BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.
DRAFT

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 NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these reply comments in response to the Federal Communications Commission's (Commission) Second Further Notice of Proposed Rulemaking (Second FNPRM), released March 18, 2005 in its proceeding regarding Truth-in-Billing and Billing Format and the National Association of State Utility Consumer Advocates' petition for a Declaratory Ruling.

While it is unclear exactly what state regulation, besides non-Commercial Mobile Radio Service (CMRS), the Commission proposes to preempt, we file these reply comments to make clear that if the Commission is considering preempting the states from establishing rules for the billing practices and format for other than CMRS carriers, it should not do so for both policy and legal reasons. States remain responsible for setting just

and reasonable rates for intrastate charges and thus, are responsible for ensuring carriers abide by their intrastate tariff rates. Second, states have a heightened interest in protecting their own resident consumers from misleading or fraudulent billing practices.

Nothing in the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, (the 1996 Act) has altered the division of the authority over customer bills, including format and line item requirements. Consequently, to the extent the Commission intends to preempt state billing practices for other than CMRS carriers, there is no basis for the Commission to conclude that it is impossible for carriers to comply with both state and federal regulations, nor do two sets of regulations frustrate a legitimate statutory purpose.

IRRESPECTIVE OF ANY LEGAL REASONS, THE COMMISSION SHOULD NOT PREEMPT STATE BILLING REQUIREMENTS

The Commission should not preempt state regulation of non-CMRS carriers' bills. Bills are the primary vehicle by which carriers communicate with their customers after they become subscribers. As such, states have a profound interest in ensuring that those communications accurately and effectively inform customers about the services they have, or could avail themselves of, and that they are being billed properly. Even under the 1996 Act, states remain responsible for setting just

and reasonable rates for intrastate services, and thus, are responsible for ensuring that carriers abide by their tariffed rates. States also have a strong interest in protecting their own resident consumers from misleading, fraudulent or inappropriate billing practices.

Inasmuch as states continue to have jurisdiction over intrastate services, the states need a mechanism for ensuring that carriers actually charge their customers the rates for those services that the states have determined to be just and reasonable. The best and most logical mechanism for determining whether carriers are in compliance is oversight of carriers' bills. Having authority to prescribe billing content and formats allows a state to determine readily whether a carrier is abiding by its filed rates precisely because the state is aware of what each and every charge reflected thereon represents.

Additionally, allowing states to regulate carriers' bills allows the state to act in its traditional role of consumer protector. Should consumers complain about misleading charges or other information, the state is able to respond immediately to address such concerns, for example, by considering new formats or through consumer education. More fundamentally, the state can more readily resolve consumers' complaints about

inaccurate or inappropriate billings.[1] Hence, to ensure accurate and informative billing, New York exercises some minor regulation over non-CMRS carriers' bills.

In addition to an itemized listing of the services being subscribed to and their associated charges, New York's regulations require a carrier's bill to provide such basic information as:

- the customer's name, address and account number,
- the telecommunications company's name,
- a telephone number which may be contacted to discuss the bill,
- the date by which payments may be paid without a late-payment charge,
- the late-payment charge, if any, for late-paid bills,
- amounts owed and unpaid and or credits from past bills, and
- and a statement of how the bill may be paid;[2]

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[1] These may be individual customer complaints or may reflect mis-billing of large groups of customers. For example, in 2004, the NYDPS spent several months working with a carrier to resolve a billing dispute involving continued erroneous charging of a $3.95 per month long distance calling fee to thousands of the carrier's former customers. Although the charge in question happened to be an interstate fee, it just as well could have happened with a charge for intrastate services. Identification and resolution of the problem depended on being able to identify the charge on customers' bills.

[2] 16 N.Y.C.R.R. 609.12.

As can be seen from the foregoing, New York's regulations are in the nature of reasonable consumer protections. They cannot be said to impose unreasonable obligations on providers.[3]

Several parties argue that the Commission should preempt state billing regulations on grounds that any differences in those requirements among the states will be burdensome and costly.[4] Most wireline carriers' billing systems already accommodate differing state regulatory requirements; some have done so for over a century. Failing to preempt existing state rules will not necessitate altering those billing systems at all because the systems in place are already designed to accommodate the current regulatory scheme. In addition, the very nature of modern computerized billing systems (calculating, printing, mailing, and receiving) makes those systems more capable of efficiently producing state-specific bills than billing systems of yesteryear. Indeed, carriers could use current technologies to produce unique bills for each customer, either on paper or electronically, if they so chose. As no evidence has been

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[3] New York has established some additional billing-related protections beyond these dealing with the content and format of bills. (16 N.Y.C.R.R. Part 609) These provisions cover such matters as foreign language billing, deferred payment plans, and treatment of partial payments. We would also oppose pre-emption of such billing-related regulations, if that is what the Commission here proposes.

