

**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 T-MOBILE USA, INC.**

Sara F. Leibman  
Howard J. Symons  
Robert G. Kidwell  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Of Counsel

Thomas J. Sugrue  
Vice President, Government Affairs  
Kathleen O'Brien Ham  
Managing Director,  
Federal Regulatory Affairs  
James W. Hedlund  
Senior Corporate Counsel,  
Federal Regulatory Affairs

T-MOBILE USA, INC.  
401 Ninth Street, N.W.  
Suite 550  
Washington, D.C. 20004  
(202) 654-5900

June 24, 2005

**TABLE OF CONTENTS**

INTRODUCTION AND SUMMARY ..... 1

I. IN THE COMPETITIVE WIRELESS MARKET, ADDITIONAL  
CONSUMER PROTECTION RULES ARE UNNECESSARY ..... 3

A. Wireless Carriers Compete on Customer Service..... 3

B. Congress Established a Deregulatory Framework for Wireless Services..... 5

II. IF THE COMMISSION ADOPTS ADDITIONAL WIRELESS RULES, IT  
SHOULD TAKE INTO ACCOUNT COMPETITIVE MARKET  
CONDITIONS ..... 8

III. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF  
WIRELESS CARRIERS’ BILLING AND DISCLOSURE PRACTICES ..... 11

A. Excessive State Regulation Interferes with Congress’s Goals for the Wireless  
Industry ..... 11

B. The Commission Has the Authority To Preempt State Regulation of  
the “Other Terms and Conditions” of Wireless Service ..... 16

C. The State Role in Wireless Billing and Disclosure Regulation Should  
Be Limited to Enforcement of Laws of General Applicability..... 21

CONCLUSION..... 24

**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	)	CG Docket No. 04-208
Advocates' Petition for Declaratory Ruling	)	
Regarding Truth-in-Billing	)	

**COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”) hereby submits its comments on the Second Further Notice of Proposed Rulemaking issued in the above-captioned docket.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

In the robustly competitive wireless environment, T-Mobile does not believe the Commission’s proposed billing and point-of-sale disclosure rules are either warranted or wise. As a matter of business strategy, wireless providers are taking a variety of pro-consumer actions, including expanding the scope of upfront disclosures and simplifying bills. Indeed, for two years in a row, T-Mobile has won the top customer service award from J.D. Power and Associates, and other wireless carriers are actively seeking to displace T-Mobile through introduction of new customer care features and improved

---

<sup>1/</sup> *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55 (rel. March 18, 2005) (“*TIB Second Order*” or “*TIB Second FNPRM*”).

response to consumer complaints. Imposition of detailed regulatory mandates runs the risk of interfering with these market-driven initiatives.

If the Commission nonetheless believes that some additional regulations are necessary, it should adopt general guidelines as opposed to rigid mandates. Consumers will benefit far more if wireless carriers strive to differentiate themselves on the basis of customer service than if the goal is merely to meet a regulatory baseline. In addition, Commission regulations should be developed only if needed to address a specific substantial and continuing problem.

Most importantly, T-Mobile urges the Commission to preempt state regulation of wireless billing and disclosure practices, because such regulation conflicts with congressional and Commission goals of promoting wireless competition through the creation of a uniform, federal regime. Ignoring nearly a decade of experience under this approach -- which saw the introduction of four or five new wireless competitors in virtually every market, exciting new digital technologies, innovative pricing plans, and vastly improved customer service -- multiple state legislatures and commissions have decided to regulate wireless carriers as if they were monopolist incumbents. If not curbed, the resultant patchwork quilt of state requirements on everything from font size to the wording of consumer notices will raise the costs of providing wireless service, compromise national rate plans, and reduce consumer choice.

Decades of case law make clear that the Commission has the authority to preempt state regulations that stand as an obstacle to the fulfillment of legitimate federal objectives. Given the significant harm to competition and consumers that the recent state actions threaten, the Commission should exercise its preemptive power by restricting

state regulation of wireless billing and disclosure practices to enforcement of their laws of general applicability. This would provide wireless consumers with the same protections as all other purchasers of goods and services in competitive markets and, at the same time, allow them to enjoy the benefits that only competition can bring.

**I. IN THE COMPETITIVE WIRELESS MARKET, ADDITIONAL CONSUMER PROTECTION RULES ARE UNNECESSARY**

**A. Wireless Carriers Compete on Customer Service**

In competitive industries, customer service is driven by business imperatives; failure to satisfy customers means failure as a business. For two years in a row, J.D. Power and Associates has awarded to T-Mobile the claim for “Highest Ranked Customer Service Performance” among all wireless carriers.<sup>2/</sup> Notably, just a few years before, T-Mobile was at or near the bottom of this category, but it made a business decision that to compete successfully in the wireless arena, it had to raise significantly its level of customer service. Indeed, providing world-class service for all subscribers is among the most important elements of T-Mobile’s competitive strategy.

