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

In the Matter of	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

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

Robert S. Foosaner
Senior Vice President &
Chief Regulatory Officer — Government Affairs

Leonard J. Kennedy
Senior Vice President & General Counsel

Kent Y. Nakamura
Vice President and Deputy General
Counsel – Regulatory

Laura L. Holloway
Vice President — Government Affairs

Christopher R. Day
Counsel — Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

Donald J. Manning
Vice President and General Counsel

Todd B. Lantor
Chief Regulatory Counsel
NEXTEL PARTNERS, INC.
4500 Carillon Point
Kirkland, WA 98033
(425) 576-3660

Christopher J. Wright
Timothy J. Simeone
Michelle Meyer*
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 730-1330

Counsel to Nextel Communications, Inc. and Nextel Partners, Inc.

* Law student

June 24, 2005

SUMMARY

As the Commission is aware, the CMRS market is intensely competitive. CMRS providers therefore have a natural incentive to provide good customer service, including clear billing statements. To efficiently serve their customers, CMRS carriers have developed complex billing systems that operate without regard to state borders. For these reasons, any regulations adopted in this proceeding should be limited and targeted at helping consumers take advantage of their competitive options. In addition, carriers should not be subject to any additional state rules. The cost of regulations that require carriers to retrofit their networks and billing systems to account for state-by-state regulation would outweigh any putative benefits, and only harm the very consumers that they were intended to help.

Nextel supports the Commission's proposal to require carriers to separate charges they are required to pass through to end-users ("mandated" charges) from other charges because that rule will help consumers choose among carriers. Drawing the line in that manner makes sense because the category of "mandated" charges so defined includes only those charges that will not vary among carriers. For example, if a county imposes a three percent sales tax on end-users, every carrier will impose that tax. It makes sense to separate such charges from other charges on which carriers may vary in order to assist consumers in making their choice among competing wireless providers.

The Commission should not, however, require carriers to treat assessments that they are not required to pass through to end-users as mandated charges. In response to prior decisions by the Commission, most carriers have revised their billing systems, at considerable expense, to distinguish between charges they must pass through to end-users and other charges. The cost of requiring them to revise their systems again would outweigh

any potential benefit, particularly since such a revision would not provide additional useful information to consumers and might in fact increase consumer confusion.

Nextel does not believe that universal labels for categories of charges are warranted. Again, in light of prior Commission decisions addressing billing practices, most carriers have revised their billing systems and adopted labels distinguishing charges they must pass through to end-users from other charges. Mandating specific labels for various categories of charges will disrupt billing systems and could cause carriers to spend substantial amounts of money changing those systems — money that could be used to improve coverage or offer new wireless products. In addition, because requiring carriers to adopt a script written by the government is not necessary to protect consumers, any attempt to do so would raise serious First Amendment issues. The Commission should avoid creating a constitutional problem by declining to mandate the use of specific labels.

With respect to point of sale disclosures, the Commission should require carriers to disclose only material rate information that is within their knowledge and control at the point of sale. The Commission must acknowledge, for example, that carriers cannot predict whether a county will adopt a new tax or whether the next quarterly adjustment of the federal universal service fee will be substantial. Accordingly, carriers may reasonably be required to disclose (a) charges within the control of the carrier that a customer would incur under the contract selected by the customer and (b) charges that would appear on the customer's bill assuming no changes in state or federal regulatory requirements. However, the Commission should make clear that carriers are *not* required to predict how taxes and regulatory fees might change.

Whatever rules the Commission adopts regarding billing and point of sale issues should preclude additional regulation by the states. The regulations the Commission adopts will strike the balance the Commission determines is appropriate between the costs and benefits of the regulation. Congress has instructed the Commission to repeal regulations that become unnecessary as competition develops in telecommunications markets. The wireless industry is fully competitive, and it would undermine Congress's goals for the Commission to balance the costs and benefits of regulation but then permit the balance it strikes to be upset by state regulators. The Commission should instead make clear that its regulations are intended to provide uniform, national standards. Therefore, the Commission should make clear (a) that state regulators may not impose additional billing or point of sale requirements and (b) that a carrier that complies with the Commission's billing rules and its point of sale requirements is not subject to liability on any theory that its bills or point of sale disclosures are inadequate under state law.

States should continue to play an important role in ensuring that consumers are protected, however. State commissions should receive complaints and refer them to the appropriate carrier. They should monitor those complaints and, if warranted, ask the Commission to conduct an investigation or amend its regulations. In addition, state commissions can provide valuable consumer education concerning how to shop for wireless services and how consumers may seek redress if they are dissatisfied with their service.

It would not, however, make sense for the Commission to delegate authority to enforce its rules to state commissions because many rules will require uniform interpretation. For some rules regarding billing and point of sale disclosures, the Commission can adopt precise guidelines, such as a clear rule that carriers may pass through only the amount of the

universal service fee assessment. There should be little or no dispute regarding such matters because carriers will simply comply with the Commission's rules. But as the Commission's current truth-in-billing rules reflect, other requirements will necessarily be phrased more generally and will require "non-misleading" and "clear and conspicuous" disclosures. With respect to such requirements, which are by their nature somewhat inexact, it is necessary to have one adjudicator. Otherwise, for example, a carrier could be required to provide key portions of its bill in a 12-point font in one state, a 14-point font in another, and in bold in yet another. The competitive wireless industry, which operates without regard to state borders, should not be subject to different requirements of that sort.

TABLE OF CONTENTS

SUMMARY i

INTRODUCTION 1

ARGUMENT 2

I. NEXTEL'S BILLING STATEMENTS ALREADY PROVIDE CUSTOMERS WITH UNIFORM, EASILY COMPREHENSIBLE BILLING INFORMATION AND WOULD BE BOTH COSTLY AND UNNECESSARY TO ADJUST 2

A. Nextel's Current Billing System Was Specifically Designed To Respond to Consumer Demand for Uniform, Easily Comprehensible Billing Statements and Strong Customer Care 2

B. Billing Systems, Such as Nextel's Ensemble System, Are Very Costly To Adjust .....

II. SEPARATING MANDATED FROM NON-MANDATED CHARGES ON WIRELESS BILLS IS SUFFICIENT TO ENABLE CONSUMERS TO MAKE AN INFORMED CHOICE AMONG WIRELESS CARRIERS 3

A. The Commission Should Define as "Mandated" those Charges the Government Requires the Carrier to Collect from the User 6

B. Regulation of Line Items Beyond the Mandated/Non-Mandated Distinction Is Unnecessary for Consumer Protection and Would Unduly Burden Carriers 8

1. Requiring Universal Labels for Line Item Categories Violates the First Amendment, Is Unnecessary To Protect Consumers, and Would Be Unduly Burdensome on Carriers 9

a. Universal Labels Would Unconstitutionally Infringe Carriers' Commercial Speech Rights Under the First Amendment 10

b. The Commission Should Avoid the Constitutional Question and Reject the Universal Label Proposal on Policy Grounds 14