[4] *See*, *e.g.*, comments of AT&T, BellSouth, the Coalition for a Competitive Telecommunications Market, MCI, Inc., the United States Telecom Association and Verizon.

provided of the alleged increase in costs that would accrue due to use of differing billing formats (which already occurs), there is no way to evaluate whether the alleged cost difference is even material, will produce higher rates, or would exceed the benefits such state regulations are intended to produce. Furthermore, as the Commission does not propose to preempt state-specific consumer protection rules or laws of general applicability, any purported cost savings from eliminating state-specific telecommunications billing regulations may be illusory.

AT&T and the Coalition for a Competitive Telecommunications Market (CCTM) aver that failure to preempt state billing regulations will lead to asymmetrical requirements, skewing intermodal competition.[5] While regulatory symmetry might be a preferred condition, the fact that different industry segments might become subject to differing regulatory requirements is not, in itself, a problem. The question is whether any differences in rules that might occur create additional costs (financial or otherwise) that are not justified by the benefits those differing rules produce. This question can only be answered in terms of specific rules, not generalities. In this matter, no evidence has been provided showing that state-

[5] AT&T Comments at 14-15, CCTM Comments at 6-7.

specific billing requirements are harming competition or any particular competitors to any meaningful extent.

BellSouth and Verizon argue that state billing regulations would require unbundling of service packages or would at least make such bundling more difficult.[6] Their arguments assume that state rules with respect to billing bundled offerings will, in fact, conflict with federal rules or will prevent carriers from offering bundled services. There is absolutely no basis for assuming this is so *a priori* and even if it turns out to be true in some instances, such does not justify broadly preempting all telecommunications-specific state billing regulations.

BellSouth and CCTM argue that state billing requirements will lead to customer confusion and will make comparison shopping difficult.[7] This argument suggests that either the states or the FCC will impose requirements that will produce unintelligible bills, because differences in bill formats and nomenclature will not, by themselves, make bills confusing or render comparisons unacceptably difficult. Finally, regardless of the foregoing, few consumers comparison shop by comparing phone bills, as they only get such bills after they become customers.

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[6] BellSouth Comments at 3-4, Verizon Comments at 18-19.

[7] BellSouth Comments at 7, CCTM Comments at 4-5.

Finally, claims that New York's consumer-oriented billing laws are somehow an obstacle to a pro-competitive environment are disingenuous and without any demonstrated merit. New York was one of the first states to experiment with opening its telecommunications markets to competitive carriers, and as shown in New York's comments to the Triennial Review Remand Order proceeding,[8] its residents have a variety of communications providers to choose from, across multiple platforms and modalities. That New York has some additional billing regulation to that of the Commission has not prevented this competitive market from existing, and the Commission should resist exercising preemption.

THE COMMISSION MAY NOT PREEMPT STATE BILLING FORMATS FOR NON-CMRS CARRIERS

Although it remains unclear from the Second FNPRM what state rules the Commission intends to preempt,[9] the initial

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[8] Comments of the New York State Department of Public Service in the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338 (filed October 4, 2004).

[9] Although unclear, NYDPS notes that ¶50 seeks comment on whether "conflict preemption should be applied to all carriers" in addition to CMRS carriers. Additionally, in ¶51 the Commission tentatively concludes that it should reverse its prior decision to allow states to enact more stringent truth in billing rules than its own. Then, in the first sentence of ¶52, the Commission states its belief that limiting state regulation of CMRS and other carriers' billing practices would be a good idea.

comments filed by the parties indicate that the Commission intends to preempt the states from regulating any aspect of a telecommunications carriers' billing format and content, even if the carrier is not a CMRS carrier.

AT&T, BellSouth, CCTM, MCI, the United States Telecom Association (USTA) and Verizon submitted comments seeking preemption of state regulation for all carriers, including non-CMRS carriers. Of those parties urging broad preemption, only BellSouth, CCTM and Verizon include any legal support. However, these comments do not contain any compelling legal justification, and therefore the Commission does not have a legally sustainable basis on which to preempt the states.