According to the J.D. Power survey of customer care for wireless carriers, T-Mobile improved on last year’s highest-ranking overall performance, scoring particularly well for answering customer calls promptly and resolving issues during the first call for support. T-Mobile also has introduced several other initiatives in the past twelve months that may have contributed to its high customer service ranking. For example, T-Mobile’s new “Personal Coverage Check” or “PCC” allows prospective customers to assess the quality of T-Mobile’s signal coverage down to the neighborhood

---

<sup>2/</sup> In addition to the residential consumer awards, J.D. Power and Associates announced in May 2005 that T-Mobile ranked “Highest In Customer Satisfaction With Business Wireless Service.”

level. Last month, Commissioner Geoffrey F. Brown of the California Public Utilities Commission (“CPUC”), joined by Commission President Michael R. Peevey and Commissioner Dian M. Grueneich, praised T-Mobile for instituting the PCC. Commissioner Brown stated that “T-Mobile deserves to be commended for helping the public know what it can and cannot expect from their service.”<sup>3/</sup> Importantly, the PCC was the result of the company’s conscious decision that signing up customers who ultimately will be unhappy with T-Mobile’s service makes poor financial sense and is counterproductive in the long run.<sup>4/</sup>

In addition to features such as PCC, T-Mobile and more than 30 of its wireless carrier competitors have voluntarily signed on to the CTIA Consumer Code (“CTIA Code”).<sup>5/</sup> As the Commission notes, the CTIA Code was developed by the industry “to facilitate the provision of accurate information between consumers and wireless service providers.”<sup>6/</sup> Wireless carriers have made significant changes to their systems to implement its comprehensive requirements, which include the provision of accurate descriptions of charges on bills and the separation of charges retained by the carrier from

---

<sup>3/</sup> See Statement of Commissioner Geoffrey F. Brown Regarding T-Mobile First To Have On-Line Wireless Telephone Coverage Maps (May 5, 2005) (available at [www.cpuc.ca.gov/static/aboutcpuc/commissioners/02brown/statements/05102005\\_wirelessmaps.htm](http://www.cpuc.ca.gov/static/aboutcpuc/commissioners/02brown/statements/05102005_wirelessmaps.htm)).

<sup>4/</sup> Another CPUC representative similarly noted that PCC “is a big step forward for consumers, and we hope other carriers follow suit.” See “7 On Your Side” Tests Cell Phone Coverage (June 20, 2005) (available at [http://abclocal.go.com/kgo/news/7oys/062005\\_7oys\\_cell\\_coverage.html](http://abclocal.go.com/kgo/news/7oys/062005_7oys_cell_coverage.html)). Given the exceptionally positive reception T-Mobile has received about PCC from its customers, it is very likely that other wireless providers will do exactly that.

<sup>5/</sup> CTIA Code (available at [www.ctia.org/wireless\\_consumers/consumer\\_code/index.cfm](http://www.ctia.org/wireless_consumers/consumer_code/index.cfm)). In settlement of allegations of misleading advertising and unclear disclosures, Verizon Wireless, Cingular Wireless, and Sprint PCS entered into Assurances of Voluntary Compliance (“AVC”) in 2004 with Attorneys General from 32 states. See *TIB Second Order* ¶ 12 n.28. T-Mobile is not a party to the AVC because it was not a target of the state investigations.

<sup>6/</sup> *TIB Second Order* ¶ 11.

taxes and fees remitted to the government. In addition, the CTIA Code requires its signatories to give customers a penalty-free cancellation period, and disclose at the point of sale material rates, terms, and conditions, including “the amount or range of any . . . fees or surcharges that are collected and retained by the carrier.”<sup>7/</sup>

Contrary to the suggestions of some consumer organizations, wireless carriers do not need government prodding to provide detailed upfront disclosures, straightforward bills, and other services useful to consumers. T-Mobile’s J.D. Power awards and the greatly improved customer service they represent are the result of a focused business strategy, and not of government micromanagement of T-Mobile’s relationship with its subscribers.

**B. Congress Established a Deregulatory Framework for Wireless Services**

Not only is regulating wireless carriers with a heavy hand unnecessary to protect consumers, it is contrary to Congress’s intent that the wireless regulatory regime rely primarily on market forces. Specifically, as part of landmark legislation enacted in 1993,<sup>8/</sup> Congress added a new provision -- section 332(c)(1) -- to the Act, which permits the Commission to avoid rote application of statutory common carrier provisions to commercial mobile radio services (“CMRS”), and instead to consider (1) whether a particular provision is necessary to ensure that rates are just and reasonable; (2) whether the provision is necessary to protect consumers; and (3) whether the public interest favors

---

<sup>7/</sup> CTIA Code, Items One and Six.

<sup>8/</sup> See Omnibus Budget Reconciliation Act of 1993 (“OBRA”), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392.

enforcement or forbearance.<sup>9/</sup> As the Commission has explained, this deregulatory approach would allow “wireless competition to flourish, with substantial benefits to consumers.”<sup>10/</sup>

The goal of accelerating wireless growth has been accomplished far beyond what Congress could have anticipated in 1993. Then, the FCC had issued only two licenses to provide wireless service in each geographic area and wireless service had only a “ten percent penetration rate.”<sup>11/</sup> Five years later, wireless penetration had increased to 26 percent and there were almost 70 million wireless customers in the United States.<sup>12/</sup> That upward trend continues today -- by year end 2004, more than 182 million people in the country subscribed to wireless services (up 23.4 million from 2003).<sup>13/</sup> Wireless carriers also are expanding their coverage substantially, increasing their cell site numbers by a

---

<sup>9/</sup> 47 U.S.C. § 332(c)(1). Section 332(c)(1) provided the model for section 10, the general forbearance provision added to the Communications Act in 1996. Section 10, however, is broader than section 332(c)(1) because it allows the Commission to forbear from three sections of the Act that were explicitly excluded from the Commission’s forbearance authority in 1993. *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) (finding that the section 10 permits forbearance from 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). Section 10 also made forbearance mandatory, as opposed to the permissive forbearance in section 332. *Compare* 47 U.S.C. § 160 (“the Commission shall forbear”) *with* 47 U.S.C. § 332(c)(1) (the Commission “may specify by regulation” provisions of Title II inapplicable to wireless).

