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

REPLY COMMENTS OF CTIA – The Wireless Association™

Michael F. Altschul
Senior Vice President, General Counsel

CTIA – The Wireless Association™
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

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INTRODUCTION AND SUMMARY

CTIA – The Wireless Association™[1/] submits the following reply comments in response to the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned docket.[2/] As CTIA emphasized in its initial comments, filed on June 24, 2005,[3/] it endorses the Commission's overall policy goals of ensuring that wireless consumers be provided with clear and non-misleading disclosures in customer billing statements. In adopting any rules that would govern the contents of wireless carriers' bills, however, the Commission should ensure that it does not place burdens on the ability of the competitive wireless market to introduce innovative products and services that benefit consumers.

The record in the "Truth-in-Billing" proceeding demonstrates no need for any additional regulation of wireless carriers' billing practices of the kind proposed by certain commenters in this proceeding. To the contrary, the Commission's own statistics show that the number of complaints per subscriber has actually *decreased*. The changes to carriers' billing systems proposed by certain commenters would prove extremely cumbersome and costly for most wireless carriers to implement. As a result, they would increase the costs wireless carriers incur in doing business, and would in turn unavoidably increase the costs of wireless services to

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1/ CTIA is an international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS and ESMR, as well as providers and manufacturers of wireless data services and products.

2/ *See* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 20 FCC Rcd 6448, 6470-71 ¶ 43 (2005) ("*Second Report and Order*," "*Declaratory Ruling*" and "*Second FNPRM*").

3/ *See* Comments of CTIA-The Wireless Association (filed June 24, 2005) ("CTIA Comments").

consumers — all for no legitimate purpose. That result would be completely at odds with Congress's deregulatory mandate embodied in section 332 of the Communications Act and reinforced by the Telecommunications Act of 1996.

In determining appropriate billing regulations for the wireless industry, the Commission should use as its model the *CTIA Consumer Code for Wireless Services*.[4/] The *Consumer Code*, which only has been in effect for less than two years, already is accomplishing the Commission's goals of ensuring that wireless customers' bills are clear and non-misleading, without unnecessarily restricting the ability of wireless carriers to communicate with their customers. Specifically, as detailed further in Sections I-IV below, the Commission should:

- Reject proposals that the Commission adopt a definition for "mandated" and "non-mandated" charges that treats as mandated only those charges that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments. Such a restrictive definition is unnecessary to ensure that carriers' bills are clear and not misleading.

- Refrain from forcing wireless carriers to use standardized labeling and terminology in presenting certain categories of charges, along the lines proposed by the state Attorneys General and others. Such a requirement is unjustified based on the record before the Commission and would violate carriers' First Amendment rights to communicate with their customers.

- Reject as unworkable in practice and unsupported by the record the recommendations of NASUCA and other commenters that carriers be prohibited from combining multiple federal line item charges on their customer billing statements.

- Deny NASUCA's request that the Commission adopt unrealistic point-of-sale disclosure requirements. There is no justification, for example, for requiring that carriers provide customers with the right to terminate service within 45 days of receipt of their first billing statement in the event carriers' reasonable estimates of government-mandated charges prove too low. Given carriers' inability to predict where their prospective customers will in fact use their wireless phones, such requirements are unfair to carriers and unjustified by the record in this proceeding.

[4/] *See CTIA Consumer Code for Wireless Services* ("*Consumer Code*"), *available at* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.

In Section V below, we explain that there is no justification for the Commission allowing actions by a variety of state and local governments to frustrate the regulatory goals of this proceeding. There can be no doubt of the Commission's authority to preempt state truth-in-billing regulations where, as here, such regulations conflict with federal policies designed to promote minimal regulation and robust competition in the CMRS market. Opponents of Commission action are mistaken when they claim that provisions of the Act or "presumptions" against preemption curtail the Commission's ability to act in this area.

Finally, in Section VI below, we further demonstrate that preemption serves the public interest. The growing patchwork of state-by-state regulation of wireless billing produces no benefits while imposing very real costs on the very consumers that the regulations purportedly protect. A uniform federal regime will best reconcile the need for protecting consumers while avoiding rigid, overly prescriptive regulations.

