

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

**INITIAL COMMENTS OF
THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

On March 18, 2005, the Federal Communications Commission (“FCC” or “Commission”) released a Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking (“2nd R&O”, “*Declaratory Ruling*”, and “*FNPRM*” respectively) (FCC 05-55) in the above captioned proceeding. The *FNPRM* seeks comments on issues related to the FCC’s “Truth-in-Billing” rules and State jurisdiction over telecommunications carriers’ billing practices.

The National Association of Regulatory Utility Commissioners (NARUC), which represents the interests of those State officials charged with, *inter alia*, oversight of the operation of telecommunications service providers operating in their respective States, respectfully submits these comments to respond to certain issues raised in the *FNPRM*. NARUC has been recognized by Congress¹ and the Courts² as an appropriate representative for State commission interests.

¹ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; *Cf.*, 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf.*, *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

² See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985).

Consumers are clearly confused by the way carriers currently list monthly end-user charges on billing statements. The FCC received over 19,000 comments from individual consumers in response to the NASUCA petition for a declaratory ruling in CG Docket No. 04-208. Indeed, even in the FCC acknowledges in its March 18, 2005 order, that the bulk of telecommunications consumer complaints received by the Commission involve carriers' bills and charges. NARUC is on record urging the FCC to investigate the misleading billing surcharges and we commend the FCC for opening this proceeding. NARUC's July 2004 resolution, attached as Appendix A, also specifically resolves that ". . . monthly invoices should separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated but are specifically authorized to be passed through to consumers." *In addition, that resolution urges the FCC not to preempt States from establishing more stringent standards for consumer protection.*

In response to the notice, NARUC respectfully suggests:

- A. *The FCC should require monthly invoices to separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated but are specifically authorized to be passed through to consumers.*
- B. *The FCC should not preempt States from establishing more stringent standards for consumer protection.*

DISCUSSION

The FCC should require monthly invoices to separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated but are specifically authorized to be passed through to consumers.

The *FNPRM* tentatively concludes that "where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges." *FNPRM* at ¶39. NARUC specifically endorsed such a requirement in its July 2004 resolution. Government-mandated charges should be listed in a section of the customer's bill that is distinct and separate from other areas listing monthly recurring charges, usage-based charges, and other charges that carriers impose at their discretion.

The *FNPRM* also asks “how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes,”³ and suggests two options: [a] “define government ‘mandated’ charges as amounts that a carrier is [sic] *required* to collect directly from customers, and remit to federal, State or local governments,”⁴ or [b] distinguish “between government mandated and non-mandated charges . . . based on whether the amount listed is remitted directly to a governmental entity or its agent.”⁵ Under the second option “. . . ‘mandated’ charges . . . differ from non-mandated ones in that non-mandated charges only would be composed of fees collected by carriers that go to the carrier’s coffers, and which are not directly related to any regulatory action or government program.”⁶ Again NARUC’s July resolution specifies the first option for defining government mandated charges is superior. Defining government mandated charges as “charges carriers are required to collect and remit to government” is a narrower and more accurate definition that conforms to the commonly understood, and logical, meaning of what is “mandated” by the government and what is not. “Mandatory” means “[r]equired by or as if by mandate; obligatory.”⁷ Average consumers understand this term quite well. Customer confusion is the inevitable result of adopting any definition, like that outlined in the second option that, on its face, conflates “mandatory” with “permissive” charges.

³ Id.

⁴ Id. at ¶40. Under this option, government mandated charges would include State and local taxes, federal excise taxes on communications services, and some State E911 fees. According to the Commission, non-mandated charges would consist of government authorized but discretionary fees, such as fees that carriers remit pursuant to regulatory action, such as Telecommunications Relay Service and universal service charges, as well as administrative fees and other purely discretionary charges.

⁵ Id., at ¶41.

⁶ Under the second option for defining government mandated charges, universal service charges would be considered mandated, though line items for administrative and other costs related to collecting such contributions would be considered non-mandated. Id.

⁷ See *The American Heritage Dictionary: Second College Edition* 761 (1985); see also *Webster’s II New College Dictionary* 664 (1995); *Oxford American Dictionary* 403 (1980).