<sup>10/</sup> *See TIB Second Order* ¶ 35 (quoting *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 19 FCC Rcd 20597, 20601 ¶ 4 (2004)).

<sup>11/</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8866-67 ¶¶ 3, 65 (1994).

<sup>12/</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 14 FCC Rcd 10,145, 10,150 (1999); CTIA Semi-Annual Wireless Industry Survey (2005) (available at <http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf>) (“CTIA Survey”).

<sup>13/</sup> *See* CTIA Survey.

factor of eight percent each year.<sup>14/</sup> Notably, wireless bills are considerably lower than they were in 1993, notwithstanding that average customer usage has grown at phenomenal rates -- at the end of last year, the reported wireless minutes of use exceeded one trillion for the first time ever.<sup>15/</sup>

The deregulation of CMRS that Congress set in motion stimulated a competitive marketplace that has benefited consumers through affordable rates and innovative pricing plans, such as free night and weekend minutes and free mobile-to-mobile calling. In addition, wireless carriers regularly offer incentives, including steeply discounted phones, when subscribers enter into term agreements. Requiring wireless carriers to act in lock-step through the imposition of rigid consumer protection mandates would harm both consumers and competition -- a result plainly not sought by Congress in 1993 or the hundreds of millions of wireless subscribers today.

In particular, regulation of wireless carriers beyond the truth-in-billing guidelines already adopted in the *TIB Second Order* is wholly unnecessary.<sup>16/</sup> Although the industry may have suffered growing pains as the number of subscribers more than doubled in a matter of just a few years, it has been quick to respond to customer service deficiencies through a variety of strong measures, including the CTIA Code and individual company

---

<sup>14/</sup> *Id.*

<sup>15/</sup> *Id.*

<sup>16/</sup> In addition to extending its truth-in-billing rules to wireless carriers, the *TIB Second Order* clarified that line item charges are “rates” and, therefore, state regulation that either prohibits or requires a wireless carrier from recovering costs in separate line items is barred under section 332(c)(3). *TIB Second Order* ¶¶ 30-31. T-Mobile appreciates this important clarification. As T-Mobile and other wireless carriers have noted in previous filings, some laws and rules recently promulgated by various states plainly cross the line into prohibited rate and entry regulation. *See, e.g.*, Letter to FCC Chairman Michael K. Powell and FCC Commissioners from Leonard J. Kennedy, Senior Vice President and General Counsel, Nextel Communications, and Thomas J. Sugrue, Vice President, Government Affairs, T-Mobile, CG Docket No. 04-208, at 7-9 (Dec. 13, 2004).

initiatives. The Commission should not jump in prematurely to mandate regulatory solutions to problems that the industry is addressing voluntarily.

## **II. IF THE COMMISSION ADOPTS ADDITIONAL WIRELESS RULES, IT SHOULD TAKE INTO ACCOUNT COMPETITIVE MARKET CONDITIONS**

Notwithstanding the foregoing, if the Commission believes that some additional regulation of wireless providers is warranted, T-Mobile urges it to favor general principles over rigid mandates. Consumers will benefit far more if wireless carriers continue to compete -- and differentiate themselves -- on the basis of customer service than if the carriers are shackled by prescriptive regulatory requirements. In addition, to avoid imposing unnecessary costs on a competitive industry, the Commission should only adopt rules in areas in which it has identified a substantial and continuing problem.

The Commission's proposal to require carriers to place "government mandated" charges in a separate section of the bill, for example, is a reasonable means of ensuring that customers have accurate information about the services being provided.<sup>17/</sup> Of course, as the Commission recognizes, the difficulty arises in attempting to define which charges are mandated and which are not. T-Mobile prefers the Commission's second proposed definition, which turns on "whether the amount listed is remitted directly to a government entity or its agent."<sup>18/</sup> This approach would draw a clear line between fees that are a direct pass-through to the government and fees that are collected and retained by the carrier.

By contrast, the Commission's proposal to identify mandated charges as those that "a carrier is *required* to collect directly from customers and remit to federal, state or

---

<sup>17/</sup> TIB Second FNPRM ¶ 39.

<sup>18/</sup> TIB Second FNPRM ¶ 41.

local governments” would give legislatures and agencies too much leeway in determining how the taxes and fees they impose on carriers are described to consumers.<sup>19/</sup> The effect of placing any tax that a government entity fails -- or refuses -- to designate as “required” in the discretionary section of consumers’ bills would be to deprive consumers of complete information about the range of taxes and fees imposed by government entities.<sup>20/</sup> This would result in “hidden taxes” and deny consumers complete disclosure. Given that this proceeding is all about *truth*-in-billing, the Commission should prevent governments -- federal, state, and local -- from hiding their own assessments and avoiding taxpayer accountability.