I. ADDITIONAL BILLING REQUIREMENTS BEYOND THOSE SET FORTH IN THE *CTIA CONSUMER CODE* ARE UNWARRANTED.

Although CTIA responds, in Sections II through IV below, to the specific recommendations submitted in response to the *Second FNPRM*, it is important to reiterate at the outset that in setting the appropriate level of billing regulation to be applied to wireless carriers, the Commission should be guided by the overriding principle that has governed its treatment of the wireless industry to date: Protect consumers with the least amount of regulation possible. In particular, as CTIA explained in its comments,[5/] the Commission should continue to pursue a regulatory philosophy that relies wherever possible "on market forces, rather than regulation,

5/ *See* CTIA Comments at 10-11.

except where there is a market failure."[6] Notwithstanding the suggestion of the Consumer Groups,[7] the state Attorneys General,[8] and the National Association of State Utility Consumer Advocates[9] to the contrary, CTIA believes that the overall record before the Commission in this proceeding demonstrates that in the area of wireless carrier billing practices, there is no market failure that needs to be addressed.

As the comments filed in response to the *Second FNPRM* make clear, "[t]he deregulation of CMRS that Congress set in motion [has] stimulated a competitive marketplace that has benefited consumers through affordable rates and innovative pricing plans."[10] Indeed, statistics compiled by CTIA drive this point home: In 2004 alone, the number of wireless subscribers in the United States increased from more than 158 million to more than 182 million (an increase of more than 23 million).[11] At the same time, the average local monthly bill has *decreased* since

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6/ *See Orloff v. Vodafone Airtouch Licenses LLC, d/b/a/Verizon Wireless*, 17 FCC Rcd 8987, 8998 n.69 ¶ 22 (2002), *pet. for review denied sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

7/ *See* 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") (filed June 24, 2005) ("Consumer Groups Comments").

8/ Comments of Attorneys General of the Undersigned States (filed June 24, 2005) ("Attorneys General Comments").

9/ Initial Comments of the National Association of State Utility Consumer Advocates (filed June 24, 2005) ("NASUCA Comments").

10/ Comments of T-Mobile USA, Inc. (filed June 24, 2005) at 7 ("T-Mobile Comments"). *See also* Comments of Nextel Communications, Inc. and Nextel Partners, Inc. (filed June 24, 2005) at 23-24 ("Nextel Comments").

11/ *See* CTIA Semi-Annual Wireless Industry Survey (2005) (available at http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf.

1993, despite the fact that per-customer minutes of use have increased dramatically.[12/] As the Commission itself has recognized, "competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."[13/] In particular, "competition continues to afford many significant benefits to consumers," and "[c]onsumers continue to contribute to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service."[14/] And the implementation of local number portability beginning in November 2003 has enabled those wireless customers that are dissatisfied with their wireless carrier to switch easily from one competitor in the market to another — thus creating further pressure on wireless carriers to improve their customer service.[15/] Carriers ignore this pressure at their peril. A recent survey commissioned by the National Consumers League reports that almost half of the respondents with wireless phone service have switched providers at some point.[16/]

Given the competitive pressures that wireless carriers face to ensure customer satisfaction, it is not surprising that carriers have gone to great lengths to ensure that their customer bills are clear and non-misleading. Accordingly, the wireless industry has *voluntarily*

12/ *Id*. *See also* T-Mobile Comments at 6-7.

13/ *See* Ninth Report, *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, 20600 ¶ 3 (2004).

14/ *Id*. at 20601 ¶ 4.

15/ *Id*.

16/ Harris Interactive, *Consumers and Communications Technologies: Current and Future Use*, prepared for the National Consumers League, at 53 (June 29, 2005), *available at http://nclnet.org/research/utilities/telecom_survey_harris.pdf*.

adopted consumer protection practices, of which the *Consumer Code* is the prime example. And contrary to the suggestions of the Consumer Groups, the state Attorneys General, and NASUCA, these efforts are already bearing fruit notwithstanding the limited time the *Code* has been in effect. As the FCC itself has acknowledged,[17/] the number of billing-related complaints received by wireless carriers is remarkably low — especially when adjusted to take into account the astounding increase in the number of wireless customers overall. For example, as Sprint discusses in its comments, the complaint rate against wireless carriers in 2004 was only 0.01 percent, or one complaint for every 10,000 wireless customers.[18/] Statistics presented by Verizon Wireless and others similarly emphasize the point that the "total volume of [wireless subscriber] complaints is far less relevant than complaints on a proportionate, per-subscriber basis," which the FCC's own statistics make clear have in fact been declining.[19/] A complaint rate this miniscule clearly *does not* suggest that there is any problem here of the kind suggested by the Consumer Groups and others. The high levels of customer satisfaction attained by the industry

17/ *See Second Report and Order* at 6456 ¶ 16.