Moreover, adoption of the first definitional scheme should deter carriers from blaming the government for charges that they are not required to pass through to customers. The record developed in response to NASUCA's petition for a declaratory ruling clearly demonstrates the strong incentives carriers have to blame government, rather than any company action, for charges their customers must pay. Finally, defining government mandated charges to include only those charges carriers are required to impose and subsequently remit to the government is the only choice consistent with earlier pronouncements in the Truth-in-Billing ("TIB") docket⁸ and the universal service proceedings concerning end-user charges imposed by carriers to recover contributions to the federal universal service fund.⁹

⁸ In its original Truth-in-Billing order, the FCC recognized that labeling a line-item charge "mandated" when they are not makes it more difficult for consumers to understand their bills and undermines competition:

"As the record in this proceeding demonstrates, line-item charges are being labeled in ways that could mislead consumers by detracting from their ability to fully understand the charges appearing on their monthly bills, thereby reducing their propensity to shop around for the best value. Consumers misled into believing that these charges are federally mandated, or that the amounts of the charges are established by law or government action, could decide that such shopping would be futile. In addition, lack of standard labeling could make comparison shopping infeasible. Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce. For example, when a consumer purchases socks from the local department store, the consumer knows what item the bill refers to, whether it describes the product as socks, men's wear, hosiery, etc. In contrast, a consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill." *I/M/O Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (May 11, 1999) at ¶ 62; *Cf. Id.* at ¶ 63 (carriers should be prevented from misleading consumers into believing they cannot "shop around" to find carriers that charge less for fees "resulting from federal regulatory action").

⁹ The FCC has also discussed the obvious impact of allowing carriers to characterize universal service contributions as taxes or otherwise mandated charges when carriers have flexibility to recover such contributions through rates or surcharges. Specifically, the Federal-State Joint Board on Universal Service wrote:

We believe that inaccurately identifying or describing charges on bills that recover universal service contributions may violate section 201(b) . . . it is important for consumers to understand that universal service support has long been implicit in the rates for various intrastate and interstate telecommunications services. We therefore recommend that the Commission take decisive action to ensure that consumers are not misled as to the nature of charges on bills identified as recovering universal service contributions. Specifically, we recommend that the Commission consider prohibiting carriers from identifying as a "tax" or as mandated by the Commission or federal government any charges to consumers used to recover universal service contributions. Similarly, we recommend that the Commission consider prohibiting carriers from incorrectly describing as mandatory or federally-approved any universal service line items on bills. This restriction would include both written descriptions of the charges and any oral descriptions from consumer service representatives as well as placement on the bill. While interstate telecommunications providers are required to contribute to the universal service support mechanisms, they are not required to impose such charges on consumer bills. *In the Matter of Federal-State Joint Board on Universal Service*, Second Recommended Decision, [13 FCC Rcd 24744, 24771-24772 at ¶ 70 \(1998\)](#)

The *FNPRM*, at ¶45, also asks parties to comment on if the First Amendment limits the FCC's authority to impose a standard billing format. The first question that must be addressed before turning to the four-part analysis, under which regulation of commercial speech is assessed, is whether protected speech is the target of the proposed regulation.¹⁰ NARUC respectfully suggest that it is not. The FCC's proposed regulations for interstate carriers and wireless attempt to eliminate unreasonable, misleading and deceptive conduct, *e.g.*, carrier efforts to maintain the appearance of low monthly and per-minute rates for services provided, while simultaneously recovering (or over-recovering) ordinary operating costs through a welter of surcharges that may be totally unrelated to government action. The proliferation of misleading line items and fees among carriers justifies regulatory intervention to ensure consumers know what they're paying for and how much they're going to pay. Even if Commission action is deemed to constitute regulation of commercial speech – as opposed to conduct – such regulation is not an unconstitutional violation of carriers' First Amendment rights. As the Commission has previously noted, “[c]ommercial speech that is misleading is not protected speech and may be prohibited.”¹¹ The volume of complaints both jurisdictions¹² receive annually clearly indicate that current carrier bills are inherently misleading. Actions that reasonable designed to correct this characteristic are consistent with Supreme Court rulings addressing federal agencies' power to regulate, even prohibit, commercial speech that is misleading.

¹⁰ Cf. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-564 (1980).

¹¹ *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking (*1999 TIB Order*), FCC 99-72 (rel. May 11, 1999) at ¶ 60, citing *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980).

¹² See, e.g., *FNPRM* at note 66.

The FCC should not preempt States from establishing more stringent standards for consumer protection.

