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

REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Truth-in-Billing

The purpose of the *Truth-in-Billing Order* was to ensure that consumers receive "thorough, accurate, and understandable bills" from their telecommunications carriers.[1] The Ohio Commission recommends that the FCC act to guarantee application of the common sense steps adopted in the *Truth-in-Billing Order* to ensure that consumers are provided with the accurate information needed to make informed choices in the telecommunications marketplace. Consequently, the Ohio Commission recommends that the FCC establish a "Government Mandated Charges" section at the end of telecommunications providers' bills. This section of the bill should only include charges that are established by state or federal law. All other charges attributed to state or federal requirements, such as regulatory assessments or fees, should be absorbed

[1] *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, FCC 99-72 (rel. May 11, 1999) at ¶ 5 ("Truth-in-Billing Order").

and recovered through traditional or standard charges for services. If line item charges persist outside the "Government Mandated Charges" section of the bill, States should retain the authority to ensure that the charges attributed to government programs and or fees are labeled appropriately. States should also retain the authority to audit carriers to ensure that the charges are not resulting in premiums or windfalls to the detriment of customers. The Ohio Commission maintains that the FCC does not possess the requisite authority to preempt state regulation of billing format for charges that are either established by state law or are attributed to state program assessments.

BACKGROUND

Further Notice of Proposed Rulemaking

The Federal Communications Commission's (FCC's) *Truth-in-Billing Order* required carriers that list charges in separate line items to identify certain of such charges through standard industry-wide labels and to provide full, clear and non-misleading descriptions of the nature of the charges. Six years after the *Truth-in-Billing* decision the FCC observes that there remains "tremendous" customer confusion regarding their bills, which inhibits their ability to compare carriers service and price offerings contrary to the pro-competitive framework of the Telecommunications Act of 1996 (1996 Act).

On March 18, 2005, the Federal Communications Commission (FCC) released its Second Further Notice of Proposed Rulemaking (*2005 Truth-in-Billing Order and Notice*)[2] inviting comments on a proposal to establish a separate section of the bill for government mandated charges.

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[2] *In the Matter of Truth-in-Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, FCC Docket Nos. CC 98-170, CG 04-208 (March 18, 2005).

The FCC also invites comments on how it should define the distinction between mandated and non-mandated charges and whether it should adopt specific point-of-sale disclosure requirements.

The Public Utilities Commission of Ohio (Ohio Commission) submits these comments and recommendations responding to the FCC's Second Further Notice in the above captioned proceedings and the initial comments filed in these dockets.

DISCUSSION

Preemption of Inconsistent State Regulation

In the *Truth-in-Billing Order* (Order) the FCC correctly "allowed that the states will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in the Order, including rules more specific that the general guidelines adopted today."[3] Currently, the FCC tentatively concludes that it possesses the authority to preempt state regulation of billing and not permit states to enact and enforce more specific truth-in-billing requirements.[4] The FCC's conclusion is not supported by either the Federal Communications Act and its amendments or the will of Congress.[5]

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3 *Truth-in-Billing Order*, 14 FCC rcd. at7507, ¶ 26.

4 2005 Truth-in-Billing Order and Notice, at ¶ 30.

5 The basis of the FCC's preemption was not included in the noticed rulemaking entry, but instead in response to filed ex parte communications. The Ohio Commission concurs with the initial comments of the Arizona Corporation Commission in relation to appropriateness of action taken by the FCC in relation to the notice provided.

In fact, Congress only preempted state laws regarding the entry or rates charged by any wireless carrier.[6] "While Congress may have completely preempted claims relating to rates, it has left regulation of other terms and conditions to the states."[7] The language of the 1993 amendments to the Act provides in pertinent part: "Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."*[8] States regulation of billing practices falls under the express reservation of power to the states to regulate other terms and conditions of wireless service. Where the reasonableness or the ability to charge the various fees is not challenged, but the challenge is to the carrier's description and placement of the fee on their bills, there is no preempted challenge to the carrier's rates.[9] Further, the legislative history of the 1993 amendments to the Act shows that Congress intended to preserve state law actions, not completely preempt them. A House of Representatives report proclaimed:

> It is the intent of the Committee that the states still would 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 (e.g. 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 state's law-

6 *Gattegno v. Sprint, et al.*, 297 F. Supp. 2d 372, 377 (D. Mass 2003).