18/ *See* Sprint Comments (filed June 24, 2005) at 16 ("Sprint Comments").

19/ *See* Comments of Verizon Wireless (filed June 24, 2005) at 33-34 ("Verizon Wireless Comments") (citing various FCC sources demonstrating the "steep decrease" in the number of billing-related complaints per wireless subscriber between 2002 and 2004); Comments of Dobson Communications Corporation (filed June 24, 2005) at 3 ("Given that the total number of wireless subscribers exceeded 160 million as of December 2003, the total number of complaints continues to be relatively small."). *See also* FCC News Release, "Quarterly Report on Informal Consumer Inquiries and Complaints Released" (rel. Mar. 4, 2005) (demonstrating that the number of informal complaints by wireless customers during the fourth quarter of 2004 dropped to 4,369 from 9,120, with billing and rate complaints alone declining by more than 50 percent). Although state-by-state statistics are less readily available, this appears to be the case at the state level as well. As Verizon Wireless suggests, for example, Minnesota "could only offer a 'handful' of affidavits of consumer complaints," to justify a law that required significant changes in wireless carriers' billing practices. Verizon Wireless Comments at 35 (citing Joint Reply to Appellee's Opposition to Appellants' Joint Motion for Stay Pending Appeal, *Cellco Partnership et al v. Hatch*, No. 04-3198 (8th Cir. argued May 11, 2005)).

corroborate these statistics. The National Consumers League survey indicates that the vast majority of wireless telephone customers are satisfied with the quality of their service and believe that it provides them with a good value for the price.[20/]

Because wireless carriers, through industry-led efforts such as the *Consumer Code*, have created billing and other consumer protection practices that undeniably are already working to the benefit of consumers, the Commission should refrain from imposing costly, unnecessary additional regulation.[21/] Indeed, replacing these voluntary efforts at this early date with prescriptive regulations is unsupported by the record and inconsistent with the policies of the Act and the deregulatory approach to the wireless industry.

20/ *Consumers and Communications Technologies* at 40 (reporting that 75% of survey respondents with wireless phones believed they receive good value for the price they pay and 90% are satisfied with service quality). The metrics of the wireless industry are higher than those attained by the less competitive cable and satellite television industries. *See id.*

21/ The *CTIA Consumer Code* was adopted in September 2003, less than two years ago, with substantial industry effort and participation. CTIA developed it following the Commission's own suggestion that voluntary industry efforts were preferable to increased Commission regulation to protect wireless consumers. *See, e.g.*, "Best Practices 'Best Way' To Solve Wireless Problems, CTIA Told," Communications Daily, March 19, 2003. At the time of its adoption, the Commission lauded the *Code* as the preferred approach for addressing wireless consumer protection issues. *See, e.g.*, "FCC Chairman Michael Powell Statement on Wireless Industry Voluntary Consumer Code," News Release (rel. Sept. 9, 2003) ("Ultimately, voluntary efforts, like the code, are not only good for consumers; they are good for business too by improving the customer experience and encouraging subscription."); "Statement of Commissioner Kathleen Q. Abernathy in Response to CTIA Consumer Code for Wireless Service," News Release (rel. Sept. 9, 2003) ("At the end of the day, the industry's willingness to adopt a voluntary code of conduct avoids the need for costly regulatory oversight while delivering greater value to wireless customers."). Given the relatively short time in which the *Code* has been in effect, as well as the lack of evidence that the number of wireless billing-related complaints per-subscriber is increasing, CTIA believes that the Commission should refrain from abruptly reversing course and imposing excessive regulation on wireless billing practices.