Nor does T-Mobile believe it would serve the public interest for the Commission (or any other governmental entity) to mandate the use of specific language for the labeling of categories of charges.<sup>21/</sup> Wireless carriers consistently strive to make their bills simpler and less intimidating to consumers. In light of the limited space on telecommunications bills, labeling requirements could interfere with these efforts. Moreover, the mix of wireless services and applications is constantly changing, which could cause government labels to become outdated shortly after their adoption, and themselves cause customer confusion. The Commission’s existing requirements that “billing descriptions be brief, clear, non-misleading and in plain language,” and that carriers refrain from “represent[ing] discretionary line item charges in any manner that

---

<sup>19/</sup> *TIB Second FNPRM* ¶ 40 (emphasis in original).

<sup>20/</sup> As the Commission acknowledges, carriers are subject to a number of fees today that are imposed by the government but are not “required” to be passed on to customers. *TIB Second FNPRM* ¶ 40 (“Under this definition, some examples of non-mandated, government authorized but discretionary charges would include state Telecommunications Relay Service and universal service charges.”).

<sup>21/</sup> *TIB Second FNPRM* ¶ 44.

suggests such line items are taxes or charges required by the government,” are sufficient to address and deter abuses in the labeling of categories of charges.<sup>22/</sup> Apart from these general guidelines, carriers should be given the flexibility to describe the charges or categories of charges they put on their bills.

Similarly, the Commission should not prohibit carriers from combining two or more regulatory charges into a single line item.<sup>23/</sup> In 1996, some state and consumer groups argued in favor of the one-charge approach, others advocated for separate lines for each fee, and yet others contended that carriers should not be able to separate out any fees resulting from regulatory action.<sup>24/</sup> Although the Commission noted that “precluding a breakdown of line item charges would facilitate carriers’ ability to bury costs in lump figures,” it also “recognize[d] that consumers may benefit from a simplified, total charge approach.”<sup>25/</sup> In the end, the Commission correctly decided “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.”<sup>26/</sup> Because carrier decisions about whether to assess line item fees and the amount of such fees are subject to competition in the wireless industry, it is unnecessary for the Commission to take a more prescriptive approach today.<sup>27/</sup>

---

<sup>22/</sup> *TIB Second FNPRM* ¶ 1.

<sup>23/</sup> *See TIB Second FNPRM* ¶ 48.

<sup>24/</sup> *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492, 7526 ¶ 55, nn.150-152 (1999) (“*TIB First Order*”).

<sup>25/</sup> *TIB First Order* ¶ 55.

<sup>26/</sup> *Id.*

<sup>27/</sup> T-Mobile describes its regulatory programs fee in a manner that lets customers know the purpose for which it is being assessed and that it is not a government-imposed tax or fee: “We elect to collect and retain this Fee to help recover a portion of our costs incurred to satisfy certain

Finally, if the Commission believes that point of sale disclosure rules are needed, it should adopt general guidelines, as opposed to restrictive mandates on the items that must be provided to, and the language used when communicating with, prospective customers. The Commission's questions on this point make abundantly clear that defining with specificity when a particular disclosure is accurate enough is a very difficult task.<sup>28/</sup> As discussed above, moreover, wireless carriers have significant business incentives to provide as much information as possible about their rates and services before customers sign a contract. It simply is not in a carrier's long term financial interest to alienate newly-acquired customers by surprising them with undisclosed fees or charges.

### **III. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF WIRELESS CARRIERS' BILLING AND DISCLOSURE PRACTICES**

#### **A. Excessive State Regulation Interferes with Congress's Goals for the Wireless Industry**

In addition to authorizing the Commission to rely primarily on market forces in regulating the wireless industry, Congress's 1993 amendments to the Communications Act were intended to ensure that the emerging wireless industry would be governed by a uniform, *federal* regulatory regime.<sup>29/</sup> Specifically, Congress amended section 2(b) to eliminate the traditional limitation on federal authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate

---

federal government mandates and programs related to customers, including, without limit, wireless number pooling, local number portability and E911."

<sup>28/</sup> See *TIB Second FNPRM* ¶ 55 (asking whether it would be misleading if "actual government mandated surcharges [were] in excess of 25 percent greater than estimated government mandated surcharges . . . [or] if such actual surcharges were in excess of 10 percent greater than such estimated surcharges").