BellSouth and CCTM both note that the Commission, under §201(b), has jurisdiction over the billing practices of a carrier's billing practices for interstate communications.[10] BellSouth then asserts that because billing involves both interstate and intrastate components that cannot reasonably be severed, the Commission must exercise its authority to preempt the states to avoid any potential conflicts.[11] CCTM and Verizon both state that the Commission should preempt the states because state billing regulation stands as an obstacle to the accomplishment of the competitive goals of the 1996 Act and that

[10] BellSouth Comments at 4, CCTM Comments at 3.

[11] BellSouth Comments at 4.

state regulation prevents the Commission from promulgating uniform, nationwide billing regulations.[12]

BellSouth cites Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), for the proposition that where interstate and intrastate issues overlap, the Commission has the authority to preempt the states.[13] BellSouth claims that the Commissions truth-in-billing regulations represent a valid federal regulatory objective, and then asserts, without providing any concrete examples, that the Commission should preempt the states because any additional state regulation would create longer and more confusing bills, or would cause the carrier to separate bundled packages into intrastate and interstate components. In essence, BellSouth is claiming that the Commission should preempt based on conflict but, other than broad speculation, does not provide the Commission with any substantial record evidence on which to find an existing conflict.

To support their argument that the Commission should act here because concurrent state and federal billing regulation present an obstacle to the Congress' pro-competitive objectives, CCTM and Verizon both cite City of New York v. FCC, 486 U.S. 57

[12] CCTM Comments at 3, Verizon Comments at 19.

[13] BellSouth Comments at 4-5.

(1988) as an example of a Court affirmed exercise of Commission preemption authority.[14]

City of New York simply was a different case than the one presented here. In that case, the Commission was concerned with technical standards, exercising its preemption authority based on the real fear that lower standards in adjoining municipalities undermined the workability of the whole transmission system and would impede "the development and marketing of signal source, transmission, and terminal equipment."[15] Billing regulation simply does not present the same network problems as differing technical standards, and City of New York is therefore not instructive here.

Additionally, in Louisiana Public Service Commission, *supra*, the Court considered the question of whether the Commission could preempt states by requiring the states to use a Commission mandated depreciation rate for valuing utility assets. Relevant to this matter, the Court stated therein that the Commission may preempt states, *inter alia*, only where there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect impossible, or where state law stands as an obstacle to the

[14] CCTM Comments at 3-4, Verizon Comments at 19.

[15] City of New York, 486 U.S. 57, 60.

accomplishment and execution of the full objectives of Congress.[16]

Here, there has been no evidence presented of any state regulation in actual conflict with the Commission's existing regulations. Indeed, it would be extremely difficult for the pro-preemption parties to make such a demonstration, as the existing federal law specifically allows for more stringent state regulation so long as it does not conflict with the federal regulation. Thus, the parties have not presented a compelling case that there are existing conflicts or that compliance with any and all state regulation will be impossible because of existing federal regulation.

The Ninth Circuit, in People of the State of California v. FCC, 907 F.2d 1217, (9th Cir. 1990), explains the very high burden that the Commission must show when claiming impossibility as its grounds for preemption. There, the Court stated, that the impossibility exception is limited, and that the Commission "may not justify a preemption order merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals."[17] Instead, the Appeals Court noted, "the FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly

[16] Louisiana Public Service Commission, 476 U.S. 355, 368 & n.4.

[17] People of the State of California, 905 F.2d 1217, 1243.

tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals."[18] In sum, the Commission must determine with specificity that it is impossible for carriers to meet both state and federally imposed billing requirements.[19] Based on the limited record before the Commission in this proceeding, it cannot meet its burden and should not preempt the states. In fact, New York does have minimal existing state billing regulations[20] and, to date, we are unaware that any claim has been made pursuant to 47 C.F.R. §§64.2400 and 64.2401 that state regulations are inconsistent with the federal regulation contained therein.[21]

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[18] Id.

[19] Louisiana Public Service Commission, 476 U.S. 355, 368 & n.4; *see also* People of the State of California, 905 F.2d 1217, 1243.

[20] *See* n.2, *supra*, and accompanying text for New York's billing regulations.

[21] Thus, there is no need to eliminate New York's concurrent state regulation located at 16 N.Y.C.R.R. §609.12.

CONCLUSION

For all the foregoing reasons, the NYDPS urges the Commission not to exercise the complete preemption alluded to in its Second Further Notice of Proposed Rulemaking and requested by some of the parties hereto.

Respectfully submitted,

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