II. THE COMMISSION SHOULD AVOID ADOPTING OVERLY RESTRICTIVE DEFINITIONS FOR "MANDATED" AND "NON-MANDATED" CHARGES.

As indicated in its comments, CTIA supports the Commission's proposal to establish industry-wide definitions for government-mandated and non-mandated charges, and recommends that any such definitions be based on the approach incorporated in the *CTIA Consumer Code*. This approach has proven to be a reasonable, workable means of ensuring that carriers' billing statements are clear and not misleading, while at the same time ensuring that carriers retain the flexibility to present billing charges in a manner that best meets marketplace demands. In particular, because "mandated" and "non-mandated" are imprecise terms given the diverse nature of government-imposed charges faced by wireless carriers, CTIA believes that the straightforward approach to distinguishing among the various charges that make up customers' bills set forth in the *Consumer Code* is preferable. The *Code* avoids overly restrictive definitions, and instead draws the basic distinction that is most important to customers: charges that are *remitted* to the government versus those that are not. This standard is easy for carriers to implement and easy for consumers to understand. For example, carriers are not permitted to include in government-mandated charges those overhead costs associated with compliance with government mandates. The *Code* prohibits labeling as "government mandated" any costs not actually remitted to the government, and it expressly bars labeling "cost recovery fees or charges as taxes."[22/] Thus, customers can easily and quickly determine by reviewing their billing statements for wireless services the amount of the bill that is not being retained by the carrier, but passed on to federal, state or local governmental authorities.

22/ *See Consumer Code* at Section 6.

Given the overwhelming success of the *Code* (which no commenter has refuted), and the simple, easily understood distinction it draws between mandated and non-mandated charges, CTIA urges the Commission to reject the recommendations of commenters who urge the Commission adopt a more restrictive definition of such charges.[23/] Under the Commission's proposal, mandated charges would include only those amounts "that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments."[24/] This defeats the legitimate (and constitutionally protected) ability of carriers to inform customers — in a clear and simple way — about the extent to which government charges affect carriers' charges. Moreover, as T-Mobile points out, the more restrictive definition supported by some commenters also would "give legislatures and agencies too much leeway in determining how the taxes and fees they impose on carriers are described to consumers."[25/] In practice, the more restrictive definition would enable state and local governments to increase taxes and other regulatory fees on carriers — and thus increase the costs of service to consumers — without any accountability because carriers would be precluded from making their customers aware of the increased cost burdens on bills.[26/]

23/ *See* Consumer Groups Comments at 7; Attorneys General Comments at 5-6; NASUCA Comments at 3-11; Comments of the Texas Office of Public Utility Counsel (filed June 24, 2005) at 2.

24/ *See Second FNPRM* at 6469 ¶ 40.

25/ *See* T-Mobile Comments at 8-9.

26/ For example, a recent Ernst & Young study suggests that state and local governments impose taxes on the telecommunications industry at a rate *2.5 percent higher* than any other industry (including manufacturing, utilities, retail, finance, insurance and real estate). *See* "Telecom Notes," Communications Daily, July 20, 2005 at 9. Carriers have every right to pass this information on to their customers in a manner that allows customers to understand the source of carriers' increased costs.

In advocating the more restrictive definition of mandated charges as including only those charges that a carrier is *required* to collect from the end user and remit to the government, commenters such as the Consumer Groups, the state attorneys general, and NASUCA have failed to provide any compelling evidence that there is a need for such a change from the current practices of wireless carriers that follow the *Consumer Code* and the Commission's existing "Truth-in-Billing" guidelines. Although such commenters attempt to focus the Commission's attention on what they perceive as a widespread practice by carriers of misrepresenting what in fact are administrative charges as government mandated charges,[27/] as discussed above, the *Consumer Code* clearly prohibits carriers from characterizing their administrative and other costs of doing business as government-mandated costs. The *Code* thus already achieves the Commission's "Truth-in-Billing" policy goals of ensuring that customer bills are "brief, clear, non-misleading, and in plain language," and any more restrictive requirements thus are unnecessary.[28/]

Finally, as CTIA explained in its comments[29/] and as the statistics cited above make clear, an overly restrictive distinction between mandated and non-mandated charges is wholly unnecessary given that the market already provides a very powerful check on unclear or misleading billing statements. Consumer confusion about billing statements leads to customer dissatisfaction, which, in turn, leads to churn. And even if billing problems do not lead a customer to seek a new carrier, calls to customer care centers are themselves expensive to

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27/ *See, e.g.*, Attorneys General Comments at 5; NASUCA Comments at 5-6.