<sup>29/</sup> See Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392.

communication service” insofar as they relate to the provision of commercial mobile service.<sup>30/</sup> Congress also enacted section 332(c)(3)(A), which prohibits states from regulating the entry of or rates charged by CMRS carriers unless the state provides concrete evidence that market conditions in that state fail to protect consumers from unjust and unreasonable rates and the wireless service is a replacement for landline telephone service in a substantial portion of the state.<sup>31/</sup> These provisions, taken together, reflect Congress’s recognition that a uniform regulatory regime applicable to CMRS would “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”<sup>32/</sup>

Congress intended the 1993 legislation to promote wireless growth through two interdependent avenues -- federal forbearance from enforcement of many statutory provisions applicable to telecommunications carriers and a strict prohibition on state regulation of wireless rates and entry. The Commission generally has upheld its part of the bargain by regulating CMRS with a light touch, but in recent years a number of states have been rushing in to fill what they perceive as a regulatory void on the federal side with wireless-specific rules that comprehensively and in considerable detail regulate such

---

<sup>30/</sup> 47 U.S.C. § 152(b). See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8<sup>th</sup> Cir. 1997), *rev’d on other grounds sub nom., AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>31/</sup> 47 U.S.C. § 332(c)(3)(A). A number of states took Congress up on its invitation to seek continued rate regulatory authority shortly after enactment of section 332. The Commission denied all the petitions on the ground that the states had failed to make the requisite showings under section 332(c)(3)(A). See, e.g., *Petition of the People of the State of Cal. and the Pub. Utils. Comm’n of the State of Cal.*, 10 FCC Rcd 7486 (1995); *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Servs.*, 10 FCC Rcd 7842 (1995); *Petition on Behalf of the State of Haw.*, 10 FCC Rcd 7872 (1995); *Petition of Behalf of the State of Conn.*, 10 FCC Rcd 7025 (1995) (“*Connecticut Petition Order*”), *aff’d, Connecticut Dep’t of Pub. Util Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996).

<sup>32/</sup> H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

matters as advertising, billing, and consumer disclosures. These states justify their increased oversight on a provision in section 332(c)(3)(A) that permits states to continue to exercise authority over the “other [non-rate and non-entry] terms and conditions” of wireless service.<sup>33/</sup> Although only a few states have adopted such regimes as of today, there is increasing state interest in regulating broad aspects of the wireless business pursuant to this “other terms and conditions” language.

The arguments offered by consumer groups and state regulators for more intensive state involvement in wireless matters do not withstand scrutiny. While Congress may have intended a continuing state role in consumer protection and similar matters that are applicable to all businesses in a state, it did not expect such regulation to interfere with its overarching goals for the wireless industry. Congress’s recognition that wireless services “operate without regard to state lines” cannot be reconciled with dozens of individual rules on bill formatting, font size for customer notifications, trial periods, and mapping methodology -- each of which legally is bound by state lines. Wireless carriers and federal regulators have had ten years’ experience with minimal, federal regulation under section 332, and there is no dispute that Congress’s approach has worked exceedingly well.

A multitude of differing state wireless regulations not only diverge from congressional and Commission intent, they have the potential to conflict with one another. As a group of state commissioners from both rural and urban states recently explained to the Commission, allowing each state to establish its own billing guidelines is unworkable:

---

<sup>33/</sup> 47 U.S.C. § 332(c)(3)(A).

The recent California Bill of Rights experiment went so far as to dictate the font size providers were to use. Imagine Florida requiring a font size of Times New Roman 12 but New York requiring Arial 11. As a more substantive example, imagine Maryland permitting the disclosure of a certain fee pursuant to state authority but Texas prohibiting such disclosure. The very real potential for conflicting state regulations, and the impact (financial and otherwise) of complying with a patchwork of rules does not serve the consumers' interest. *Regulators may feel good about having addressed an issue -- but consumers don't necessarily win when multiple jurisdictions, with the best of intentions, impose additional regulatory hurdles that ultimately cost consumers.*<sup>34/</sup>

These commissioners are correct that the cost to carriers and consumers of satisfying dozens of detailed state rules is very high. For T-Mobile to comply with the CPUC's fifty pages of regulations -- covering everything from the language that must be highlighted in customer notifications to the specific words that must be used to describe charges -- it had to alter a number of billing and customer care systems and train employees *nationwide*.<sup>35/</sup> Although California may have been the first state to develop a comprehensive regime of this sort applicable to wireless, it probably will not be the last unless the Commission asserts federal jurisdiction to ensure a uniform, national scheme. Even minor differences between the jurisdictions on bill format and permissible

---

<sup>34/</sup> Letter to Marlene H. Dortch, Secretary, FCC, from Ella Germani, Chairman, Rhode Island Public Utility Commission; Robert K. Sahr, Vice-Chairman, South Dakota Public Service Commission; Ellen C. Williams, Vice Chairman, Kentucky Public Service Commission; Randy Bynum, Commissioner, Arkansas Public Service Commission; James Connelly, Commissioner, Massachusetts Dept. of Telecommunications & Energy; Kevin Cramer, Commissioner, North Dakota Public Service Commission; Charles M. Davidson, Commissioner, Florida Public Service Commission; Susan P. Kennedy, Commissioner, California Public Utility Commission; Connie Murray, Commissioner, Missouri Public Service Commission; Anthony Rachal, Commissioner, District of Columbia Public Service Commission, CG Docket No. 04-208, at 8 (March 3, 2005) (emphasis in original).

<sup>35/</sup> On January 27, 2005, the CPUC voted to suspend its sweeping "bill of rights" in order to give the commission the opportunity to determine whether and to what extent the rules should be revised. Subsequently, the CPUC requested comment on an amended, and significantly less intrusive, set of rules. *See Order Instituting Rulemaking on the Commission's Own Motion To Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Assigned Commissioner's Ruling, R.00-02-004 (CPUC May 2, 2005).

disclosure language could cause compliance costs to skyrocket. To the extent, moreover, that one or two states impose different requirements on issues such as the duration of contracts<sup>36/</sup> or trial periods,<sup>37/</sup> it could impair wireless carriers' ability to provide service on a nationwide basis.

