriers, Article 5 establishes rules governing any "substantive change" to a wireless contract – and substantive change is defined as a "modification . . . that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." Thus, the statute by its terms applies only when a carrier's *rates* might increase or the carrier's *rate structure* would call for lengthening of the time in which to recover the carrier's up-front costs. With respect to a "provider-initiated substantive change," the statute prohibits a modification from having any effect for 60 days and thus effectively freezes rates for that period. *Id.* Even then, a modification takes effect only "if a customer on a term contract opts into the change by affirmatively accepting the change." *Id*. Thus, under Article 5 a rate increase takes effect with respect to term contracts only if a subscriber agrees to it – which is quite unlikely.

After initially enjoining enforcement of the Minnesota statute in its entirety, a district court subsequently enjoined enforcement only to the extent that the statute affects recovery of universal service fees and the like. In other words, even though the statute seeks "to regulate directly the level of the rates that CMRS carriers may charge their customers, as well as carriers' rate structures," the district court erroneously failed to enjoin it altogether. *FCC Amicus Brief* at 18. As the Commission is aware, the case is on appeal to the Eighth Circuit.

In addition, plaintiffs have filed a number of class action lawsuits focusing on the early termination fees ("ETFs") charged by wireless carriers. Such fees are plainly part of carriers' rate structures. Wireless carriers often enter into term contracts with their subscribers, allowing them to provide wireless phones at heavily discounted prices and recover their investment over the term of the contract. The Commission long ago concluded that subsidizing wireless phones in this way "is an efficient promotional device which reduces barriers to new customers." *Bundling Of Cellular Customer Premises Equipment And Cellular Service*, 7 FCC Rcd 4028, 4030 (¶ 19) (1992). In addition, wireless carriers typically sustain costs when they enroll a subscriber or adjust the terms of the subscriber's contract, but choose to recover those costs over time rather than in a lump sum paid "up front" at the time of enrollment or adjustment of the contract. Term contracts generally call for ETFs if the subscriber cancels before the end of the term. Thus, the rate structures of many wireless carriers provide for discounted up-front costs combined with term contracts requiring the payment of an ETF in the event of early cancellation. For present purposes, the point is that ETFs are plainly part of a carrier's rate structure.

But state trial courts may not agree. A court in Oakland initially decided to hold a pre-trial "preemption hearing" and used a jury to assist it in deciding whether ETFs are impermissible rate regulation or permissible regulation of other terms and conditions of wireless service, although the court subsequently decided to proceed to trial. *See Cellphone Termination Fee Cases*, Order On Jury Trial of Preemption Hearing, JCCP 4332 (Superior Ct. Alameda County July 14, 2004). Other courts have decided that early termination fees are not rates. *See, e.g.*, *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713, 715 (S.D. Tex. 1996).

Other states are also targeting wireless providers with state-specific billing and customer service requirements that cross the line into rate or entry regulation. For example, while the CPUC restricts the circumstances in which a deposit may be required, New Mexico proposes to restrict the amount of any deposit and to limit the means by which a prospective customer's creditworthiness may be established. New Mexico's proposed rules also contain requirements on how wireless carriers may collect from customers they have under-billed and how carriers have to provide refunds when they have over-billed. Proposed Rule 17.11.6.24.C, *Second Comment Draft in Utility Case No. 3567*.

Finally, attorneys general in 32 states last year initiated far-reaching investigations into the cost recovery and advertising practices of three of the largest U.S. wireless carriers, resulting in a global settlement under which the carriers were required to submit to extensive state oversight. Some of the new requirements constitute rate regulation, such as the establishment of conditions for returns and cancellations without ETFs and activation fees.

These new state regulatory regimes come with an enormous price tag for wireless carriers, which ultimately will have to be passed on to consumers. For example, in order to comply with the CPUC's new rules, wireless carriers currently are making significant changes to their billing and service activation systems *nationwide* and retraining *all* sales and customer care personnel, not just those in California. If it turns out that the CPUC's rules are less restrictive than those adopted by Minnesota or New York, wireless carriers will have to revise systems and retain employees yet again. As more states adopt their own rules, it will become increasingly likely that state rules will actually conflict – for example, one state might require a specific heading for taxes on bills and another state might mandate a different heading. This patchwork quilt of regulation can only undermine the ability of wireless carriers to respond to market forces and offer services and value to the American consumer in the most efficient and competitive manner possible.