28/ *See Second FNPRM* at 6450, 6475 ¶¶ 1, 52; 47 C.F.R. § 64.2401(b).

29/ CTIA Comments at 11.

carriers. Carriers therefore have strong incentives to provide clear and non-misleading bills. There is no need for more specific requirements in this area beyond those set forth in the *Code*.

III. THERE IS NO JUSTIFICATION FOR THE IMPOSITION OF STANDARDIZED LABELING REQUIREMENTS OR RESTRICTIONS ON CARRIERS' ABILITY TO AGGREGATE FEDERAL LINE ITEM CHARGES.

As discussed in Section I, above, the record submitted in response to the *Second FNPRM* makes clear that wireless carriers are succeeding in ensuring that their customers' bills are clear, non-misleading and written in plain language. Accordingly, CTIA believes that any disclosure requirements that the Commission adopts in this proceeding should be based on those set forth in the *Consumer Code*. The *Code* ensures that wireless customers have adequate information with which to make informed decisions concerning the wireless services available to them. CTIA therefore strongly opposes the imposition on wireless carriers of standardized labeling requirements or limitations on carriers' ability to aggregate multiple line items in their customer billing statements.

A. The record does not support standardized labeling requirements.

CTIA urges the Commission to reject the recommendations of those commenters that request that it impose standardized labeling requirements on wireless carriers.[30/] Absent any showing that consumers are being injured because carriers' bills are unclear or misleading, there is no need for specific terminology or standardized labeling requirements. Dictating the manner in which wireless carriers present and describe specific charges on their customers' bills would be completely at odds with Congress's intent that the Commission allow the CMRS industry to develop free of unnecessary, heavy regulation. Such a heavy-handed regulatory approach also

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30/ *See* Consumer Groups Comments at 9; Attorneys General Comments at 7-8; NASUCA Comments at 5.

would be extremely burdensome for most carriers to implement in practice, and it would unavoidably lead to increased costs for consumers.

As CTIA argued in its comments,[31/] both Congress and the Commission have adopted a deregulatory approach that relies "on market forces, rather than regulation, except when there is market failure."[32/] There is no market failure in the context of wireless carrier billing practices that suggests that standardized labeling requirements are necessary; instead, as Congress envisioned, robust market competition is providing a powerful incentive to carriers to ensure that their billing statements are clear and easily understood.[33/] As noted above, when customers are dissatisfied because of confusion about their billing statements, they have every incentive and ample options to select another carrier. Carriers therefore do not require the type of regulatory micromanagement over their billing systems that NASUCA and others propose.

In attempting to justify imposing standardized labeling requirements on the wireless industry, the Consumer Groups, the state Attorneys General, and NASUCA fail to address the very real practical and financial drawbacks of their proposal. As CTIA explained, its members represent a very diverse group of wireless carriers, each with its own unique billing and marketing practices, which often are aimed at targeting different segments of the consumer

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31/ CTIA Comments at 9-11.

32/ Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8998 n.69 ¶ 22 (2002), *pet. for review denied sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

33/ *See, e.g.*, Report and Order, *Petition of the Conn. Dep't of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Conn.*, 10 FCC Rcd 7025, 7031-32 ¶ 10 (1995), *review denied sub nom. Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842 (2d Cir. 1996) ("the statutory plan [of section 332(c)] is clear. Congress envisioned an economically vibrant and competitive market . . . . Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.").

marketplace.[34] Carriers often have multiple billing plans (and thus multiple billing formats), all designed to enhance consumer choice. For example, many carriers offer a variety of service plans to their customers, some of which bundle various services and features, and some of which do not. The billing formats carriers use for these various plans may therefore differ dramatically. Requiring each and every wireless carrier to abandon these individually tailored billing formats and adopt standardized billing labels would represent an enormous and time-consuming undertaking that is wholly unjustified by the record before the Commission. As Nextel makes clear, for example, "[a] telecommunications company's billing system is . . . typically its most complex system, and is costly and time-consuming to develop, implement, and maintain."[35] Altering such systems after they are implemented to take into account the need for unanticipated features, would be "vastly more complicated" and costly, and would involve "significant lead time [and] considerable expense."[36] Sprint agrees, noting "every detailed regulation that touches these complex systems can have millions of dollars of potential cost, all of which must ultimately be paid by consumers."[37] Moreover, some billing systems in fact "limit the number of characters that any label can contain."[38] As a result, any Commission-mandated standardized labeling requirement that exceeds the number of characters permitted by a carrier's current billing system

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34/ *See* CTIA Comments at 11-12.