In ¶45, the *FNPRM* asks if States should have a separate role “. . . with respect to labeling and determining what labels and descriptions are misleading.” Given the FCC’s own findings in the original TIB order,¹³ under the most expansive reading of the FCC’s authority, *it is clear States retain the right to impose more stringent standards for consumer protection with respect to billing.* It is also clear, as the Minnesota Department of Commerce contends, any FCC rules would apply only to interstate service and only provide *guidance* for States evaluating intrastate charges.¹⁴

The *FNPRM* includes several tentative conclusions regarding “preemption of State billing practices regulations that are. . .” allegedly “. . . inconsistent with [FCC] truth-in-billing rules, guidelines and principles” and seeks comment regarding those conclusions, or the legal bases for those conclusions. *FNPRM*, ¶ 50.

NARUC believes these conclusions are fatally flawed from both a policy and legal perspective. *We respectfully request the Commission reject those tentative conclusions and affirm that States retain authority to establish more stringent standards for consumer protection.*

¹³ As discussed, *infra*, the *FNPRM* provides no real discussion of changes in the industry that occurred since 1999 – when it adopted its current truth-in-billing regulations *that expressly allow States to enact their own, more stringent billing regulations.* Some significant change in either the underlying circumstances or in the law is required to justify an absolute and heretofore “inadequately” explained policy reversal. *See 1999 TIB Order*, ¶26.

¹⁴ Minnesota’s comments are cited in footnote 135 of the *FNPRM*. *See also* 47 U.S.C. §201(b), which, as the FCC acknowledges at ¶25 of the companion *Declaratory Ruling*, references *only* classifications, charges and classifications “in conjunction with *interstate* communications services.” It remains to be seen if the novel interpretation this companion ruling ascribes to the meaning of “rates” under 47 U.S.C. §332(c)(3)(A) – as equivalent to billing issues, will stand, given the clear evidence of Congressional intent that “other terms and conditions” includes State oversight of billing practices. H.R. Rep. No. 111, 103d Cong. 1st Sess., at 261 (1993). Particularly given FCC’s previous and explicit recognition that State billing oversight falls in squarely in that category.” *See* ¶25 of the companion *Declaratory Ruling*. The *Declaratory Ruling* cites “section 601(c) (2) of the Act” and specifies in ¶32 that in accordance with that section, Section 332 is not read to limit a state’s authority to impose taxes or other regulatory fees. However, nowhere is there a mention of another rule of statutory construction imposed by Congress in the very same section 601(c)(1) – significantly captioned “No Implied Effect” – which specifies the Act “...shall not be construed to modify, impair or supersede... State law...unless expressly so provided...”

Citing Verizon Wireless, Nextel, T-Mobile and Leap Wireless arguments,¹⁵ the *FNPRM* tentatively concludes that “one or more theories provide additional support” – *beyond the wireless rate preemption of 47 U.S.C. §332(c)(3)* – for preemption of State regulations related to billing. Indeed, the *FNPRM* explicitly acknowledges in ¶49, §332 on its face only applies to wireless carriers only and has *no applicability* to “other interstate carriers.”¹⁶ Therefore *some* additional basis for preemption, at least for *wireline* carriers, is necessary for the FCC to embrace these industry arguments. Before discussing those additional theories, the FCC suggests its as-yet-untested authority to preempt any State billing rule as §332 “rate regulation” as supporting “conflict preemption.” Specifically, the *FNPRM* states “there are clearly discernible federal objectives that may be undermined by States’ ‘non-rate’ regulation of CMRS carriers’ billing practices,” and describes those objectives as “the [FCC’s] pro-competitive federal scheme for truth in billing regulation.” cited by several wireless carriers. *Id.* at ¶50.

With this backdrop, the *FNPRM*, *with basically no factual*¹⁷ *or additional legal predicate*,¹⁸ suggests such State regulations must now be preempted to promote competition.

¹⁵ *FNPRM* at ¶ 49.

¹⁶ *See* citations in note 14 *supra*. The use of the word “other” as an adjective for “carrier” is a bit misleading. CMRS carriers also are, *and have always been*, “intrastate” carriers, or else States could have no jurisdiction as a matter of federal law. *Cf.* 47 U.S.C. §151-2.