II. THE COMMISSION SHOULD CONFIRM THAT REGULATION OF LINE ITEMS BY STATES IS PROHIBITED RATE STRUCTURE REGULATION.

The Commission should prohibit state regulation of rate elements designed to recover the costs of implementing state and federal regulatory mandates on the ground that such regulations fall on the "rates and entry" side of the statutory line that Congress has drawn. As the Commission held in *Southwestern Bell*, "the term 'rates charged' in Section 332(c)(3)(A)" includes *both* "rate levels and rate structures." 14 FCC Rcd at 19907 (¶ 20). Flat monthly fees that carriers charge to recover regulatory costs are obviously part of their rate structures. Carriers typically structure their rates to recover the cost of providing service by means of monthly and per-minute charges, to recover the costs of features like voice-mail by separate flat fees, to recover the cost of complying with regulatory mandates by means of separate fees, and to collect taxes separately. If carriers are prohibited from recovering the costs of complying with regulatory mandates by imposing related fees, they will adjust other rate structures. Therefore, rules that restrict what carriers may recover by means of line items plainly directly regulate rate structures.[2]

The FCC considered cost recovery issues in its E911 proceeding in the course of deciding whether to order public safety officials to reimburse wireless carriers for the costs of implementing E911 requirements. The FCC decided not to do so. It concluded that no special cost recovery mechanisms were necessary because wireless rates are not regulated, and therefore "there is no question that wireless carriers can increase their rates, if they wish, to recover any additional costs incurred in implementing E911." *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 FCC Rcd 20850, 20872 (¶ 52) (1999). Similarly, with respect to local number portability the FCC concluded that "[c]arriers not subject to rate regulation" – including wireless carriers – "may recover their carrier-specific costs directly related to providing number portability in any lawful manner." *Telephone Number Portability,* 13 FCC Rcd 11701, 11774 (¶ 136) (1998). Just as rules governing what carriers may recover affect their rates, rules governing *how* carriers recover those costs – through line items or through increases to basic rates – affect their rate structures.

State regulation of line items on carriers' bills – *i.e.*, rate structures – would *not* involve permissible regulation of "other terms and conditions" under Commission precedent for the reasons stated by the Commission in its recent amicus filing in the

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[2] *See Comcast Cellular Telecom. Litigation,* 949 F. Supp. 1193, 1201 (E.D.Pa. 1996) (state may not regulate "the way in which [a wireless carrier] actually calculates . . . the rates which are charged for [a wireless] call"); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7046 (¶ 43), 7061 (¶ 83) (1995), *aff'd sub nom., Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996) (denying state PUC authority to require that wholesale rates be cost-justified).

Eighth Circuit. First, NASUCA seeks relief that goes beyond "disclosure of wireless rates and billing practices." *Cellco Partnership v. Hatch*, Amicus Curiae Brief of the FCC, No 04-3198 (8th Cir. Nov. 12, 2004), at 21 ("*FCC Amicus Brief*"). NASUCA seeks to prohibit carriers from recovering their costs by means of line items, at least in some circumstances, even though methods of cost recovery (*e.g.*, flat charges vs. per-minute charges) are part of a carrier's rate structure. Second, if such state rules are adopted by means of statutes or regulations addressed to communications carriers they would not involve "the 'neutral application of state contractual or consumer fraud laws,'" and the Commission has recognized that laws targeted at telecommunications carriers are unlikely to regulate permissibly "other terms and conditions" of wireless service. *Id*. (citations omitted). Third, whether enacted by statute or regulation or by means of class action lawsuits purporting to apply laws of general applicability, rules governing what carriers may recover by means of line items directly affect carriers' rate structures, for the reasons stated above. Therefore, the effect of rules governing line items on rates is not "uncertain," "indirect," or "incidental" – the standards the Commission has applied to determine what constitutes permissible regulation of other terms and conditions. *Id*. at 22 (citations omitted). In short, the Commission need not break any new ground to prohibit states from regulating what carriers may recover by means of line items.