In addition, consumers are not necessarily the winners when states adopt prescriptive wireless regulations because their choices become more limited. An important objective of Congress's national approach for the wireless industry was to increase consumer choice -- not just among carriers, but among the services and features provided by each carrier. In other words, Congress expected wireless carriers to differentiate themselves through unique aspects of their offerings, and consumers could then comparison shop based on the feature most important to them. While some carriers have opted to tout their large subscriber bases or their networks, T-Mobile has made customer service its number one priority.

This does not mean that other carriers ignore consumer welfare -- to the contrary, competition has raised the level of customer care significantly throughout the industry as carriers fight to retain their current customers and acquire new ones. Ironically, however, heavy regulation on the part of states could reverse this trend. If all wireless carriers are required to answer calls within a specified number of rings, resolve complaints within a

---

<sup>36/</sup> A bill introduced in Massachusetts would prohibit wireless carriers from offering contracts in excess of one year regardless of consumer wishes.

<sup>37/</sup> The currently suspended California rules and proposed Massachusetts legislation would give customers 30 days from purchase to cancel service without penalty; draft Vermont rules provide for a 15-day trial period; New York's proposed bill would allow cancellation until 15 days after the last day of the first billing cycle; and AARP's model legislation (which it is encouraging all states to enact) would prohibit assessment of an early termination fee if the service is cancelled 20 days after the date of the first bill for monthly service. The CTIA Code requires the carrier signatories to give their customers a 14-day trial period.

set number of days, and disclose coverage at the neighborhood level, they would have reduced incentives to introduce these features on their own initiative. As the smallest among the nationwide wireless providers, T-Mobile especially recognizes that excellent customer service is essential. It should be permitted to distinguish itself in this regard as a matter of business strategy rather than have a standardized system imposed on everyone through regulatory fiat.

Congress's 1993 enactment of a uniform, national, deregulatory framework for wireless has helped the industry provide consumers with significant benefits in the form of lower prices, vastly expanded coverage, new technologies, and improved customer care. Allowing states to impose new, detailed, and conflicting wireless policies poses a real danger to the statute's pro-consumer and pro-competition objectives.

**B. The Commission Has the Authority To Preempt State Regulation of the "Other Terms and Conditions" of Wireless Service**

Federal agencies may preempt state regulation "when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>38/</sup> That test is satisfied here. As the Commission found in the *TIB Second FNPRM*, "there are clearly discernible federal objectives that may be undermined by states' 'non-rate' regulation of CMRS carriers' billing practices."<sup>39/</sup> Congress and the Commission intended the wireless industry to grow largely unfettered by intrusive and unnecessary regulation, but a number of states have chosen to ignore this preference. The discussion above sets forth the detrimental effects such state actions are beginning to have on wireless competition and consumers.

---

<sup>38/</sup> *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

<sup>39/</sup> *TIB Second FNPRM* ¶ 50.

The Commission’s authority to preempt state consumer protection or billing regulations is not restricted by Congress’s decision to allow states to continue to regulate the “terms and conditions” of wireless service. Section 332(c)(3) merely provides that “*this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services,”<sup>40/</sup> but it does not prevent the Commission from preempting more broadly should the state regulation conflict with other sections of the Act or FCC regulations implementing those sections. Congress clearly distinguished between *prohibited* rate and entry regulation and *permissible* terms and conditions regulation, but in doing so it did not grant states a blanket exemption from preemption no matter the effect of terms and conditions rules on federal objectives. To the contrary, as the Commission itself emphasized in 1994, if “a State’s regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes [the Commission’s] federal policy of creating regulatory symmetry, [the Commission] would have authority under *Louisiana PSC* to preempt such regulation.”<sup>41/</sup>

Although the Communications Act expressly precludes all state action in a given area only in a few cases, the Commission may nevertheless preempt state regulation that impedes a federal purpose.<sup>42/</sup> 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

---

<sup>40/</sup> 47 U.S.C § 332 (c)(3)(A) (emphasis added).

<sup>41/</sup> *Implementation of Sections 3(n) & 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1506 ¶ 257 n.517 (1994) (“*Second CMRS Report*”) (citing *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355 (1986)).

<sup>42/</sup> *See City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (*quoting Louisiana PSC*, 476 U.S. at 369) (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.”).

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."<sup>43/</sup>

It is not uncommon for the Commission to find that state regulation in the communications area conflicts with federal objectives -- even in situations in which the Commission itself has chosen to forbear from regulating. For example, in its recent *Vonage Order*, the Commission determined that Voice over Internet Protocol ("VoIP") service (like wireless) cannot readily be separated into interstate and intrastate communications and that compliance with state certification and other requirements would therefore negate valid federal policies and rules.<sup>44/</sup> The Commission held that applying traditional telephony regulation to VoIP service "directly conflicts with [its] pro-competitive deregulatory rules and policies."<sup>45/</sup>

Similarly, as part of its earlier efforts to remove enhanced services from the telecommunications regulatory structure, the Commission preempted the Georgia Public Service Commission's decision restricting BellSouth's ability to market its voicemail service to new customers.<sup>46/</sup> The Commission found that BellSouth's services were jurisdictionally mixed and that the interstate and intrastate components could not be severed from one another. It therefore applied the test set forth in *Louisiana PSC* that the Commission may preempt state regulations that "would thwart or impede the exercise of

---

<sup>43/</sup> *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)).