2. Once Charges Are Categorized as Mandated and Non-Mandated, the Particular Label Used To Describe Any Charge Within a Category Will Not Mislead Consumers *16*

3. Combining Two or More Federal Regulatory Charges In One Line Item Is Not Unreasonable Under Section 201(b) of the Communications Act *16*

III. THE COMMISSION SHOULD ONLY REQUIRE CARRIERS TO DISCLOSE MATERIAL RATE INFORMATION THAT IS WITHIN THEIR KNOWLEDGE AND CONTROL AT THE POINT OF SALE 17

IV. THE COMMISSION SHOULD PREEMPT THE STATES FROM ENACTING ADDITIONAL REGULATIONS GOVERNING BILLING OR POINT OF SALE DISCLOSURES 21

A. Congress Has Directed That Wireless Providers Be Regulated at the Federal Level, With Regulation Diminishing As Competition Develops 22

B. The Wireless Industry Has Become Fully Competitive 24

C. The Commission May Preempt Unwarranted State Regulation of the Terms and Conditions of Wireless Service 27

V. THE COMMISSION SHOULD PRESERVE A SUBSTANTIAL ROLE FOR THE STATES THAT DOES NOT THREATEN TO IMPOSE MULTIPLE AND INCONSISTENT STANDARDS ON CARRIERS 41

CONCLUSION .....

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

In the Matter of	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

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

INTRODUCTION

Pursuant to the March 18, 2005 *Second Further Notice of Proposed Rulemaking*[1] of the Federal Communications Commission (the Commission), Nextel Communications, Inc. and Nextel Partners, Inc. (Nextel) hereby submit the following comments regarding billing format and point of sale disclosure by commercial mobile radio service (CMRS) carriers.

Because CMRS billing systems are highly complex and the CMRS industry is intensively competitive, only limited regulation is warranted — regulation specifically targeted at ensuring that consumers have the information they need to take advantage of their abundant competitive options. In adopting such regulations, the Commission must balance the costs the regulations impose — and those costs can be substantial — with the benefits the Commission hopes they will achieve. The Commission should also make clear that states may not upset this balance by imposing additional requirements. That means that state

[1] *See Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, CG Docket No. 04-208 (rel. March 18, 2005) ("*Second Further Notice of Proposed Rulemaking*").

commissions should not be permitted to promulgate billing and point of sale regulations in addition to those adopted by the Commission. It also means that carriers that comply with the Commission's billing and point of sale regulations should not be subject to litigation contending that their bills or disclosure forms are nevertheless unlawful under state law. Rather, because CMRS carriers operate without respect to state boundaries, they ought to be subject only to one set of national rules.

ARGUMENT

I. NEXTEL'S BILLING STATEMENTS ALREADY PROVIDE CUSTOMERS WITH UNIFORM, EASILY COMPREHENSIBLE BILLING INFORMATION AND IT WOULD BE BOTH COSTLY AND UNNECESSARY TO CHANGE THEIR FORMAT.

A. Nextel's Current Billing System Was Specifically Designed To Respond to Consumer Demand for Uniform, Easily Comprehensible Billing Statements and Strong Customer Care.

As the Commission is aware, the domestic CMRS market is one of the most intensely competitive telecommunications markets in the world, and Nextel competes fiercely with the other national providers of wireless services, as well as with numerous regional and local wireless providers. In such a competitive market, one of the key ways a carrier can distinguish its service offerings is to provide the highest level of customer care.

Prior to 2002, Nextel relied on twelve different billing systems (collectively called "Tris") built loosely around state and regional boundaries to provide billing and customer support. While the Tris system allowed certain different billing practices in its platforms, it created a "siloed" concept of customer care, and made it much harder for customer care representatives to easily access customer billing information or make adjustments or changes.

Beginning in 2002, Nextel undertook an effort to substantially upgrade the customer experience by consolidating multiple billing systems into one, unified system called

"Ensemble." With Ensemble, customer care representatives are able to view the details of customer accounts regardless of the customer's location, thereby making customer care easier, quicker and more efficient. This unified customer service and billing approach is particularly important to many of Nextel's customers who travel frequently, or have multiple handsets — often in different jurisdictions — that are billed through one account. Customer satisfaction with this unified billing and customer service approach has been noted in a number of customer surveys, which have consistently ranked Nextel's customer service as above the industry average.[2]

Moreover, Nextel has worked hard to ensure that the language it uses on customer bills to describe various charges is clear and informative. Nextel refers to government-mandated charges, including the Federal Excise Tax and state and county sales taxes, as "Government Fees and Taxes," which it describes on its invoices as "fees and taxes the government imposes directly on Nextel's customers. Nextel is required to collect these fees and taxes on behalf of the government." Nextel refers to non-mandated charges as "Additional Nextel Charges," and describes them as "charges that Nextel elects to collect to recover its costs of complying with governmental programs and mandates." In addition, Nextel notes that "Additional Nextel Charges" are "not government-imposed fees." Both Nextel's labels and its descriptions clearly communicate to its customers which fees it is required to collect and which it has elected to collect.

---

[2] *See, e.g.*, *Nextel Ranking Highest in Customer Service Performance by J.D. Power and Associates*, BUSINESS WIRE, Aug. 28, 2003; *see also* J.D. Power and Associates Reports: *Live-Person Interaction is Key to Receiving Positive Wireless Customer Care Experience* (rel. June 8, 2005) (noting that Nextel's 2005 customer care is above the national industry average), *available at* http://www.jdpower.com/pdf/2005078.pdf.

B. Billing Systems, Such as Nextel's Ensemble System, Are Very Costly To Adjust.

By combining all customer billing information in one system, Nextel's Ensemble system provides uniform, nationwide billing and customer care. However, the extreme complexity and cost of developing, maintaining and, especially, altering Ensemble and other carriers' "back office" systems, including subsystems ranging from order entry to bill presentation to customer care, may be difficult for lay persons to comprehend.

The complexity of billing systems is due, among other things, to the fact that many subsystems comprise a billing system, which in turn interacts with many other systems. A typical billing system contains literally hundreds of data tables containing a vast array of information that must be consulted to render an accurate bill. In Nextel's case, for example, one of these data tables contains information on the location of each Nextel cell site. The purpose of this information is to enable the accurate billing of calls when customers have chosen rating plans that distinguish between local and long distance calls. Each time a new cell site is added to the Nextel network, this particular data table must be updated as well. Moreover, this intricate system must be able to accurately record, process, and account for billions of transactions per month.