III. THE COMMISSION SHOULD PREEMPT STATE REQUIREMENTS GOVERNING WIRELESS LINE ITEM CHARGES THAT CONFLICT WITH CONGRESS'S DECISION TO ESTABLISH A DEREGULATED, NATIONAL FRAMEWORK.

In its reply filing, NASUCA suggested that the Commission could adopt rules relating to line item charges. Although some rules the Commission might propose would plainly involve rate structure issues, others might not. As the D.C. Circuit stated: "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless service." *Cellular Telecommunications Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999); *see also* Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence – The Changing CMRS Landscape*, 56 Fed. Comm. L.J. 489 (2004). Because Congress did not draw the line with precision, the Commission should not only clarify that rules governing cost recovery by means of line items are rate regulation, but also should take this opportunity to end disputes about the line between "rates and entry" and "other terms and conditions" once and for all, at least with respect to line item charges on bills. The Commission can do so by providing that any rules it proposes governing line item charges are intended to occupy the field and preclude additional state regulation, whether such regulation constitutes "rate and entry" regulation or regulation of "other terms and conditions" relating to line item charges.

The Commission has the authority to preempt – and should preempt – more broadly than Congress did in 1993. While Section 332(c)(3) is sometimes described as if it "preserves" state regulation of "other terms and conditions" of wireless service, in fact

it merely states that "*this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C § 332 (c)(3)(A) (emphasis added). Accordingly, Section 332(c)(3) does not *itself* preempt regulation of "other terms and conditions," but also does not bar the Commission from preempting more broadly. Congress knows how to preserve state and local authority – it preserved certain aspects of local zoning power in Section 332(c)(7) (entitled "preservation of local zoning authority), and it did not do so in Section 332(c)(3) (entitled "state preemption") If the Commission concludes that it should propose narrowly tailored rules governing line item charges that balance the costs of regulation against its benefits, or that no rules are warranted, it would undermine the Commission's approach to permit states to add requirements. *See Geier v. American Honda Co., Inc.*, 529 U.S. 861, 879, 881 (2000) (because Department of Transportation had "*rejected*" single mandatory standard for automobile safety devices, "a rule of state tort law imposing such a duty . . . would have presented an obstacle to the variety and mix of devices that the federal standard sought." (emphasis in original)).

As the Supreme Court has recognized, "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.*'" *City of New York*, 486 U.S. at 64, *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added). 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." *Id*. at 63-64, *quoting Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority." *City of New York*, 486 U.S. at 64.

In *City of New York*, the Supreme Court upheld the Commission's decision to preempt local franchising authorities from promulgating technical standards governing cable service. The Court did not disagree with the localities that *Congress* had not preempted local technical standards, but found that the localities had disregarded the "Commission's own power to pre-empt." *Id*. at 69.[3]

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[3] If the Commission exercises its own power to preempt, Congress's description of what it meant by "other terms and conditions" in Section 332(c)(1)(A) is not particularly relevant. A House Report listed a number of matters that might fall into that category, from "zoning" to "customer billing information." House Rept. 103-111 (1993). These were descriptions of the matters Congress chose not to preempt in 1993 by enacting Section 332(c)(1)(A), not matters that Congress preserved for regulation by the states. In any event, legislative history can never trump subsequent legislation, and as explained above, Congress in 1996 directed the Commission to forbear from enforcement of statutory provisions and repeal regulations as competition develops. It would conflict with the achievement of Congress's goals to permit the states to regulate wireless carriers

The Commission has exercised its power to preempt state regulation beyond the preemption ordered by Congress in a number of situations analogous to that presented here, where state regulation of wireless service providers would be incompatible with the federal policy of preferring competition to regulation. For example, *Computer Communications Industry Ass'n v. FCC* ("*CCIA*"), 693 F.2d 198 (D.C. Cir. 1982), concerned the Commission's decision to detariff and unbundle customer premises equipment (CPE) from basic telephone service, and simultaneously to preempt all state regulation of CPE. The Commission found that its move to cost-based pricing for CPE "necessarily precludes any other result by the states." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry*, 77 F.C.C. 2d 384, 455 (¶ 185) (1981). The D.C. Circuit agreed, finding that when state regulation would "interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme." *CCIA*, 693 F.2d at 214. The court concluded that state regulation of CPE was incompatible with the federal objective of developing a free, competitive market in customer telephone equipment. *See id.* at 214; *see also North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied* 434 U.S. 874 (1977) (upholding Commission ban on state regulation of non-carrier-supplied telephone terminal equipment).