7 *Brown v. Washington/Baltimore Cellular, Inc, et al.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000).

8 47 U.S.C. § 332(c)(3)(A) (2005) (emphasis added).

9 *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 343 F. Supp. 2d 838, 851 (W. D. Mo. 2004).

> ful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." [10]

The 1934 Act also contains a savings clause: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[11] The savings clause contemplates application of state law and jurisdiction, further indicating that Congress did not intend to preempt state regulation of billing practices.[12] The *In re Wireless* Court found "that based on the legislative history and the savings clause, the Federal Communications Act *does not* provide the exclusive cause of action for consumer protection claims."[13] The states regulation of billing practices does not address the reasonableness of rates or market entry and is not preempted. Congress intended to leave to the states their traditional police power to regulate billing practices and consumer protections claims. This intent is expressed in the Federal Communications Act, its amendments and in its legislative history. The FCC should find accordingly.

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[10] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess, 211, 261 reprinted in 1993 U.S.C.C.A.N. 378, 588.

[11] 47 U.S.C. § 414 (2005).

[12] *Marcus v. AT&T Corp.*, 138 F. Supp. 3d 46, 54 (2d Cir. 1998); *Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703, 707 n.3 (N.D. Tex. 2000); *In re Wireless*, 343 F. Supp. 2d 838, 851-52 (W. D. Mo. 2004).

[13] *In re Wireless*, 343 F. Supp. 2d at 851-52.

Billing of Government Mandated and Non-Mandated Charges

To alleviate customer confusion, the FCC 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.[14]

The Ohio Commission concurs with the FCC's tentative conclusion to require a separate portion of carriers' bills to itemize only government mandated charges. Specifically, the Ohio Commission maintains that telecommunications providers should be required to disclose government required charges to end users by grouping these charges in a separate section of the bill, which would be labeled "Government Mandated Charges." This section should be located separate, distinct, and apart from all other charges at the end of the bill. All charges located in this portion of the bill must also be clearly itemized and clearly labeled. The Ohio Commission believes that mandating this requirement will allow customers to more accurately compare charges for services, which will promote an efficient marketplace for the provision of competitive telecommunications services. The Ohio Commission notes that its proposal in this regard is generally consistent with those of the "Consumer Groups'" and the Texas Office of Public Utility Counsel (Texas OPC) recommendations concerning government mandated charges.[15] The Ohio Commission further agrees with the Texas OPC's belief that such a requirement will help alleviate widespread customer confusion and will end the misnomer of categorizing discretionary charges as mandatory.

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14 Second Further Notice at ¶ 37.

15 Initial comments of AARP, Asian Law Caucus, Consumers Union, Disability Rights Advocates, National Association of State PIRGS, and National Consumer Law Center (collectively the "Consumer Groups"), dated June 24, 2005.

Distinction Between Mandated and Non-Mandated Charges

The FCC solicits comment on how it should define the distinction between mandated and non-mandated charges for truth-in-billing purposes. The FCC questions whether it should define government "mandated" charges as amounts that a carrier is required to collect directly from customers, and remit to federal, state or local governments? The FCC believes that non-mandated charges could be defined as those comprised of government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer. The FCC seeks comment on whether it is misleading for carriers to include expenses such as property taxes, regulatory compliance costs, and billing expenses in line items labeled such as "regulatory assessment fees" or "universal connectivity charge."[16]

The Ohio Commission supports the FCC's proposal to establish a separate section of the bill to include only those charges specifically required by government to be recovered directly from end users. That is, the only charges permitted to be included in the "Government Mandated Charges" section of the bill should be those required by the Federal, State, or local jurisdictions to be explicitly recovered from end users and rendered directly to a governmental entity (*i.e.*, sales taxes and in some instances 9-1-1 assessments). Other "non-mandated" assessments that are not specifically required to be rendered directly to a governmental entity and are recovered through line item charges at the option of the individual company should not be included in the government mandated section of the bill (*i.e.*, assessments for federal universal service programs). The Ohio Commission believes that the costs associated with non-mandated charges