There are few aspects of a telecommunications carrier's business that are untouched by the carrier's billing system. In fact, the name "billing system" is a misnomer because it greatly understates the reach and complexity of these systems. When a customer begins service, her information and rate plan are recorded so that her transactions can be accurately rated and billed. Nextel, like many other wireless carriers, has hundreds of active rate plans. Going forward, each call that a customer makes (including, in Nextel's case, Direct

Connect™ walkie talkie calls) generates a call detail record (CDR). Millions of customers generate billions of CDRs monthly. Each of these transactions must be rated,[3] billed, formatted, printed, and mailed, with payments properly credited. It is Nextel's understanding that in terms of the number of transactions processed, the telecommunications industry is the world leader, exceeding even credit card companies. Despite the enormous volume of CDRs, it is absolutely critical that each one be accurately rated, billed and presented; inaccurate bills cause other major business problems, such as massive numbers of costly inquiries to a carrier's customer care representatives, which can overwhelm customer care and result in customer dissatisfaction.

A telecommunications company's billing system is thus typically its most complex system, and is costly and time-consuming to develop, implement, and maintain. For instance, a large billing system such as Ensemble, which is capable of serving millions of customers, typically costs around $1 billion to purchase,[4] and also requires hundreds of millions of dollars in annual maintenance expenses.[5]

However, even more expensive than developing, implementing, and maintaining a billing system is altering one, especially when those alterations were unanticipated. However difficult it may be to design a billing system to accommodate a certain feature, it is a vastly more complicated, costly, and extended process to alter an existing system to accommodate that feature when the need for that feature was not planned for. The logistical problems involved in retrofitting billing systems are analogous to those that would be involved in

---

[3] Even with so-called "bucket" rate plans, CDRs are typically recorded but subsequently suppressed and not billed so long as the customer does not exceed the allotted number of minutes in the bucket.

[4] Billing systems are enormously expensive and very complex. In an interview with Dick LaFave, Nextel's Chief Information Officer, CIO Magazine noted that Nextel's contract for the Ensemble billing platform cost approximately $1 billion. *See* Meridith Levinson, *Life After Outsourcing*, CIO MAGAZINE, May 15, 2004, *available at* http://www.cio.com/archive/051504/outsourcing.html.

[5] Specialist billing consultants, for instance, typically charge between $200 and $250 per hour.

installing a swimming pool on the roof of a large, occupied commercial building that had not been designed or built to accommodate such a pool. Both scenarios require significant lead time, considerable expense, and an extended period for implementation. Although wireline carriers' billing systems have been better able to accommodate ever-evolving, state-specific regulations, those systems, like the wireline industry itself, were developed with state boundaries in mind. The wireless industry, on the other hand, developed from the outset as a regional and then national industry transcending state borders, and its back office systems developed in a manner designed for uniform, national implementation.

The considerable time and expense involved in altering wireless billing systems is again in part due to the fact that the components of such systems are both complex and interconnected. Thus, even small alterations in one part of the system can have unintended and unpredictable consequences elsewhere in the system. Generally speaking, alterations in billing systems translate into errors, which in turn cause expense for carriers and inconvenience for customers.[6] Because customer satisfaction with billing is a crucial factor for success in the intensely competitive wireless industry, a carrier must spend considerable time — often up to a year — testing any alteration in its billing system before "going live" with it. During such "regression testing," a carrier implements the alteration, and then tests each aspect of the billing system using different possible billing scenarios to ensure that it

[6] A billing system contains millions of lines of computer code and is susceptible to error for that reason alone. In one example, a telecommunications billing system was created from scratch but the developers forgot to account for daylight savings time. The billing system worked well during testing and was placed into service. When the daylight savings time change occurred later, the billing system crashed because its logic would not allow calls to be billed twice to the same time period. These types of problems are compounded by the fact that many individuals work on changes to the billing system's computer code. With personnel turnover over the years, no individual is familiar with all the changes that have been made to the billing system over time, meaning that no one understands all the complexities of the system and the effect that changes to one part of the system may have on other parts.

remains functional and produces accurate information; this process typically involves testing thousands of permutations.

Despite extensive planning and testing, billing system alterations may still have unwelcome and unanticipated effects, including expense and inconvenience not only for the carrier, but for its customers and third parties as well. For example, a seemingly innocuous change in font size on Nextel's bills rendered Nextel's subpoena compliance group unable to redact subpoenaed bills electronically; the alternative method of redacting the bills with a black marker and mailing them to law enforcement was time-consuming and expensive for Nextel, and inconvenient for the law enforcement officers who were obliged to wait for them. Similarly, a slight shift in the production and printing process caused a line of optically readable characters at the bottom of the bill to move slightly, which in turn prevented the lockbox collecting facility from reading the bill automatically; the end result was numerous calls to customer care, inconvenience for consumers, and increased costs for Nextel.

Moreover, when a carrier suspects an alteration has produced billing inaccuracies, the carrier will often refrain from discontinuing service for nonpayment or may even choose not to bill for a particular service until the billing discrepancies are resolved. Such situations obviously result in substantial loss to the carrier, particularly when customers realize that a carrier's inability to bill accurately is an opportunity to obtain free service.

Despite the significant costs involved in altering its billing system, however, Nextel has worked hard to make those changes necessary to enable its customers to easily understand their bill and to compare Nextel's services and rates to those of its competitors. As described above, Nextel provides clear and detailed explanations of each of its charges, and states whether the charge is mandated by the government or not. Nextel thus supports

the Commission's tentative conclusion that carriers should be required to separate their line items in a way that allows the user to meaningfully distinguish carriers' billing practices. However, given the onerous burdens imposed on carriers by alterations in their billing systems, Nextel urges the Commission to refrain from regulating billing formats beyond the mandated/non-mandated distinction.

II. SEPARATING MANDATED FROM NON-MANDATED CHARGES ON WIRELESS BILLS IS SUFFICIENT TO ENABLE CONSUMERS TO MAKE AN INFORMED CHOICE AMONG WIRELESS CARRIERS.

A. The Commission Should Define as "Mandated" Those Charges the Government Requires the Carrier To Collect from the User.

In its *Second Report and Order*, the Commission proposed two alternative ways of distinguishing "mandated" from "non-mandated" charges. Under the first proposed distinction, mandated charges are those that the carrier is legally required to collect directly from the user and remit to federal, state, or local government.[7] Under the second distinction, mandated charges are those that the carrier remits to government.[8] Nextel urges the Commission to adopt its first proposed distinction, which both furthers the Commission's policy goals and is consistent with several legal pronouncements on which Nextel and other carriers have reasonably relied in structuring their bill formats. In contrast, both the Commission's second proposed distinction and its suggestion that carriers be required to separate charges into more than two categories[9] would impose significant burdens on carriers while possibly *decreasing* consumer protection by increasing consumer confusion.