¹⁷ Footnote 148 of the *FRNPM*, *mimeo* at 27, provides a brief list of four States where some State rule or law is effective and two other States where regulatory action is proposed. There is a passing reference to the burden on interstate commerce posed by State regulation of carriers’ billing practices in a reprise of wireless carrier *ex partes*. There are no other examples cited of the “onslaught” of new burdensome State regulations. Nor does the *FNPRM* provide any analysis of how the State regulations burden interstate commerce before it asserts that this putative burden another basis for preemption. In ¶52, in one sweeping conclusory statement, the FCC cites its “*belief* that limiting state regulation of CMRS and other interstate carriers billing practices, in favor of a uniform, nationwide, federal regime will eliminate the inconsistent State regulation that is spreading across the country, making nationwide service more expensive for carrier to provide and raising the cost of service to consumers.” To use an old trial lawyer objection, this bald allegation about *new* State rules, *assumes* a plethora of facts not in evidence. Other than the 2 States referenced with open proceedings, there is no listing of the new rules that have come into existence in the last few years nor *any evidence* of the cited proliferation. Evidence, at least in the wireless context, of the increased costs allegedly being passed to consumers, given the downward trend of per minute charges over the past decade, is likely to be an interesting exercise – but its an exercise the FCC has yet to attempt with respect to either wireless or wireline carrier operations.

¹⁸ Other than the previously referenced Section 332 which on its face applies only to wireless, the only other statutory basis outlined is a Leap Wireless assertion that “. . . sections 201(b) and 205(a)...give the Commission ‘express preemptive authority over state regulatory agencies with respect to prescribing billing format and content.’” *Id.*

Specifically, the *FNPRM* seeks comment whether the FCC should preempt State regulation of wireless carriers' billing practices *beyond the line items preempted in the Declaratory Ruling* and, with no citation to any other portion of the statute applicable to "other carriers," seeks comment on the degree to which "such 'conflict preemption' [can] be applied to *all* carriers under the provisions of the Act and other policy frameworks." *Id.*

The mechanisms for preemption are well known.¹⁹ None of the traditional bases for preemption permit the Commission to eliminate State oversight of carrier billing completely. Indeed, there is nothing in the Constitution, the Act, or the facts discernable in the current record that supports the broad preemption specified in the Leap Wireless argument. The wireless carrier arguments in ¶ 53 that the FCC should "occupy the field and preclude additional State regulation," are obvious attempts to echo the standard Commerce Clause analysis usually associated with statutes, not agency policy. These "arguments" add nothing to the debate.²⁰ Any commerce clause analysis based on the statute runs squarely into its multiple express reservations of State authority and clear specifications of State roles. For any analysis to succeed, the agency still must find some statutory language that indicates Congress actually intended for the agency to be able to preempt in the particular circumstance presented. The limited cites offered by industry do not suffice.

¹⁹ "When State and federal law conflict, the Constitution's Supremacy Clause, U.S. Const., art. VI, cl. 2., provides Congress with power to preempt State law. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986). Preemption occurs: (1) when a statute expresses clear Congressional intent to preempt; (2) when there is actual conflict between federal and State law; (3) where compliance with both federal and State law is, in effect physically impossible; (4) where there is implicit in federal law a barrier to State regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law; or (6) where the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* at 368-69 (citations omitted).

²⁰ As a general matter, when a federal statute or regulatory scheme is so extensive it leaves no room for States to act, then the entire field of regulation is preempted. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). This is generally referenced as "field preemption." *See* the discussion, *infra*. Field preemption has usually been found with respect to regulatory schemes involving subjects of particular federal interest or an issue committed to federal control by history and tradition, *e.g.* foreign affairs, Indian commerce and maritime law. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Here that is not the case. States have traditionally regulated telecommunications carriers. Moreover, the relevant statutory framework provides a key role for States and includes numerous express reservations of State authority.

Preemption analysis generally can be segregated into two broad categories – express²¹ or implied. *It is clear that the Act on its face does not specify elimination of State authority over billing.* Accordingly, the preemption proposed in ¶50 of the *FNPRM* is implied, given it would arise, if at all, from future agency action. An implied preemption analysis can be further subdivided into either “field” or “conflict” preemption. Again, the *FNPRM* specifically references, in ¶50 “conflict”, though it is less than clear about what the conflict is. It is difficult to discern if *FNPRM* is suggesting State regulation of carriers’ billing practices directly conflict with the FCC’s truth-in-billing regulations²² or if it is just that State regulation of carriers’ billing practices stand as an obstacle to the full realization of Congress’s purposes in the 1996 legislation.²³ Indeed, this lack of clarity regarding the basis for its tentative conclusion strongly suggests the proposed preemption is not legally sustainable. In any case, the *FNPRM* provides little discussion of Congressional intent. Whether Congress intended to allow the agency to preempt State law or to allow it to operate, is the “touchstone” and starting point for any implied preemption analysis.²⁴ Even when analyzing the statutory base for preemption offered by an agency, in an act that does not, like the 1996 legislation, include precise Congressional instructions not to “imply” preemption or “construe” the 1996 Act as modifying, impairing or superseding “... State law...unless expressly so provided...,”²⁵ federal courts begin with the *presumption* that *Congress does not intend to displace State law.*²⁶