35/ *See* Comments of Nextel Communications, Inc, and Nextel Partners, Inc. (filed June 24, 2005) ("Nextel Comments") at 5.

36/ *Id* at 5-6.

37/ *See* Sprint Comments at 15. *See also* Nextel Comments at 5 ("However difficult it may be to design a billing system to accommodate a certain feature, it is a vastly more complicated, costly, and extended process to alter an existing system to accommodate that feature when the need for that feature was not planned for.").

38/ Nextel Comments at 16.

would require significant time and effort by carriers (or their billing vendors) to implement. And in the case of those carriers that outsource their billing and customer care systems, the adoption of standardized labeling requirements may not be entirely within their control.[39/] Nothing in the record justifies eliminating choice and increasing consumer costs in this manner.

B. The First Amendment does not support standardized labeling requirements.

As CTIA has argued extensively before the Commission in its comments in response to the Commission's past "Truth-in-Billing" proposals and the *NASUCA Petition* seeking to prohibit certain line items[40/] (and as the Commission itself has recognized), imposing standardized labeling requirements may violate the First Amendment. Accordingly, the Commission must be especially careful about imposing rules that — even inadvertently — would censor carriers' truthful, non-misleading speech. As discussed below, none of the commenters advocating such requirements[41/] has made a compelling argument as to how the rules would survive the level of scrutiny necessary to restrict carriers' freedom of speech.[42/]

39/ *See, e.g.*, Comments of Dobson Communications Corporation (filed June 24, 2005) at 8-9 ("Dobson does not yet have the economies of scale to justify having its own personalized billing system. Accordingly, Dobson does not have the same flexibility to unilaterally make changes to the billing system as would a larger carrier with an internal system."); Sprint Comments at 15 ("The Commission must also be sensitive to the fact that not all billing platforms are directly in the control of a carrier.").

40/ *See, e.g.*, CTIA Comments at 12-15; Opposition of CTIA – The Wireless Association™, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers; Truth-in-Billing and Billing Format*, filed in CG Docket No. 04-208, CC Docket No. 98-170, July 14, 2004, at 17.

41/ *See, e.g.*, Consumer Groups Comments at 9-10; Attorneys General Comments at 7-8; NASUCA Comments at 15-16.

42/ Moreover, as some commenters have pointed out, labels describing government taxes and fees "have a political element," and carriers have a constitutional right to convey to their customers the source of many of the non-service-related costs that affect customers' monthly

When a lawmaker (or regulator) seeks to prohibit the dissemination of truthful, non-misleading commercial information, such as a carrier's choice of wording to identify its own legitimate charges, the First Amendment demands that the prohibition be subjected to rigorous review.[43/] Under that rigorous review, the only instance in which standardized labels — which in effect would amount to a blanket restriction on carriers' legitimate commercial expressions — would be permissible would be if the Commission found that carriers' bills are deceptive or otherwise misleading, which it has not found and the record does not support.

On this issue, NASUCA, the Consumer Groups, and the State Attorneys General largely repeat the same arguments here that they raised in proceedings on the *NASUCA Petition* in favor of restricting carriers' First Amendment rights to communicate with their customers. CTIA and others demonstrated in their comments in response to the *Second FNPRM* and elsewhere in this docket that the Supreme Court's decision in *Central Hudson* would not permit such a restriction on speech.[44/] The Consumer Groups and the State Attorneys General also suggest that carriers enjoy no protection under the First Amendment in determining how to present charges for specific items on their billing statements because a requirement that carriers employ only the specific terminology dictated by the Commission is necessary to make certain that carriers "more

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bills. *See, e.g.*, Sprint Comments at 21-22 ("customers have a right to know the taxes and fees that government is imposing on their service providers"). For example, as noted above (*see* note 26, *supra*), a recent Ernst & Young study suggests that state and local governments impose taxes on the telecommunications industry at a rate *2.5 percent higher* than any other industry (including manufacturing, utilities, retail, finance, insurance and real estate). *See* "Telecom Notes," Communications Daily, July 20, 2005 at 9. A requirement that carriers use standardized labels to describe such taxes would interfere with carriers' First Amendment right to inform their customers about the magnitude of such taxes and their impact on customers' bills.