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16 Second Further Notice at ¶ 38.

should be recovered through traditional means as a normal course of business and not through line items. That is, these costs should be included in conventional charges for the provision of service since these assessments should be considered a normal cost of providing telecommunications service. The Ohio Commission further concurs with the FCC's observation that it is within the discretion of the individual provider as to how these costs should be recovered from end users, if at all. Finally, the Ohio Commission urges that any new truth-in-billing rules adopted by the FCC should apply in a nondiscriminatory manner to all providers of telecommunications services that interconnect with the public switched telecommunications network (PSTN).

In addition, the Ohio Commission submits that if a line item charge generates cash flows that exceed the amount required by the assessment, fee, or tax, the charge should be either reduced or removed from the "Government Mandated Charge" section on the bill. Moreover, regardless of its location on a bill, it should be incumbent upon government to ensure that discretionary or non-mandated assessments attributed to government are labeled accordingly and are not generating cash flows in excess of the amount necessary to support the program(s). If it is determined that excess cash flows are being generated by the non-mandated fee, government should possess the necessary authority to require reductions to the charges or to have the carrier rename the assessment to reflect its true nature. Expressed another way, if a line-item charge is attributed to government, common sense dictates that the relevant government jurisdiction must have the authority to ensure that the charge is accurate and labeled appropriately. If either is found to be erroneous, the involved government jurisdiction should also possess the requisite authority to reduce the charge to end users or rename the charge. Likewise, if a charge located in the "Government Mandated Charges" results in a premium or excess cash flows to the company, States and the FCC should retain the authority to reduce the charge or to require the charge to be moved outside of the "Government Mandated Charges" section of the bill.

Consistent with the Ohio Commission's recommendation to limit the government mandated section of the bill to only those charges specifically required by government, we also propose that carriers should be required to verify as accurate both their government mandated charges and discretionary charges attributed to government fees or programs. Initially, this verification at both the State and Federal level could occur by requiring all carriers with surcharges to attest to the accuracy of the charge. For example, a process could be instituted that would require an accountable officer of the company to attest to the accuracy of the charges. Carriers and officers misrepresenting the amount of charges that result in an over-recovery of costs should be subject to the full panoply of applicable sanctions in each respective jurisdiction (*i.e.*, Federal, state, and local). To the extent a carrier's charge appears to be excessive or disproportionate as compared to other similarly situated carriers rendering fees for identical mandated programs, the Ohio Commission recommends that the FCC and States request that the carrier provide additional supporting documentation or cost studies verifying the amount of its charge(s).

The Ohio Commission notes that its recommendation regarding this matter does not suggest economic regulation of CMRS providers or IXCs. However, as mentioned earlier if any carrier charges are attributed to government, rational thinking commands that it should be incumbent upon government to ensure that customers are only remitting the dollar amount required. To the extent that these charges are required by or attributed to government, it should be incumbent upon government to ensure that the companies are not over-recovering their costs at the customer's expense and contrary to promoting efficient markets.

Standardized Labeling of Charges

The FCC invites additional comment on the mechanics of placing government mandated fees and taxes in a section of a bill separate from all other charges. In addition, should the labeling of such categories of charges be subject to imperative national uniformity, and if so, what should these categories be called? Concerning its proposal for standardized labeling of categories of charges, the FCC seeks comment on whether the First Amendment provides any legal impediment.[17]

Consistent with our July 14, 2004 recommendations, the Ohio Commission maintains that any new regulations regarding billing content should be imposed as disclosures. Disclosures have proven a viable option for government action regulating commercial speech. The landmark case authorizing disclosure of speech as a means to regulate commercial speech is the United States Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*.[18] In *Zauderer,* the Court upheld the requirement that an attorney disclose in advertisements that clients will be required to pay costs in cases the attorney accepts on a contingency fee basis. The decision points out that the disclosure requirement only mandated that more information be provided than the attorney might otherwise be inclined to present.[19] The Court has repeatedly emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do

[17] Second Further Notice at ¶¶ 42 -45.