First, distinguishing between charges that the carrier is — and is not — required to collect from the user best supports the Commission's policy goal of "provid[ing] consumers

[7] *See Second Further Notice of Proposed Rulemaking at* ¶ 40.
[8] *See id.* at ¶ 41.
[9] *See id.* at ¶ 44.

with clear, well-organized, and non-misleading information so that they may be able to reap the advantages of competitive markets."[10] In order to meaningfully compare carriers, consumers need to know how carriers' charges differ. The only charges on which carriers *cannot* differ are those the government requires the carrier to collect directly from the user, such as most state and local taxes.[11]

Second, this distinction between charges a carrier is and is not legally required to collect from the user has been embodied in several legal pronouncements on which carriers have reasonably relied in structuring their billing formats. As the Commission noted, this distinction is consistent with the settlement agreements between the Attorneys General of thirty-two states and Verizon Wireless, Cingular Wireless, and Sprint PCS, as well as the Commission's own precedents.[12] In addition, in its *Truth-in-Billing Order and Further Notice* the Commission rejected as "misleading" any characterization of a carrier's "business decision" to pass universal service and similar charges on to its users as mandated.[13] Although it would not be unreasonable to treat universal service assessments as government-mandated fees — since carriers send their universal service assessment recovery collections to the government's designated collection agent — Nextel reasonably relied on the Commission's pronouncements in restructuring its bill format. It would be unfair to now

---

[10] *Id.* at ¶ 43.

[11] In this typical situation, the government imposes a tax on the user and essentially requires the carrier to act as its collection agency by placing the tax on the user's bill, collecting it from the user, and remitting it to the government. However, we note that in a few cases, the government technically imposes a tax on the carrier but nevertheless requires the carrier to collect this tax from the user; examples of this kind of charge include the New York and New York City Gross Receipts taxes, the New York Metropolitan Transit Authority tax, certain excise taxes, and several state 911 fees. If the primary distinction between mandated and non-mandated charges is whether a tax is imposed in the first instance on the user or on the carrier, then these latter taxes might be construed as non-mandated. However, this arbitrary classification would miss what is, from the consumer's perspective, the most important distinction that should underlie any classification scheme: whether a charge is one on which carriers could differ. Because carriers cannot differ on these latter taxes, such taxes should be considered mandated.

[12] *See Second Further Notice of Proposed Rulemaking* at ¶ 40 & n.121.

[13] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 7492, 7527, ¶ 56 (rel. May 11,1999) (citations omitted) ("*First Report and Order*").

impose on it the cost of complying with yet another standard, such as the Commission's second proposed distinction between charges that are remitted to the government, whether or not carriers are required to collect them from end-users. Nor would it make sense to create three categories of charges — those that carriers are required to collect from end-users; those they are required to remit to the government and may collect from end-users; and those they collect to fund compliance with regulatory mandates but do not send to the government.

In addition to being unfair and unnecessary, both of these alternative billing structures would frustrate the Commission's goal of enabling consumers to reap the advantages of a competitive market by blurring the distinction between, on one hand, those charges on which carriers can differ, and on the other hand, those charges on which carriers cannot differ. Providing any more than these two categories necessarily weakens this important distinction, and generally increases the possibility of consumer confusion by increasing the complexity of carrier invoices. Similarly, the Commission's second proposed definition blurs this distinction by categorizing as "mandated" charges (such as universal service assessments) that a carrier may choose not to pass on to consumers, either in part or in whole. Although carriers of course cannot control — and therefore cannot differ on — the *rate* of a regulatory charge such as universal service assessments, they can choose whether to pass some or all of this cost on to the user, or whether instead to reduce their revenues by the amount of these charges.

As we have stated, the Commission's key concern has been to require the provision of information that is helpful to consumers in choosing among carriers. The distinction that best furthers that goal is the distinction between charges carriers must pass through to consumers — a category on which carriers will not differ — and other charges.

B. Regulation of Line Items Beyond the Mandated/Non-Mandated Distinction Is Unnecessary for Consumer Protection and Would Unduly Burden Carriers.

Although Nextel supports the Commission's tentative conclusion that mandated charges should be placed in a separate section of wireless carrier bills, Nextel urges the Commission to refrain from regulating any other aspect of line items. As explained in Section I(B) above, altering a carrier's billing system can be extremely costly and the benefits dubious. Moreover, further regulation of line items is unnecessary to allow consumers to choose meaningfully between carriers, and Congress has directed the Commission to refrain from regulating where there is sufficient industry competition so that regulation "is not necessary for the protection of consumers."[14] The Commission should make clear that carriers must separate mandated from non-mandated charges, and that they must do so in a way — using labels, explanations, or other means — that communicates to users in a non-misleading way the relevant distinction between the two categories. However, given the costs associated with altering carriers' billing systems, the Commission should not require carriers to conform to precise language in meeting this demand. Nor should the Commission require carriers to itemize each particular charge on its bill.

1. Requiring Universal Labels for Line Item Categories Violates the First Amendment, Is Unnecessary To Protect Consumers, and Would Be Unduly Burdensome on Carriers.

The Commission invited comment on whether it should require carriers to label their categories of charges with standardized, national labels in order to ensure that bills are not

[14] Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 214, *et seq.* (the "*Act*"), at § 332(c)(1)(A)(ii); *see also id.* at § 161 (directing the Commission to "repeal or modify any regulation" that "is no longer necessary in the public interest as the result of meaningful economic competition between providers").

misleading.[15] Requiring carriers to use specific labels in communicating to their customers the existence of government charges is not necessary to protect consumers, and as such, would implicate the First Amendment. The Commission should avoid this constitutional issue and decline to mandate the use of universal labels on policy grounds.

a. Universal Labels Would Unconstitutionally Infringe Carriers' Commercial Speech Rights Under the First Amendment.

As explained in Section I(A) above, Nextel's current method of identifying mandated and non-mandated line items is "neither misleading nor related to unlawful activity," and so comes within the First Amendment's protection under the first prong of *Central Hudson*'s[16] test for the regulation of commercial speech. With respect to other carriers, if the Commission requires mandated and non-mandated charges to be separated into two categories, then as long as those categories are clearly explained, their methods of communicating the difference between mandated and non-mandated charges will be non-misleading as well.

Because wireless bills such as Nextel's currently permit consumers to understand the difference between the two types of charges, any requirement to change to a mandated label would likely fail the third and fourth prongs of the *Central Hudson* test. Those prongs require that "the regulatory technique [is] in proportion to [the state's] interest," and that "[t]he limitation on expression [is] designed carefully to achieve the State's goal."[17] With respect to the third prong, the Commission must show that "the speech restriction directly and materially advanc[es] the asserted governmental interest. This burden is not satisfied by

---

[15] *See Second Further Notice of Proposed Rulemaking* at ¶¶ 44-45.

[16] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). Universal labels cannot be construed as a mere regulation of conduct under *United States v. O'Brien*, 391 U.S. 367 (1968), since the government interest at stake is not "unrelated to the suppression of free expression, *id.* at 377; indeed, the Commission justifies its proposal "expressly on the basis that the speech might be harmful to consumers," *Consolidated Edison Co. of NY, Inc. v. Pub. Serv. Comm'n of NY*, 447 U.S. 530, 541 (1980).