43/ *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

44/ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

fully disclose information"[45] to their customers and to ensure that customers are not "deceived by ambiguity."[46] As discussed above, in the absence of a showing that customers' bills are unclear or misleading, the imposition of a standardized labeling requirements on carriers' billing statements is wholly unjustified. The Consumer Groups make no effort to demonstrate exactly how restricting carriers' ability to communicate with their customers to the use of only those terms dictated by the Commission would result in fuller disclosure; in fact, as noted below, CTIA believes that carriers are likely to provide their customers with *more* information if they are able fully to communicate with them without being forced to use only government-approved terminology.

The commenters advocating the imposition of standardized labeling requirements have failed to provide any new or compelling reasons why standardized labeling of categories would not unconstitutionally interfere with carriers' efforts to communicate with specific groups of customers (*e.g.*, Spanish speakers) or introduce new categories of service (*e.g.*, bundled voice and data offerings, and hybrid service offerings that combine prepaid and postpaid elements). And as discussed throughout CTIA's submissions in this proceeding, given the highly competitive nature of the wireless marketplace, carriers have very real incentives to respond flexibly and quickly to concerns by the customers that their bills are inaccurate or confusing. In short, if customers are surprised or confused by the presentation of specific charges on their billing statements and believe they gave been misled, they are likely to seek service elsewhere.

45/ *See* Consumer Groups Comments at 10.

46/ *See* Attorneys General Comments at 8 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

C. Carriers must retain the flexibility to combine multiple federal regulatory charges into a single line item.

As CTIA made clear in its initial comments,[47/] section 201(b) creates no presumption against combining multiple federal regulatory charges into a single line item, and CTIA strongly opposes the adoption of any regulations that would dictate the manner in which carriers may present federal regulatory charges on their customer billing statements, except insofar as may be necessary to ensure that such statements are clear and not misleading. CTIA therefore recommends that the Commission reject the proposals by commenters such as the Consumer Groups, the state Attorneys General, and NASUCA, that it prohibit or otherwise limit the combination of federal regulatory charges in line items, beyond the basic disclosure requirements set forth in the *Consumer Code*.[48/] Although such commenters suggest that carriers have in the past combined one or more federal regulatory charges into a single line item, or "lump sum" charge, in a manner that is unjust or unreasonable under section 201(b), they have failed to make any showing that this practice is widespread within the industry, or that it cannot adequately be addressed through restrictions now in place under the *Consumer Code* coupled with the FCC's existing enforcement mechanisms. And more importantly, they have completely failed to take into account the important reasons, which CTIA and others have discussed in their comments,

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47/ CTIA Comments at 15-17.

48/ It is worth noting that NASUCA previously supported an entirely different limitation on carrier billing flexibility. Specifically, NASUCA supported a requirement that telecommunications carriers *combine* their line-item charges – asking the Commission to preclude carriers from separately listing line-item charges on customer bills that are not mandated by federal, state, or local regulatory action. *See National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers; Truth-in-Billing and Billing Format*, filed in CG Docket No. 04-208, CC Docket No. 98-170, March 30, 2004.

why carriers should retain the flexibility to present federal line items in a manner that best meets their customers' needs.

By aggregating the substantial number of federal charges on their bills, carriers provide their customers with valuable information concerning the various costs underlying their wireless calling plans — and the extent to which those costs lie wholly outside the carrier's control. In the absence of a showing that carriers' billing statements are unclear or misleading, the Commission should leave the market free to strike the proper balance between combined and separated charges. Indeed, as many commenters have recognized,[49/] the Commission relied on this very reasoning in the past to *reject* any rules that would limit carrier flexibility in this manner. Specifically, in the *First Truth-in-Billing Order*, the Commission refused to adopt a detailed regulatory approach to the presentation of line items because it envisioned that "carriers may satisfy [their disclosure obligations] in widely divergent manners that best fit their own specific needs and those of their customers."[50/] The Commission also concluded that "carriers should have broad discretion in fashioning their additional descriptions, provided only that they are factually accurate and non-misleading."[51/] In short, the Commission found that as long as customers were able to understand their bills and compare the costs of service among carriers, "competition" should ensure federal regulatory line item costs "are recovered in an appropriate manner."[52/]

49/ *See, e.g.*, Sprint Comments at 19-20; T-Mobile Comments at 10.