²¹ Express preemption in a statute is generally easy to identify. The 1996 Act is no exception. *See, e.g.*, 47 U.S.C. § 276(b)(1)(a) (express preemption of elements of State regulation of payphones); 47 U.S.C. § 253(a) (express preemption of State entry requirements for telecommunications service providers).

²² Conflict preemption is ordinarily not to be implied absent an “actual conflict.” *English v. General Elec. Co.*, 496 U.S. 72, 90 (1990). Mere contradictory language or requirements are generally not enough.

²³ *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁴ *See Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

²⁵ *See* note 14, *supra*.

²⁶ *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 432-33 (2002).

Generally speaking, precluding States' regulation in areas otherwise within their jurisdiction is a serious act that should not be casually attributed to Congress. See Laurence H. Tribe, *American Constitutional Law* §6-28, at 1175-76 (3d Ed. 2000). If the premise is that State regulation of carriers' billing practices stand as an obstacle to the Commission's pro-competition truth-in-billing regulations, then rationale appears deficient on its face. In May 1999, the FCC adopted its current truth-in-billing regulations that based on the facts and circumstances presented, *expressly allow States to enact their own, more stringent billing regulations.*²⁷ There has been no change in the telecommunications industry since which justifies the proposed policy reversal.

Standing alone, the Commission's pro-competitive federal scheme, as expressed in its current truth in billing principles and guidelines, does not suffice to confer upon it the power to preempt State regulations governing carriers' billing practices. However, the *FRNPM* posits two additional putative "bases" for preempting States' jurisdiction over carriers' billing practices: [a] wireless carriers' arguments that "requiring these carriers to satisfy 50 different States' sets of rules relating to consumer disclosures and details on bills would stifle the further development of wireless competition and unreasonably burden interstate commerce, in contravention of the U.S. Constitution's Commerce Clause²⁸ – an argument NARUC has already addressed, *supra* ;" and [2] another wireless carrier's assertion that "sections 201(b) and 205(a) of the Act give the Commission

²⁷ See *1999 TIB Order*, ¶ 26, where the Commission held:
[S]tates will be free to continue to enact and enforce additional regulation consistent with the general guidelines . . . set forth . . . including rules that are more specific than the general guidelines we adopt today. *In addition to whatever powers they may have to enforce their rules under state law, states also have express authority under section 258 to enforce the Commission's verifications procedure rules . . . with respect to intrastate services.* We are aware of several states that have existing regulations that are consistent with the truth-in-billing guidelines we adopt here. . . *We support these efforts.* (emphasis added).

For decades before passage of the 1996 legislation, as well as during the nine years since, NARUC's member commissions have regulated the billing practices of local, interexchange and, in many cases, wireless carriers. These regulations have existed alongside federal regulatory, or deregulatory, policies and rules. The March 18 order preempting certain State protective measures with respect to the wireless industry, currently pending on review, provides an interesting case in point. During the entire time the now preempted State regulations were imposed, the wireless industry, and competition among wireless carriers, flourished.

²⁸ *FNPRM* at ¶50

‘express preemptive authority over State regulatory agencies with respect to prescribing billing format and content, including line item charges.’²⁹ Neither provides an appropriate legal basis for preemption. If there actually is a significant burden on interstate commerce that results from wireless carriers having to comply with State billing rules – that is exactly what Congress intended. In 47 U.S.C. §332(c)(3)(A) Congress expressly reserves State authority over “other terms and conditions” of wireless service. The reservation is in conjunction with, and references other clear reservations of State authority in §152(b) and §221(b) that point to wireline service. The industry alternative argument referenced in ¶50 suggesting Congress did not “preserve” State authority in this section is counter to the express terms of the relevant statutory provisions, the legislative history, and common sense.