[17] *Central Hudson*, 447 U.S. at 564.

mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[18] While the Commission has cited evidence of an increase in general complaints about billing clarity since 1999,[19] it has not cited any evidence — particularly given the thirty-plus wireless carriers that voluntarily adopted the 2003 CTIA Consumer Code[20] and the three largest wireless carriers, which were made subject to a 2004 Assurance of Voluntary Compliance ("AVC")[21] — that these complaints are the result of carriers' ability to choose the wording of their labels *per se*, rather than the practices of particular carriers who have chosen not to comply with the guidelines set forth in the Code or the AVC.

Similarly, a standardized labeling requirement would fail *Central Hudson*'s fourth prong, according to which the regulation on speech must be no "more extensive than is necessary to serve [the government's] interest."[22] The regulation must constitute a "reasonable fit between the [state's] ends and the means chosen to accomplish those ends,...a means narrowly tailored to achieve the desired objective."[23] In response to prophylactic suppression of commercial speech, the Supreme Court has insisted that "the States may not place an absolute prohibition on certain types of potentially misleading information...if the

---

[18] *Lorillard Tobacco* , 533 U.S. at 555 (internal quotation marks omitted).
[19] *See Second Further Notice of Proposed Rulemaking* at ¶ 16.
[20] Principle Six of that Code provides that carriers "Separately identify carrier charges from taxes on billing statements. On customers' bills, carrier 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." CTIA Consumer Code for Wireless Service, *available at* http://files.ctia.org/pdf/The_Code.pdf.
[21] Paragraph 36 of that AVC provides, in pertinent part, that "On Consumers' bills, Carrier will (a) separate (i) taxes, fees, and other charges that Carrier is required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs, from (ii) monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges (including, but not limited to, Universal Service Fund fees)...and (b) not represent, expressly or by implication, that discretionary cost recovery fees are taxes."
[22] *Central Hudson*, 447 U.S. at 566.
[23] *Lorillard Tobacco*, 533 U.S. at 556 (internal quotation marks omitted) (emphasis added).

information also may be presented in a way that is not deceptive."[24] The Court has thus emphasized the "material differences between disclosure requirements and outright prohibitions on speech,"[25] and has rejected the claim that administering an "accurate and nonmisleading" standard on a case-by-case basis is unduly burdensome on regulators:

> We are not persuaded that identifying deceptive or manipulative uses...is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use.... [T]he free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.[26]

Requiring all carriers to use mandated labels when the majority of carriers, including Nextel, adhere to standards that provide equally clear and accurate information does not constitute narrow tailoring, but rather is grossly overinclusive. In *Lorillard Tobacco*, the Court found inadequate the fit between the goal of reducing smoking by minors and the requirement that certain stores refrain from placing tobacco ads lower than five feet from the floor, noting that "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[27] Similarly, not all carrier-created labels are misleading.

Nor is the degree of speech restriction and economic cost involved for carriers "proportionate" to the marginal increase in clarity achieved by forcing outlier carriers to conform to the standards of clarity Nextel and many other carriers already use. The obvious

---

[24] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 644 (1985) (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).
[25] *Id.* at 650.
[26] *Id.* at 649, 646; *see also id.* at 644-46 & n.13.
[27] *Lorillard Tobacco*, 533 U.S. at 566.

alternative solution, which is far less restrictive of speech, is to evaluate on a case-by-case basis consumer complaints alleging that particular labels are misleading.[28]

In its previous discussion of the First Amendment implications of standardized labels for line items themselves, the Commission emphasized that while carriers would be required to use Commission-developed labels, they would be free to provide supplementary descriptions of those labeled line items.[29] However, even where "the burden on speech imposed by the provision is very limited," the Court made clear in *Lorillard Tobacco* that "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."[30] In that case, the Court was not moved by the fact that store owners prohibited from displaying tobacco ads lower than five feet from the floor were able to display the same ads above the five foot mark.[31] Similarly, the fact that carriers are able to include elsewhere in their bills their own language describing the distinction between mandated and non-mandated charges does not erase the fact that they are not only prohibited from using their own words to characterize this distinction through the category labels (an infringement on carriers' positive speech rights), but are additionally required to use the Commission's language (an infringement on carriers' negative speech rights).

b. The Commission Should Avoid the Constitutional Question and Reject the Universal Label Proposal on Policy Grounds.

Although there is a strong case to be made that the Commission's proposal regarding universal labels would violate the First Amendment, the Commission should avoid this issue by refraining, on policy grounds, from requiring universal labels as both unnecessary to

---

[28] Indeed, in finding that "[t]he Commission...has not demonstrated that its interest...cannot be protected adequately by more limited regulation of appellant's commercial expression," the *Central Hudson* Court similarly suggested that the Commission "consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy." *Central Hudson*, 447 U.S. at 570-71 & n.13.
[29] *See, e.g.*, *First Report and Order, 14 FCC Rcd. at 7533-34* ¶ 63.
[30] *Lorillard Tobacco*, 533 U.S. at 567.
[31] *See id.*

protect consumers and unduly burdensome on carriers. Although a change in labels may seem a simple task for a carrier, this is not always the case. As explained in Section I(B) above, billing systems, including Nextel's Ensemble system, are highly complex, intricate systems that, among other things, often limit the number of characters that any label can contain. Therefore, any Commission requirement (or, for that matter, state or local requirement) for a specific line item exceeding that character limitation would require substantial billing system changes which Nextel's billing vendor estimates would involve 1,000 person hours and $200,000. For this reason, Nextel has already had difficulty complying with California regulations requiring long names and/or descriptions.

Given the cost to carriers of requiring such universal labels — as well as the Commission's congressional mandate to refrain from regulating wireless carriers when possible — the Commission should move forward with this proposal only if it is absolutely necessary to protect consumers. It is not. Clearly there is more than one non-misleading way to label the categories of "mandated" and "non-mandated" charges; as the Commission noted in its *First Report and Order*: "Our goal is to enable consumers to make comparisons among different service providers in connection with these charges, but we expect that this end will be accomplished th[r]ough several means."[32] As described in Section I(A) above, Nextel already clearly communicates this distinction to its customers through the category labels of "Government Fees and Taxes" and "Additional Nextel Charges." Nextel's consumers would gain no further benefit from universal labels. Indeed, once the Commission requires *all* carriers to similarly separate mandated from non-mandated charges, all consumers will have the information they need to choose among carriers. Rather than dictating the language

[32] *First Report and Order*, 14 FCC Rcd.. at 7525 ¶ 55.

carriers must use in their bills, the Commission should invite consumers who feel a carrier's labels are misleading to file a complaint.