[18] *Zauderer,* 471 U.S. 626 (1985).

[19] *Id*. at 650, 105 S.Ct. at 2281.

flat prohibitions on speech, warnings and disclaimers are appropriate in order to dissipate the possibility of consumer confusion or deception.[20] Disclosure of truthful speech is viewed as a more narrowly tailored manner of regulating commercial speech.

The "Government Mandated Charges" section should be in an area separate and distinct and after the listing of all other charges at the end of the bill.[21] The distinction between this section and the other charges on the bill should be obvious and labeled accordingly. The truth-in-billing requirements dictate that the bill be clearly organized and sufficiently clear.[22] The current location and description of the non-sanctioned government charges as a government assessment could mislead a consumer to believe such charge is mandated by the government. That constitutes neither a clear organization of the bill, nor a sufficiently clear description of the charge in question. This practice of grouping different company specific costs into line-item surcharges as "regulatory assessments" with government sanctioned charges should stop.

Under the Ohio Commission's proposal to permit only those charges required by state or federal law to be located in the government mandated charges section of the bill, telecommunications providers should also be required to disclose line-item charges in an appropriate place on the bill along with adequate descriptions. The Ohio Commission prefers that all non-mandated charges be included in the companies' standard offering to customers. But if the FCC does not

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20 *Id*. at 651, 105 S.Ct. at 2282; citing *In re R.M.J.*, 455 U.S. 191, 201, 102 S.Ct. 929, 936 (1982); *Central Hudson* at 565, 100 S.Ct. at 2351; *Bates v. State Bar of Arizona*, 433 U.S. 350, 384, 97 S.Ct. 2691, 2709 (1977); *Virginia Pharmacy Bd*., 425 U.S. 748, 772, n.24, 96 S.Ct. 1817, 1831, n. 24 (1976).

21 If a bill format contains a front page summary of charges the "Government Sanctioned Charges" section should be at the end of the summary distinct from all other charges.

22 7 C.F.R. § 64.2401 (2005).

agree, the Ohio Commission recommends that a bill including non-mandated charges carry the following disclosure:

> *These surcharges are imposed by the company to recover other costs of doing business and are not required by law or government regulation.*

As noted in our previous comments, the need for clarification of the description of surcharges is due to the risk that consumers are being misled and not able to identify that the surcharges are company specific charges. These types of descriptions on bills lead customers to assume that the charges are government authorized charges and cannot be avoided by switching carriers. Companies are able to lower the initial pitch for service, offering a seemingly lower competitive price while recovering the discount in a line-item surcharge described as a government assessed surcharge. This practice does not ensure that the most efficient company will prevail, rather the practice acts to the detriment of developing a robust marketplace. The consumer deserves to be made aware of the surcharges recovering ordinary company costs that are not ordered by a government agency and may be avoided by switching carriers.

These disclosures should serve the interest of the FCC in preventing misleading billing and provide consumers with a better understanding of the charges on bills. The Ohio Commission wants to be sure that companies are not labeling ordinary expenses of doing business as government or regulatory charges. Therefore, if discretionary line-item charges are allowed for non-mandated items, the telecommunications companies must appropriately label their charges in accordance with the truth-in-billing requirements and place them in an area that can not be confused as a tax or other government mandated surcharge.