Subsequently, in its *BellSouth MemoryCall Decision*, the Commission preempted a decision by the Georgia Public Service Commission ("PSC") prohibiting the provision of BellSouth's voicemail service to new customers until the Georgia PSC could develop its own set of regulatory controls. *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992). The Commission found that BellSouth's services were jurisdictionally mixed and that the interstate and intrastate components could not be severed. Although the Commission acknowledged that Section 2(b) of the Act retains for the states jurisdiction over intrastate services, it applied the test set forth in *Louisiana PSC* that the Commission may preempt state regulations that "would thwart or impede the exercise of lawful federal authority over interstate communications." *Id.* ¶ 18. The Commission concluded that the Georgia PSC's order

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as if they were dominant carriers. Further, if by "customer billing information" Congress meant to permit the application of state laws of general applicability prohibiting carriers from misleading subscribers, the Commission upheld the application of such laws in *Wireless Consumers Alliance* and we are not asking the Commission to reconsider that decision. If, on the other hand, the House Report's reference to "customer billing information" were interpreted unnaturally to mean that states may control all aspects of billing – not just information but how carriers recover their costs – then such a reading would conflict with Congress's decision to prohibit states from regulating wireless rates. The Commission should either clarify that such rules governing line items on wireless bills are impermissible rate regulation or exercise the Commission's own power to preempt.

displaced the FCC's chosen regulatory framework for enhanced services and effectively negated important federal objectives. *Id.* ¶ 20.

Similarly, in *California v. FCC* ("*California III*"), 75 F.3d 1350 (9th Cir. 1996), the Commission had held that its rule requiring "per call" blocking for subscribers who failed to choose a method to prevent disclosure of their nonpublished telephone numbers justified preemption of state regulation of call blocking. The Ninth Circuit agreed, quoting at length from the Commission's explanation that "per line" blocking would adversely affect the competitive market for Calling Party Number-based ("CPN") services. *See Id.* at 1360. Like *CCIA and BellSouth MemoryCall*, *California III* thus indicates that the Commission may properly preempt state regulation inconsistent with pro-competitive federal regulatory goals.

In *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), the Second Circuit upheld the Commission's rules governing exposure to radio frequency ("RF") emissions. The court explained that the Commission properly concluded "that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to 'balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.'" *Id*. at 92 (citations omitted). The Second Circuit also upheld the Commission's decision to preempt more stringent state regulation of the "operation" of facilities emitting RF, even though Congress had not barred the states from regulating the operation of facilities emitting RF while barring them from regulating certain other matters relating to RF emissions. Citing *City of New York*, the Court concluded that Congress's failure to preempt did not matter because "[t]he FCC has broad preemption authority under the Telecommunications Act" – authority that includes the power to preempt state rules that upset the balance the Commission strikes. *Id*. at 96.

Finally, the Commission just exercised its preemption authority to bar application of "traditional 'telephone company' regulations to Vonage's DigitalVoice service, which provides voice over Internet protocol (VoIP) service." *Vonage Holdings Corporation Petition for Declaratory Ruling*, WC Docket No. 03-211 (Nov. 12, 2004) ("*Vonage Order*") (¶ 1). The Commission concluded that applying traditional regulation to that VoIP service "directly conflicts with our pro-competitive deregulatory rules and policies." *Id*. (¶ 20). As that illustrates, where the Commission chooses to pursue regulation with a light hand – the course the Commission has chosen with respect to VoIP and the course Congress has mandated with respect to wireless carriers – the imposition of additional state rules on carriers conflicts with the achievement of the goals of the Communications Act. The Commission cannot effectively pursue a pro-competitive deregulatory policy if states impose unnecessary regulations on wireless carriers.