The Commission's *First Report and Order* discussion of carrier descriptions of billed charges properly recognized the limitations imposed by the "technical parameters of [carriers'] current billing systems,"[33] and wisely "decline[d] to adopt specific language describing the distinction."[34] Instead, the Commission "balanced consumers' need for clear, logical, and easily understood charges against concerns that rigid formatting and disclosure requirements would inhibit innovation and greatly increase carrier costs"[35] by allowing companies "wide latitude" to "craft their own descriptions to convey the Commission's...definition to their customers, provided that the information is conveyed truthfully and accurately."[36] This was the prudent course in the context of the *First Report and Order*, and it remains the prudent course here as well.

2. *Once Charges Are Categorized as Mandated and Non-Mandated, the Particular Label Used To Describe Any Charge Within a Category Will Not Mislead Consumers.*

The Commission also invited comment on whether it is misleading for carriers to label, for example, regulatory compliance costs as "regulatory assessment fees."[37] If no other information about the charge were provided, a consumer might not understand what those fees covered. But when a carrier like Nextel separates its charges into mandated and non-mandated categories, explains that the non-mandated category includes "charges that Nextel elects to collect," and emphasizes that "*[t]hese charges are not taxes or government-imposed fees*," a reasonable end-user will not be misled.

---

[33] *Id.* at 7518 ¶ 41.
[34] *Id.* at 7529 ¶ 58.
[35] *Id.* at 7516 ¶ 36.
[36] *Id.* at 7529 ¶ 58.
[37] *Second Further Notice of Proposed Rulemaking*. at ¶ 47.

3. *Combining Two or More Federal Regulatory Charges In One Line Item Is Not Unreasonable Under Section 201(b) of the Communications Act.*

For substantially the same reasons, combining two or more "federal regulatory charges" in one line item is not unreasonable under Section 201(b) of the Communications Act.[38] All that should be relevant to a consumer choosing among carriers is the total amount a carrier would charge a particular customer in mandated fees, and the total amount it would charge that customer in non-mandated fees. Consumers should not care about the amount a carrier charges for each mandated fee, because all carriers must charge the same fees at the same rates. Of course, revealing the total amount of mandated fees will allow the consumer to discover the rare case where her carrier is not complying with Commission rules and is in fact not charging the same total amount in mandated fees as are all other carriers; but the only relevant number for this purpose is the total amount a carrier charges for all of its mandated charges. Similarly, the consumer needs to know the total amount she would pay a carrier in non-mandated fees, because she will compare this number to the totals of competing carriers. But again, the consumer is not aided by knowing how much of a carrier's discretionary fee goes to its profit margin and how much goes to recover administrative fees; all she should care about, understandably, is the bottom line.

Given the potential huge costs of compliance with even seemingly small changes in a carrier's billing system and the minimal public benefit, the Commission — rather than imposing *per se* rules — should allow consumers who feel that a label is misleading to continue to file complaints and should assess those complaints in the context of all the information provided by a particular bill.

---

[38] *See id.* at ¶ 48.

III. THE COMMISSION SHOULD ONLY REQUIRE CARRIERS TO DISCLOSE MATERIAL RATE INFORMATION THAT IS WITHIN THEIR KNOWLEDGE AND CONTROL AT THE POINT OF SALE.

Nextel certainly agrees with the Commission that, as a matter of policy, carriers should disclose at the point of sale — and before a potential customer signs a service contract — "all material rates and terms of service." Thus, carriers should disclose the full rate that the customer would incur, including any current charges presented as non-mandated line items. In addition, carriers should disclose that the consumer would be subject to government-mandated charges and should provide the most recent rate or percentage of each mandated charge in the customer's jurisdiction.

However, it is unreasonable to require carriers to accurately provide a "reasonable estimate of government mandated surcharges," given that carriers have neither control over, nor knowledge of, potential increases to such fees. While carriers can and should disclose current government charges, they cannot foresee increases in those rates, or the addition of entirely new charges, such as city or county taxes. For example, the City of Alexandria, Virginia recently announced its intention to impose a three-dollar ($3.00) per month charge on all mobile phones with a billing address in that city.[39] There is no way that Nextel — or any other carrier — can predict the future imposition of such a tax.[40] Accordingly, the Commission should reject efforts to require point of sale "estimates" of future taxes, fees or assessments over which carriers have no control.

---

[39] *See* Robert MacMillan, *Alexandria to Tax Cell Phones as Other Revenue Drops*, WASH. POST, June 16, 2005, at T03 (noting that the Alexandria tax plan will require residents to "pay $3 a month on cell phone bills of more than $30, while those on lower-cost plans will be charged 10 percent of their monthly bill").

[40] In the same context, it is also impossible for carriers to foresee increases in many government assessments. For instance, the Second Quarter 2004 Universal Service Fund (USF) assessment factor was 8.7 percent. *See Proposed Second Quarter 2004 Universal Service Contribution Factor*, Public Notice, 19 FCC Rcd. 4052 (2004). By the Second Quarter of 2005, the USF assessment factor had increased substantially to 11.1 percent. *See Proposed Second Quarter 2005 Universal Service Contribution Factor*, Public Notice, 20 FCC Rcd. 5239 (2005).

IV. THE COMMISSION SHOULD PREEMPT THE STATES FROM ENACTING ADDITIONAL REGULATIONS GOVERNING BILLING OR POINT OF SALE DISCLOSURES.

More importantly, the Commission should adopt its tentative conclusion that it is authorized to preempt states from enacting truth-in-billing rules that govern carriers' billing practices or point of sale disclosures. Permitting states to adopt additional billing or point of sale requirements would upset the "reasonable balance" the Commission strikes "between the needs of consumers for access to accurate and truthful information...and any burden or cost such requirements may impose on carriers."[41] The same reasoning applies to any rules the Commission adopts with respect to point of sale disclosures. It bears emphasis that this sort of conflict preemption does *not* depend on whether it is possible for a carrier to comply with the additional state regulations. *Rather, the conflict arises from the Commission's conclusion that additional regulations would upset the reasonable balance it strikes between the costs and benefits of regulation.*

As we explain below, the Commission plainly has authority to preempt, even with respect to state regulation of the "terms and conditions" of wireless service. Indeed, reading the Communications Act as a whole, including Congress's directive that regulation diminish as competition increases, the Commission not only can but should preempt state adoption of unnecessary and burdensome regulation.

A. Congress Has Directed That Wireless Providers Be Regulated At The Federal Level, With Regulation Diminishing As Competition Develops.

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."[42] Indeed, through a number of enactments adopted in 1993 and 1996, Congress specifically encouraged the

---

[41] *First Report and Order*, 14 FCC Rcd. at 7530 ¶ 59.
[42] *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) (emphasis added).