<sup>44/</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶¶ 1, 14 (2004) ("*Vonage Order*"); see also *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, ¶¶ 3, 20 (rel. June 3, 2005).

<sup>45/</sup> *Vonage Order* ¶ 20.

<sup>46/</sup> *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992).

lawful federal authority over interstate communications.”<sup>47/</sup> The Commission concluded that the Georgia Commission’s order displaced the FCC’s chosen deregulatory framework for enhanced services and effectively undermined important federal objectives.<sup>48/</sup>

The VoIP and enhanced services preemption cases cited above followed the Commission’s 1980 *Computer II* decision in which the Commission detariffed customer premises equipment (“CPE”). The Commission found that its move to carrier-determined CPE pricing coupled with the unbundling of CPE from local phone service “necessarily precludes any other result by the states.”<sup>49/</sup> In upholding the Commission’s decision, the D.C. Circuit Court of Appeals explained 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.”<sup>50/</sup> The court rejected arguments by some parties that the Commission had unlawfully preempted state regulation of CPE “by creating a vacuum of deregulation,” and responded that “Federal regulation need not be heavy-handed in order to preempt state regulation.”<sup>51/</sup> The court concluded that “Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that

---

<sup>47/</sup> *Id.* ¶ 18.

<sup>48/</sup> *Id.* ¶ 20.

<sup>49/</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384, 455 ¶ 185 (1980).

<sup>50/</sup> *Computer Communications Industry Ass’n v. FCC (“CCIA”)*, 693 F.2d 198, 214 (D.C. Cir. 1982).

<sup>51/</sup> *Id.* at 217 (quoting *New York State Comm’n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982)).

the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capricious, nor an abuse of discretion.”<sup>52/</sup>

The U.S. Supreme Court likewise has upheld the applicability of conflict preemption in situations in which the federal government has deliberately chosen not to regulate in a specific area. In *Geier v. American Honda Co., Inc.*, the Court held that the Supremacy Clause of the U.S. Constitution invalidates not only conflicting state laws “that make it ‘impossible’ for private parties to comply with both state and federal law,” but it nullifies state laws “that prevent or frustrate the accomplishment of a federal objective.”<sup>53/</sup> In that case, the Department of Transportation had expressly rejected a single mandatory standard for automobile safety devices, which led the Court to conclude that “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.”<sup>54/</sup>

As *Geier* and the FCC decisions discussed above illustrate, when a federal agency has determined to take a hands-off approach to regulation under authority granted by Congress, a state’s decision to “fill the void” with its own prescriptive regime has the serious potential to undercut federal objectives.<sup>55/</sup> Although Congress may have believed ten years ago that preserving state authority over the terms and conditions of wireless

---

<sup>52/</sup> *Id.*; see also *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4<sup>th</sup> Cir.), *cert. denied* 434 U.S. 874 (1977) (upholding Commission preemption of state regulation of non-carrier-supplied telephone terminal equipment).

<sup>53/</sup> *Geier v. American Honda Co., Inc.*, 529 U.S. 861, 873-74 (2000)

<sup>54/</sup> *Id.* at 879, 881.

<sup>55/</sup> Much of the legal analysis in the *Vonage Order* and other Commission preemption decisions was devoted to section 2(b), which the Commission properly viewed as the primary obstacle to preempting state regulation. Because section 2(b) does not apply to wireless service, the Commission’s preemptive authority is broader in the context of CMRS than it is with VoIP. Nevertheless, some state regulators continue to argue that the exemption in section 332(c)(3)(A) for state regulation of “other terms and conditions” precludes the Commission from exercising its authority to preempt under well-established Communications Act jurisprudence.

operations could coexist with its chosen mechanism for encouraging wireless growth -- a uniform, national, deregulatory regime -- recent state actions call that conclusion into question. Just as the wireless industry is topping all expectations on subscriber numbers, intense wireless-wireless and emerging intermodal competition, broadband deployment, and *vastly improved customer service*, many states are choosing to regulate the carriers as if they were incumbent monopolists. The Commission has the power to -- and should -- head off the inevitable adverse consequences of these misguided state initiatives.

**C. The State Role in Wireless Billing and Disclosure Regulation Should Be Limited to Enforcement of Laws of General Applicability**

In the *Vonage Order*, notwithstanding its determination that state regulation would negate pro-competitive deregulatory policies,<sup>56/</sup> the Commission found that states would continue to play an important role in protecting VoIP consumers through enforcement of “general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices.”<sup>57/</sup> In light of the Commission’s recognition that VoIP is very similar to CMRS, “which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues,”<sup>58/</sup> the Commission should take the same approach to preemption here.

In particular, T-Mobile urges the Commission to preempt states from imposing wireless billing and consumer disclosure regulations except to the extent the state seeks to apply its general laws to govern the non-rate and non-entry practices of wireless

---

<sup>56/</sup> *Vonage Order* ¶¶ 20, 23.