Much of the legal analysis in the *Vonage Order* and other decisions cited above is devoted to Section 2(b) – which the Commission properly viewed as the primary obstacle to preempting state regulation of VoIP and enhanced service. Of course, Section 2(b) does not apply to wireless service. That was one of the key steps Congress took in centralizing wireless authority in the Commission. In addition, as stated above, Congress instructed the Commission to forbear from the application of statutory provisions as competition developed, both in Section 10 and in Section 332(c)(1). Congress also instructed the Commission, in Section 11, to conduct a biennial review and repeal regulations as competition develops. The wireless industry is now vigorously competitive by any standard. It would be contrary to Congress's instructions to deregulate as competition develops to permit the states to re-regulate wireless carriers. In short, the case for preemption is just as clear for wireless as for VoIP – and not complicated by Section 2(b).[4]

The Chairman recognized the similarity between VoIP and wireless service in his separate statement in the *Vonage Order*. As he stated: "The founding fathers understood the danger of crushing interstate commerce and enshrined the principle of federal jurisdiction over interstate services in the commerce clause of the U.S. Constitution. In the same vein, Congress rightly recognized the borderless nature of mobile telephone service and classified it an interstate communication." *Vonage Order*, Separate Statement of Michael K. Powell, WC Docket No. 03-211, at 2 (Nov. 12, 2004). A sound argument can be advanced that the dormant Commerce Clause is violated by some of the more extreme versions of state regulation of wireless services. Requiring wireless carriers to satisfy 50 different sets of rules relating to matters such as font size for bills or exactly what must be disclosed in advertisements or on bills – or any of the other matters recently regulated in intricate detail by the CPUC – would stifle the further development of wireless competition and unreasonably burden interstate commerce. The ease and speed with which new services may be introduced to the national marketplace would be slowed to a crawl as carriers adjusted their offerings and consumer practices to take into account a multitude of unnecessary regulations – regulations that ultimately would increase the cost of wireless service without providing benefits beyond those provided by the CTIA Code and whatever regulations, if any, the Commission deems warranted. Moreover, wireless demands similar regulatory treatment as *Vonage* to promote the benefits of intermodal competition (between wireless and wireline platforms) that the FCC is so often touting as the future of the telecommunications marketplace.

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[4] In establishing rules for wireless service in the early 1980s, the Commission exercised its preemptive authority even though Section 2(b), at that time, reserved state authority over intrastate matters. The Commission "affirm[ed] our preemption over the technical standards for cellular systems" and "also preempt[ed] the states with respect to the market structure we have established for cellular services" *An Inquiry Into the Use of the Bands 825-845 MHz for Cellular Communications Systems*, 89 FCC 2d 58, 95 (¶¶ 81, 82) (1982).

Of course, the Commission need not conclude that state regulations such as those promulgated by the CPUC violate the dormant Commerce Clause in order to preempt. All the Commission needs to determine is that state regulation would conflict with the achievement of its goals in administering the Communications Act. In making that determination, the Commission should not focus exclusively on Section 332(c)(1)(A), but should consider all of Congress's actions, including its 1996 actions broadening its instructions to forbear from enforcement of statutory provisions and to repeal regulations as competition develops. And as Sections 10 and 11 make clear, whether a particular statutory provision or regulation should apply is not a matter frozen in time – Congress plainly recognized that a rule that is appropriate when consumers have a choice between only two carriers may not be warranted when consumers have a choice among five or more.

In light of Congress's instructions in 1996 as well as 1993, the Commission should ask whether it would now adopt a particular regulation imposed by a state. If it would not, then it would conflict with Congress's goal to deregulate the wireless industry as competition develops for the Commission to permit states to adopt any such regulation, whether by statute, rule, or litigation. Under *City of New York*, the Commission has the authority to preempt such rules.

We recognize that in adopting truth-in-billing principles and guidelines in 1999, the Commission chose at that time to permit states "to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today." *Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492, 7507 (¶ 26) (1999). Then-Commissioner Powell explained in his separate statement, however, that the Commission had failed to give adequate weight to Congress's instruction to "rely on markets and competition, rather than regulation." *Id*. at 7566 n. 9. As he stated: "The statute makes clear (through mandatory section 10 forbearance, biennial review, and the 'pro-competitive de-regulatory national policy framework' of the Act) that *Congress* has decided that markets should replace regulation except where actually necessary to protect consumers." *Id*. at 7566. The Commission is free to change course where it provides a reasonable explanation for doing so. Of course, giving effect to Congress's direction that markets replace regulation except where actually necessary is an appropriate explanation for changing course.