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 by amending the Communications Act to underscore the need for a *uniform* federal regulatory framework to govern the burgeoning 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 interstate radio communications service.[43]

Also in 1993, Congress enacted Section 332(c)(1) of the Act. Section 332(c)(1) makes clear that the Commission has broad authority over wireless carriers by generally applying Title II of the Communications Act to wireless service. But Section 332(c)(1) also *limits* the extent to which that authority should be exercised. More specifically, Congress indicated that the Commission should decide which of the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers. Congress mandated that the Commission base its decisions on review of "competitive market conditions."

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, the Commission concludes that enforcement is not warranted to protect consumers.

---

[43] 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).

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.[44] In multiple orders, the FCC has implemented this congressional direction to favor competition over regulation.[45]

The states often point out that Congress' 1993 preemption of state commission authority over rate and entry regulation did not eliminate pre-existing state authority over "other terms and conditions" of wireless service. That is certainly true, but while Section 332(c)(3)(A) is sometimes described as if it permanently "preserves" state regulation of "other terms and conditions" of wireless service, that is not so. To the contrary, the provision merely states that "*this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[46] In other words, while Section 332(c)(3) does not *itself* preempt regulation of "other terms and conditions," neither does it bar the *Commission* from preempting more broadly.

Congress, of course, knows how to "preserve" state and local authority, as opposed to merely declining to preempt such authority itself. For example, Congress preserved certain aspects of local zoning power in Section 332(c)(7) (entitled "preservation of local zoning

---

[44] 47 U.S.C. § 161.

[45] *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993,* Seventh Report, 17 FCC Rcd. 12985, 12988 (2002) ("*Seventh Report*") (stating that wireless industry has "continued to experience increased competition, innovation, lower prices for consumers, and increased diversity of service offerings"); *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, Second Report and Order, 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*, First Report and Order, 15 FCC Rcd. 17414, 17416-17 ¶ 6 (2000) (enumerating numerous other provisions of Title II that Commission has found inapplicable to wireless carriers).

[46] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

authority") by providing that "nothing in this Act" limits state or local authority over the certain matters relating to the placement of wireless towers. But Congress did not *preserve* state authority in Section 332(c)(3) (entitled "state preemption") — it just said that its decision to preempt rate and entry regulation did not, by itself, preempt state regulation of other terms and conditions of wireless service.

Thus, reading the provisions Congress enacted in 1993 and 1996 together, Congress has directed that wireless carriers be regulated primarily at the federal level, with regulation diminishing as competition develops. Congress in 1993 preempted state rate or entry regulation of wireless carriers, but did not itself preempt further.

B. The Wireless Industry Has Become Fully Competitive.

Because the wireless market has changed from a duopoly to a fully competitive market since 1993, the Commission should refrain from regulating wireless carriers except to the extent regulation is necessary to assist consumers in taking advantage of their competitive options. After forbearing from onerous regulation of wireless carriers — as the Commission has, by and large — the Commission should not permit the states to step in and re-regulate. That would conflict with Congress's vision of a wireless industry free from unnecessary regulation.

The wireless market has changed dramatically since 1993, when Congress applied common carrier regulation to the industry except to the extent that the Commission determined that competition rendered regulation unnecessary and did not itself preempt state regulation of the terms and conditions of wireless service. By 1994, the Commission 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.[47] At that time, wireless carriers had only a "ten percent penetration rate," although the Commission noted that wireless providers "have recently begun to target their marketing strategies toward the mass consumer market" rather than focusing exclusively on business users.[48]

In 1999, the Commission reported that the wireless penetration rate had increased to 26 percent.[49] 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."[50] That was because "new entrant network buildout and coverage ha[d] not caught up to that of cellular."[51]

In contrast, the Commission's *2004 Competition Report* on the wireless industry indicated that roughly 250 million people, or 87 percent 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.[52] The wireless penetration rate had increased to 54 percent — to more than 160 million wireless phones.[53]

An important part of the improvement and expansion of wireless services over the last ten years has been the carriers' shift from providing primarily local service (with

---

[47] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, First Report, 10 FCC Rcd. 8844, 8866-67 ¶ 65 (1995).
[48] *Id.* at 8844 ¶ 3.
[49] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fourth Report, 14 FCC Rcd. 10145, 10150 (1999).
[50] *Id.* at 10154.
[51] *Id.* at 10150.
[52] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Ninth Report, 19 FCC Rcd. 20597, 20618 ¶ 49 (2004) ("*2004 Competition Report*").
[53] *Id.* at 20601¶ 5.

"roaming" and long distance charges) to having a "national footprint." That trend is illustrated by AT&T Wireless's "Digital One Rate" plan, which was introduced in 1998 and, the Commission concluded, "altered the market and benefited consumers."[54] "Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of MOUs ["minutes of use"] to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges."[55]

To provide the kind of national pricing and service demanded by customers, Nextel and other national carriers have made substantial investments of capital and resources to develop national networks and back office 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.

Because the wireless market has become fully competitive and many wireless carriers have taken advantage of the opportunity to provide service without respect to state borders, it is clear that only limited regulation is warranted. Yet as the Commission noted, wireless carriers have recently been threatened by "an onslaught of state regulation that is making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."[56] As set forth directly below, the Commission has the power to stem that onslaught, and it should do so.

---

[54] *Id.* at 20644.
[55] *Id.*
[56] *Second Further Notice of Proposed Rulemaking*, ¶ 49.

C. The Commission May Preempt Unwarranted State Regulation of the Terms and Conditions of Wireless Service.

Although Congress did not preempt state regulation of the terms and conditions of wireless service, the Commission may. As the Supreme Court has stated, "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.*'"[57] 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."[58] "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority."[59]

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."[60] Moreover, the Court recognized that the legislative history said that the relevant statutory provision "'does not affect the authority of a franchising authority to establish standards'...that are not inconsistent with Commission standards."[61] But the Court held that the Commission had properly issued technical standards and prohibited localities from adopting additional standards, even standards that were not inconsistent with the Commission's standards in the sense that cable operators could not comply with both sets of

---

[57] *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)) (emphasis added).
[58] *Id.* at 63-64 (quoting *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355, 369 (1986)).
[59] *Id.* at 64.
[60] *Id.* at 69.
[61] *Id.* at 68.

standards.[62] In its decision, the Commission had concluded that it had adopted *all the technical standards that were needed*, just as we urge the Commission to balance the costs and benefits of regulation of billing and point of sale disclosures and adopt only those regulations that are warranted.[63]

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. For example, *Computer and Communications Industry Ass'n v. FCC* [64] 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."[65] 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."[66] The court concluded that state regulation of CPE was

---

[62] *See id.* at 69.

[63] As *City of New York* shows, 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 it intended to fall into that category, from "zoning" to "customer billing information." H.R. Rep. No. 103-111, pt.3 (1993). As an initial matter, those 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 perpetuity. In any event, legislative history can never trump subsequent legislation, and as explained 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 deregulatory goals to permit the states to promulgate regulations beyond those the Commission determines are warranted.