<sup>57/</sup> *Id.* ¶ 1.

<sup>58/</sup> *Id.* ¶ 22.

carriers.<sup>59/</sup> This approach would invalidate the detailed wireless-specific<sup>60/</sup> regulatory regimes recently adopted by various commissions and legislatures, but would still permit wireless consumers to seek redress in state courts for fraud, unfair business practices, and the like. Wireless subscribers would be entitled to the same protections available to all other consumers that purchase goods and services in competitive markets.

Contrary to the proposal in the *TIB Second FNPRM*, the Commission should not permit states to enforce any billing or point of sale disclosure rules it develops in this proceeding.<sup>61/</sup> In support of this proposal, the Commission gives the example of its rules against slamming, which allow state commissions to administer the Commission's rules and resolve slamming complaints.<sup>62/</sup> The Commission's slamming regime, however, is extremely different from the billing and disclosure rules at issue here. The federal slamming rules are very specific as to the parties' obligations and the penalties for noncompliance and, thus, there is little room for varying state interpretations.<sup>63/</sup> Indeed, the enforcement role of the state commissions generally is limited to issuing a show-

---

<sup>59/</sup> As noted above, section 332(c)(3)(A) expressly preempts any state regulation of wireless rates or entry. Thus, even under its generic laws, a state court lacks jurisdiction to adjudicate claims challenging those aspects of wireless service. In addition, to the extent a state law of general applicability conflicts with the Commission's rules, it would be preempted.

<sup>60/</sup> Federal preemption also would bar application to wireless providers of rules and laws governing the practices of telecommunications carriers generally. Similarly, states would not be permitted to add wireless-specific provisions to their generic laws -- only those provisions that apply to *all* companies doing business in a state would apply to wireless carriers.

<sup>61/</sup> See *TIB Second FNPRM* ¶¶ 51, 57.

<sup>62/</sup> *Id.*

<sup>63/</sup> The Commission's slamming rules contain explicit procedures that carriers must follow before they can submit or execute a change in a subscriber's selection of a provider, and they limit the acceptable method for verifying the subscriber's selection to three options. The rules contain details, such as what third-party verifiers must say to customers, when the carrier must drop off the line, and how long call records must be maintained. In addition, the Commission's rules set forth the procedures for carriers, subscribers, and regulators in the event a slamming allegation is made and permit a state commission administering the Commission's regime to require disgorgement only as spelled out by the Commission.

cause order, making a factual determination as to whether an unauthorized change (as defined by the Commission) has occurred, and if so, ordering the penalties permitted under the rules.

The Commission's truth-in-billing and disclosure rules, by contrast, are not easily made amenable to solely one interpretation. For example, states can have widely differing views on what constitutes a "clear and conspicuous" disclosure. Even if the Commission adopts its proposals to add some specific provisions to its general guidelines, such as requiring separation of government-mandated charges on bills, uniform labeling of categories of charges, and estimates of taxes and fees, there will still be significant room for state commissions to come to their own legal conclusions about the permissibility of carrier actions. As such, each state commission would be able to create its own regulatory regime through disparate enforcement decisions, ultimately duplicating the patchwork quilt that Congress intended to displace with a uniform, federal regulatory framework.

Preemption of state wireless regulation is neither a radical move in violation of states' rights, nor does it represent an abandonment of consumers. Rather, it is the next logical step in fulfilling Congress's and the Commission's objectives of promoting competition in the wireless market -- *for the benefit of consumers*.

## CONCLUSION

For the foregoing reasons, the Commission should continue its hands-off approach to wireless regulation and preempt state billing and disclosure rules that undermine the federal purpose in creating a uniform, federal regulatory regime for commercial mobile services.

Respectfully submitted,

**T-MOBILE USA, INC.**

Sara F. Leibman  
Howard J. Symons  
Robert G. Kidwell  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Of Counsel

/s/ Thomas J. Sugrue

---

Thomas J. Sugrue  
Vice President, Government Affairs  
Kathleen O'Brien Ham  
Managing Director,  
Federal Regulatory Affairs  
James W. Hedlund  
Senior Corporate Counsel,  
Federal Regulatory Affairs

T-MOBILE USA, INC.  
401 Ninth Street, N.W.  
Suite 550  
Washington, D.C. 20004  
(202) 654-5900

June 24, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of June, 2005, I caused a true and correct copy of the foregoing Comments to be served upon the following persons via ECFS and/or via E-mail, as indicated.

*Served via ECFS:*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 2054

*Served via E-mail:*

Fred Campbell  
Fred.Campbell@fcc.gov

Monica Desai  
Monica.Desai@fcc.gov

John Branscome  
John.Branscome@fcc.gov

Catherine Seidel  
Cathy.Seidel@fcc.gov

Paul Margie  
Paul.Margie@fcc.gov

Thomas Wyatt  
Thomas.Wyatt@fcc.gov

Barry Ohlson  
Barry.Ohlson@fcc.gov

Jay Keithley  
Jay.Keithley@fcc.gov

Sue McNeil  
Sue.McNeil@fcc.gov

David Furth  
David.Furth@fcc.gov

Leon Jackler  
Leon.Jackler@fcc.gov

Erica McMahan  
Erica.McMahan@fcc.gov



---

Robert G. Kidwell