Point of Sale Disclosure

In order to ensure that point of sale disclosure obligations apply nationwide to all companies, the FCC tentatively concludes that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale. The FCC further tentatively concludes that such disclosure at the point of sale must occur before the customer signs any contract for the carrier's services. The FCC also solicits comment on whether it should adopt an enforcement regime where states are permitted to enforce rules developed by the FCC regarding point of sale disclosures.[23]

The Ohio Commission recommends that point of sale disclosure requirements should be established by the FCC for interstate services. The same requirements could be used as guidelines by those state jurisdictions that have not established their own requirements for intrastate services. The agreements between the 32 state Attorneys General and the larger CMRS providers (*i.e.*, Verizon Wireless, Cingular Wireless, and Sprint PCS) regarding point-of-sale disclosures would be an appropriate starting place for the development of such requirements. In pertinent part carriers should be required at the point of sale to disclose clearly and conspicuously all material terms and condition of the service to be purchased including but not limited to prices, rates and conditions of service and cancellation policy where the transaction is covered by a term agreement. Where a sales transaction occurs over the telephone, within five (5) business days for new customers and ten (10) for existing or renewing customers carriers should send written materials containing the terms and conditions of service. In addition to these require-

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[23] Second Further Notice at ¶¶ 55-57.

ments, the Ohio Commission advocates that carriers be required to use only positive enrollment when enrolling a customer in a service for the first time.

- The Ohio Commission is in agreement with the Consumer Groups' proposal that any point of disclosure rules should apply to carriers' agents;
- The Ohio Commission concurs with the Consumer Groups' and the FCC's tentative conclusion that disclosures should be made prior to the customer signing a service contract; and
- The Ohio Commission also agrees with the Consumer Groups, that the carrier should have the burden of proof to show that disclosures were made.

On a related matter, the Ohio Commission urges the FCC to preserve the right of state commissions to regulate point of sale disclosures for entities already subject to existing regulation.[24] Unregulated entities are currently governed by consumer protection laws. Each state is in a unique position to determine how best to trend and enforce its specific regulations in relation to the needs of its geographic area. In addition to labeling of the charges, the Ohio Commission works with IXCs to ensure the price disclosed to customers at the point of sale is a price already reviewed and on file with the Ohio Commission. Nothing done in the context of this investigation should serve to limit a state utility commission's existing control over point of sale disclosures.

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[24] This recommendation is in reference to the request for comment in paragraph 57 of the Second Further Notice of Proposed Rulemaking.

If a standardization of this federal regime is adopted by the FCC, then the ability for state enforcement is imperative. As stated above, the individual states are in the best position to understand issues facing customers in its own geographic area. The ability of a state to elect to enforce the point of sale disclosure requirements will guarantee that more areas of the country see the Commission's directives enforced.

Depending upon the composition of the FCC's final point of sale rules, the Ohio Commission would be willing to work in tandem with the FCC in administering point-of-sale requirements. As the FCC is aware, the State of Ohio has had great success in enforcing the FCC's slamming rules. For example, from January 1, 2000, through July 6, 2005, the Ohio Commission has entertained 7501 slamming inquires. Slamming complaints are usually resolved informally by the Ohio Commission within ten days. This quick turn around time on consumer complaints is essential and can only be maintained if states retain the enforcement rights since the states have the resources to better accomplish this important enforcement goal.

If the FCC were to adopt federal enforcement regime for point of sale disclosures similar to the slamming program, the FCC should not adopt specific penalty amounts. The point of any penalties should be to make the consumer whole and this could vary per transaction. However, just as in slamming, the FCC should allow the states to adopt more restrictive point of sale disclosure rules as well as more stringent penalties which the states may see fit to impose. The states should not be restricted to just making the aggrieved customer whole, but should also be able to seek civil penalties where appropriate.

CONCLUSION

The Ohio Commission respectfully recommends that the FCC establish a separate section at the end of carriers' bills for government mandated charges. The Ohio Commission further recommends that this section of the bill be limited to those charges or line items expressly required by government to be rendered to end user customers. The Ohio Commission submits that the FCC has no authority to preempt state regulation of billing format for charges that are listed on carriers' bills attributed to state programs costs.

Respectfully submitted,

Public Utilities Commission of Ohio

By its Attorneys:

Jim Petro
Attorney General of Ohio

Duane W. Luckey
Senior Deputy Attorney General

__s/Anne L. Hammerstein_____
Anne L. Hammerstein
Deputy Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-4396

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