[64] 693 F.2d 198 (D.C. Cir. 1982)("CCIA").

[65] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384, 455 ¶ 185 (1980).

[66] *CCIA*, 693 F.2d at 214.

incompatible with the federal objective of developing a free, competitive market in customer telephone equipment.[67]

In *Cellular Phone Taskforce v. FCC*,[68] 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.'[69]

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. 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.[70]

The Commission recently 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."[71] The Commission concluded that applying traditional regulation to that VoIP service "directly conflicts with our pro-

---

[67] *See id.* at 214; *see also North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.1977), *cert. denied* 434 U.S. 874 (1977) (upholding Commission ban on state regulation of non-carrier-supplied telephone terminal equipment).
[68] 205 F.3d 82 (2d Cir. 2000).
[69] *Id.* at 92 (citations omitted).
[70] *Id.* at 96.
[71] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an order of the Minnesota Public Utilities Commission,* Memorandum Opinion and Order, 19 FCC Rcd. 22404 ¶ 1 (2004).

competitive deregulatory rules and policies."[72] As that illustrates, where the Commission pursues 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.

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 at the point of sale would stifle the further development of wireless competition. The ease and speed with which new services may be introduced to the national marketplace would be slowed 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 substantial benefits in addition to those provided by the regulations the Commission deems warranted.

Ironically, the well-intentioned efforts by multiple states to regulate the terms and conditions of wireless service would, because of the unified, integrated and interrelated nature of carriers' billing systems and back office processes, disserve consumers' interests. Consider, for example, the difficulties associated with assisting a customer who experienced a problem with their service and who originally subscribed to the service in state A, subsequently moved to state B, and experienced their service problem in state C. Assuming states A, B and C each had different rules for addressing the customer's problem, the customer service representative, who is typically not a lawyer, would need to decide which state's rules should apply.

---

[72] *Id.* at22415 ¶ 20.

Having made this initial legal judgment, the customer service representative would be confronted with a computer screen with potentially more than 50 different icons, each representing a different state or jurisdiction's rules governing wireless service. Only after he or she had completed these two initial tasks could the representative actually begin to address the customer's problem. It should be obvious that the amount of time necessary to address the customer's problem will increase, as will the opportunity for errors in solving the problem.[73]

The Commission should also remember that multiple unplanned changes to billing systems are always costly and always present opportunities for error due to the complexity and interrelated nature of these systems. A series of rapid and unplanned changes to carriers' back office systems resulting from a multiplicity of state laws governing wireless carrier practices is clearly a recipe for both trouble and additional expense. These costs will ultimately be passed on to the consumer. The end result will be higher prices for lower quality service for all consumers of wireless service. The Commission should not allow this to happen and should protect the interests of the interstate consumer, which will clearly suffer from multiple sets of state regulations of wireless service. Such a result is not in the public interest.

To prevent this result, 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

[73] The state regulations need not conflict to produce this unfortunate result. It is sufficient that there be multiple differing state regulation of wireless.

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 many carriers.

In light of Congress's instructions in 1996 as well as 1993, 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 — and it should exercise that authority.

V. THE COMMISSION SHOULD PRESERVE A SUBSTANTIAL ROLE FOR THE STATES THAT DOES NOT THREATEN TO IMPOSE MULTIPLE AND INCONSISTENT STANDARDS ON CARRIERS.

Nextel believes that state commissions may play an important role in ensuring that their citizens can take advantage of their competitive options. State commissions should receive any complaints from citizens of the state with respect to billing or point of service disclosures and refer them to the appropriate carrier. They should monitor those complaints, but once a state commission reviews a complaint and determines that it implicates the Commission's rules, it should forward that complaint to the Commission.

If warranted, however, the state commission should ask the Commission to conduct an investigation or amend its regulations. Although it is rarely used, Section 208 of the Act gives state commissions the authority to bring complaints to the FCC. State commissions should be encouraged to bring such claims when their experience suggests that some aspect of the Commission's billing or point of sale rules needs clarification.

Moreover, state commissions may file petitions for rulemaking if they conclude that additional rules or amendments to the Commission's rules are warranted. Again, state commissions could use their expertise and their knowledge of consumer concerns to provide useful advice, and this Commission could ensure that wireless carriers could continue to operate on a national basis. Under such a system, state commissions would perform a valuable service for their citizens. They would also perform a valuable service for carriers and the Commission by highlighting complaints warranting swift resolution.

The Commission, however, should not authorize state commissions to enforce the rules the Commission adopts. Some of the rules the Commission adopts will be straightforward, such as a rule requiring the separation of "mandated" charges from other line items. Frankly, we doubt there will be substantial need for enforcement of such rules because wireless carriers will comply with them. Other rules, however, likely will proscribe the distribution of "misleading" information on bills and at the point of sale or enunciate other standards that will necessarily be somewhat ambiguous. With respect to such rules, there needs to be a single adjudicator. As already discussed in Section I(B) above, even small changes in the required billing format can prove technically — and financially — burdensome. But state commissions would almost surely differ to some extent in deciding, for example, what is "misleading" and what is and is not "clear and conspicuous." The result of state enforcement power would thus be a logistical and technological nightmare for carriers, the economic consequences of which would only be passed on to consumers. Indeed, permitting state commissions to enforce rules of that nature is likely to be little different than permitting them to adopt their own regulations.

CONCLUSION

For the foregoing reasons, Nextel urges the Commission to:

- Require carriers to separate those charges they are required to pass through to end-users from other charges, but *not* to require more than these two categories of charges or require universal labels for these categories;
- Require carriers to disclose only material rate information that is within their knowledge and control at the point of sale and *not* require carriers to predict future changes to taxes and regulatory fees;
- Preempt the states from enacting any bill format or point of sale disclosure rules in addition to any rules the Commission adopts here and make clear that carriers that comply with the Commission's rules in these areas are not subject to liability under any state theory of proper bill format or point of sale disclosure;
- Permit state commissions, in appropriate circumstances, to bring claims on behalf of their citizens to the Commission, but reserve for itself the role of enforcing its own rules.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.

Christopher J. Wright
Timothy J. Simeone
Michelle Meyer*
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 730-1330

Counsel to Nextel Communications, Inc. and Nextel Partners, Inc.

* Law student

Robert S. Foosaner
Senior Vice President &
Chief Regulatory Officer — Government Affairs

Leonard J. Kennedy
Senior Vice President & General Counsel

Kent Y. Nakamura
Vice President and Deputy General
Counsel – Regulatory

Laura L. Holloway
Vice President — Government Affairs

Christopher R. Day
Counsel — Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

Donald J. Manning
Vice President and General Counsel

Todd B. Lantor
Chief Regulatory Counsel
NEXTEL PARTNERS, INC.
4500 Carillon Point
Kirkland, WA 98033
(425) 576-3660

June 24, 2005