In 47 U.S.C. §152(b), Congress expressly limited the Commission’s authority to preempt State regulation over matters relating to intrastate communications services, *including wireless telecommunications*.³⁰ In that section Congress essentially has already found that State regulation of intrastate telecommunications services does not impermissibly burden interstate commerce. The FCC is not free to ignore that determination. The simple existence of some burden on interstate commerce does not violate the Commerce Clause. Without some evidence derived from Congress’ expression of policy embodied in federal legislation, alleging a burden on commerce is not an independent basis for preempting States’ regulation.

²⁹ Id., citing Leap Comments at 17.

³⁰ Section 152(b) is the basic reservation of State authority in the Act. The reservation is “except as provided” in §332 which discusses wireless matters. The structure makes clear §332 modifies – with respect to rates and entry – the scope of authority *otherwise reserved over wireless carriers by §152(b)*. Indeed, the “preemptive addition” to §332(c)(3) made in 1993 states: “*Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*”

The Commerce Clause is instead a basis for enacting federal regulations that may, or may not, preempt State regulations, depending on whether express or implied preemption is found.³¹

The *FNPRM* concedes that State-by-State regulation is permissible, via “consumer protection and contractual laws of general applicability”, so long as those laws do not require or prohibit the use of line items.³² This significantly handicaps the analysis, missing in the *FNPRM*, and sketchy at best in the wireless *ex parte* filings, necessary to show the regulations constitute a burden and the burden is unreasonable.

Congress did not stop with §152(b) in the 1996 legislation. In dealing with *wireline* carriers, in Section 253, 47 U.S.C. §253(a)-(d), it actually specified the conditions when preemption is appropriate, at least with respect to telecommunications services, as follows: “No State or local Statute or regulation. . .may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”³³

Interestingly, even that section – which *specifies* preemption, *expressly reserves State authority* to impose “on a competitively neutral basis...requirements necessary to preserve and advance universal service, protect the public safety and welfare, *ensure the continued quality of telecommunications service, and safeguard the rights of consumers.*” (emphasis added)

The second basis of preemption tentatively identified is the agency’s authority under sections 201(b) and 205(a) of the Act. *Id.* at ¶50. However, neither section evidences Congressional intent to preempt State regulation of carriers’ billing practices. Section 201(b), 47 U.S.C. § 201(b), merely authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter” in connection with its authority to ensure that “[a]ll charges, practices, classifications, and regulations for and in

³¹ See *Retail Clerks*, 375 U.S. at 103 (1963).

³² *FNPRM*, at ¶ 53.

³³ In §253(e), Congress specified that nothing in that section “. . .shall effect the application of section 332(c)(3) to commercial mobile service providers.”

connection with such communication service, shall be just and reasonable.” Section 205(a), 47 U.S.C. § 205(a), provides only that the Commission may, after hearing, prescribe just and reasonable charges, classifications, regulations or practices if it finds a carrier to be in violation of any provisions of the Act. Arguments that either section vest the Commission with the authority to preempt States’ regulation of carriers’ billing practices simply ignores the Supreme Court’s determinations in *Louisiana PSC* preserving State authority relating to intrastate services:

[G]iven the breadth of the language in § 152(b), and the fact that it contains not only a substantive jurisdictional limitation on the FCC’s power, but also a rule of statutory construction (“[Nothing] in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to intrastate communication service. . .”), we decline to accept the narrow view [of § 152(b)] urged by respondents. . . . 476 U.S. at 373.

The FNPRM also seeks comment on the proper boundaries of Congress’ express reservation of authority over “other terms and conditions” under 47 U.S.C. § 332(c)(3)(A) with respect to defining carriers’ proper billing practices. FNPRM, at ¶ 52.34 The express text of the statute and the legislative history are crystal clear. Congress *expressly preempted* States from regulating the rates charged by CMRS providers but also *expressly reserved* to States their existing authority to regulate other terms and conditions of CMRS providers’ service. The legislative history specifies the phrase “other terms and conditions” is to be broadly construed:

It is the intent of the Committee that the States would still be able to regulate the terms and conditions of these services. By “*terms and conditions*,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a States lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “*terms and conditions*.” H.R. Rep. No. 111, 103d Cong. 1st Sess., at 261 (1993).

³⁴ As referenced, supra, §332, by its own terms, applies only to wireless carriers. It cannot provide a basis for preempting State regulation of other interstate carriers’ billing practices.