That is particularly so because the wireless market has become fully competitive – and much more competitive than it was in 1999. As noted above, the wireless penetration rate more than doubled between 1999 and 2004. Moreover, as the Commission stated in its *1999 Competition Report*, competitors to the cellular duopolists were still building out their systems at that time, and the cellular duopolists still retained an 86 percent market share. *1999 Competition Report* at 10,145. The change from a market that retained duopoly characteristics to a fully competitive market makes regulation even less desirable today than it was five years ago. Because Congress has

decided that competition should replace regulation, and the wireless market is now fully competitive, it would subvert Congress's goals to permit states to prefer regulation to competition.

In 1999, Commissioner Powell also recognized that the wireless industry is different than other telecommunications industries in other relevant respects. He "applaud[ed] the majority's thoughtful decision not to impose the requirement adopted here regarding descriptions of billed charges on CMRS carriers." *Id*. at 7567. But he criticized "the *Order*'s assertion that government intervention is always necessary to protect consumers," which "ignore[d] the clear evidence on the record indicating that the problems of slamming, cramming and consumer confusion may not be significant in certain telecommunications markets, such as wireless." *Id*. at 7565. Since 1999, the wireless industry has taken the important step of implementing the CTIA Consumer Code. Thus, the wireless industry, through self-regulation, has "undertaken common-sense steps to ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications market, while at the same time protecting themselves from unscrupulous competitors" – the goals of the truth-in-billing rules, as described by the Commission majority in 1999. *Id*. at 7493-94 (¶ 1). The Commission should support the wireless industry's adoption of the Code by forbearing from regulation of wireless (or proposing to adopt portions of the industry's Code as its rules), even if it concludes that different rules are warranted for other telecommunications carriers. In addition, the adoption of the Code in 2003 is another factor that would support a decision to preempt state regulation despite the Commission's reluctance to do so in 1999.

In short, if the Commission proposes rules relating to line items on bills, it should couple that proposal with the finding that its rules are intended to occupy the field, without regard to whether an additional requirement relating to line items might be characterized as rate regulation or regulation of other terms and conditions of wireless service. It would make sense to do so because Congress has centralized regulation of wireless service at the Commission and instructed the Commission to deregulate as competition develops. It would be contrary to those instructions for the Commission to propose rules and then – either through PUC adoption of regulations or state court adjudication of class action misrepresentation and nondisclosure claims – permit states to add to them. Similarly, if the Commission concludes that no rules relating to line items are warranted at this time, it would undermine that conclusion to permit states to regulate line items.

IV. CONCLUSION

In this proceeding, we are asking for relatively narrow relief prompted by NASUCA's requests relating to line item charges. First, the Commission should confirm that determinations of whether carriers may include line item charges on bills or the reasonableness of such charges involve carriers' rate structures, so that Section

332(c)(3)(A) preempts states from prohibiting line item charges. In 1999, the Commission concluded that carriers are authorized to recover the costs of complying with regulatory mandates "as part of their rates, or to list the charges in separate line items." *Truth-in-Billing Order*, 14 FCC Rcd at 7526 (¶ 55). If the Commission adheres to that approach, as it should, it would conflict with federal policy goals for a state commission to then preclude cost recovery through line item charges.

Second, the Commission should preempt state rules relating to line items without regard to whether the rules are properly characterized as rate regulation or regulation of other terms and conditions of wireless service. Whether the Commission makes a judgment that no rules are required with respect to line item charges at this time or proposes to adopt portions of the CTIA Code, or ultimately promulgates some other rule, it necessarily will be balancing the perceived benefits of regulation against the costs. Should the Commission adopt rules, it should conclude that additional state regulation necessarily would conflict with the balance it strikes and with Congress's goal of regulating the wireless industry with a light hand now that it is fully competitive. Should the Commission decide that rules governing line item charges are not desirable, it similarly should conclude that it would conflict with that decision for states to adopt rules.

Sincerely,

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