Consumer disclosure rules and other billing details clearly fall within “*customer billing information and practices and billing disputes and other consumer protection matters*” reserved to States by §332(c)(3)(A). Certainly, such regulations are within a non-illustrative list of “other matters generally understood to fall under ‘other terms and conditions’.” Accordingly, §332 simply cannot provide the needed basis for preempting States’ jurisdiction of what can only be considered “other terms and conditions” of commercial mobile radio service, let alone preempting State regulation of other interstate carriers’ billing practices. The proposed reading of section 332(c)(3)(A)’s reservation of State authority over “other terms and conditions” flatly inconsistent with the text and history of that section and should be abandoned. States must be able to establish more stringent standards for consumer protection.

CONCLUSION

Based on the foregoing, NARUC respectfully requests that the FCC (1) require monthly invoices to separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated but are specifically authorized to be passed through to consumers, and (2) not preempt States from establishing more stringent standards for consumer protection.

Respectfully Submitted:

James Bradford Ramsay
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW Suite 200
Washington, DC 20005
(202) 898-2207

Resolution Concerning the Truth-In-Billing Petition filed at the Federal Communications Commission by the National Association of State Utility Consumer Advocates (NARUC)

WHEREAS, Some State Commissions have seen a trend where some wireline and wireless telecommunications carriers impose separate monthly surcharges and fees that are not mandated or specifically authorized by the Federal and/or State governments to be passed through to consumers; *and*

WHEREAS, Some States have reported that consumers frequently complain about these monthly surcharges on their telecommunications bills and that the explanation provided by the carriers for the charges sometimes is inadequate; *and*

WHEREAS, These monthly surcharges, as described by carriers, may be misleading by implying that the fees are not only the product of government regulation but are sanctioned or required by either Federal or State governments; *and*

WHEREAS, Many consumers do not discover the full cost of their telephone service until they receive their monthly bills; *and*

WHEREAS, Some carriers' monthly surcharges may violate the FCC's Truth-In-Billing Order's requirement that carrier bills "contain full and non-misleading descriptions of the charges that appear therein"; *and*

WHEREAS, On July 30, 2003, the National Association of Regulatory Utility Commissioners (NARUC) Board of Directors adopted a resolution stating that NARUC has numerous concerns regarding the current practice of some wireless carriers imposing separate explicit charges for Federally mandated programs such as enhanced 9-1-1 service, local number portability, number pooling, and Universal Service programs funding; *and*

WHEREAS, On July 30, 2003, the NARUC Board of Directors adopted a resolution encouraging the FCC to conduct a proceeding to determine whether its existing Truth-in-Billing rules should be revised to address wireless carriers' current billing practices; *and*

WHEREAS, On July 31, 2002, the NARUC Board of Directors adopted a resolution urging that a Consumer Bill of Rights be developed for consumers of all telecommunications services that should include the right of consumers to receive clear and complete information regarding rates, terms and conditions for services; *and*

WHEREAS, On March 30, 2004, NARUC filed a petition with the FCC detailing wireline and wireless carriers' practices with respect to such monthly surcharges and fees and asking the FCC to enter an order addressing this problem.

WHEREAS, On May 25, 2004, the FCC established a pleading cycle to consider NARUC's petition and docketed NARUC's petition as CG Docket No. 04-208; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its 2004 Summer Meetings in Salt Lake City, Utah, opposes the imposition of monthly surcharges that are not mandated or specifically authorized by law or regulation to be passed on to the consumer; *and be it further*

RESOLVED, That NARUC believes that a clear, full and meaningful disclosure of all applicable surcharges should be made at the time of execution of the service agreement between the company and the consumer as such disclosure is one of the keys to empowering the consumer to make an informed decision regarding its choice; *and be it further*

RESOLVED, That NARUC believes that monthly invoices should separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated but are specifically authorized to be passed through to consumers; *and be it further*

RESOLVED, That NARUC agrees with the principles advanced in the NARUC's March 30, 2004, petition and supports an FCC investigation into the billing practices of the carriers with regard to such surcharges; *and be it further*

RESOLVED, That NARUC urges that any order resulting from these proceedings should not preempt States from establishing more stringent standards for consumer protection; *and be it further*

RESOLVED, The NARUC General Counsel is directed to file comments in support of the NARUC petition and take any appropriate action to further the intent of this resolution.

Sponsored by the Committee on Consumer Affairs

Adopted by the NARUC Board of Directors, July 14, 2004