50/ *See* First Report and Order and Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7502 ¶ 15 (1999) ("*Truth-in-Billing Order*").

51/ *Id* at 7527-28 ¶ 56.

52/ *Id*. at 7526-27 ¶ 55.

NASUCA and others that advocate a flat-out prohibition on the combination of federal regulatory charges also have failed to consider the likelihood that requiring carriers to list each and every federal regulatory charge in a separate line item would clearly result in *more*, not less, customer confusion. Under this proposal, customer billing statements would end up being significantly longer and more complicated than is currently the case. Such a result would run completely counter to what carriers are striving to do: respond to their customers' demands for greater simplicity in their bills. As Verizon Wireless has noted, a rule prohibiting carriers from combining one or more federal regulatory charges into a single line item would significantly lengthen and increase the complexity of customer billing statements.[53/] Requiring carriers to itemize all federal regulatory charges separately — such as the annual FCC regulatory fee, and the fees assessed on carriers to support number administration and Telecommunications Relay Services — would add to customer confusion and, in fact, could make it *more difficult* for customers to comparison shop among various carriers.

Finally, to the extent the Commission establishes straightforward, industry-wide distinction between mandated and non-mandated charges, any concern that the combination of multiple federal regulatory charges is misleading will have been largely addressed.[54/]

53/ *See* Verizon Wireless Comments at 49-50. Verizon Wireless also raises an additional practical difficulty associated with an approach that required carriers to list and itemize all federal regulatory charges: In many instances, such charges are less than $0.01 per customer per month. Unfortunately, however, many carriers' billing systems will not permit them to impose charges on customers of less than $0.01. *See* Verizon Wireless Comments at 48-49. As a result, a rule prohibiting the grouping of federal charges into one or more line items could prevent a carrier from identifying and directly capturing the costs associated with certain individual charges.

54/ *See, e.g.*, Comments of Cingular Wireless LLC (filed June 24, 2005) at 59; *see also* Nextel Comments at 16 ("[O]nce the Commission requires *all* carriers to similarly separate mandated from non-mandated charges, all consumers will have the information they need to choose among carriers.").

Specifically, to the extent carriers already comply with any Commission rule prohibiting the characterization of what in fact are non-government-related charges as mandated, the combination of federal regulatory charges into one or more consolidated line items would be reasonable under section 201(b). In other words, by adopting a formal definition for mandated and non-mandated charges and requiring carriers to adjust their billing practices to make sure that their customers understand that distinction, the Commission will have addressed any fears that combining such charges would somehow mislead customers.

IV. THE COMMISSION SHOULD ADOPT REASONABLE POINT OF SALE DISCLOSURE RULES BASED ON THE PRINCIPLES SET FORTH IN THE CTIA CONSUMER CODE.

The Commission proposed in the *Second FNPRM* that carriers be required to disclose to their prospective customers, at the point of sale, the "full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges."[55/] CTIA supports the Commission's efforts on this issue, and emphasizes that Section 1 of the *CTIA Consumer Code* already imposes on wireless carriers disclosure requirements that in fact reach *beyond* those proposed by the Commission. All carriers that subscribe to the *Code* are required to provide their prospective customers with accurate information regarding the total costs of service. Specifically, among other information, such carriers must separately identify at the point of sale (and on their websites) all of the charges that they collect for providing service (including the monthly access fee or base charge for service, any additional or different charges for nights and weekends, any charges for access or additional minutes, and the per minute long distance and roaming or off network charges) and all of the taxes, fees or surcharges that might apply,

55/ *Second FNPRM* 6476-77 ¶ 55.

including "the amount or range of any such fees or surcharges that are collected and retained by the carrier."[56/]

CTIA opposes any Commission rule that would automatically treat as "misleading" any mandated charges that exceed the carrier's reasonable estimate of such charges. Commenters advocating the ten percent threshold, such as NASUCA,[57/] have failed to demonstrate how this arbitrary threshold would not unfairly prejudice carriers, given the fact that, in the end, carriers can only make a good-faith estimate of the specific federal, state and local taxes and other fees that will apply to an individual wireless customer. This problem is exacerbated by the fact that wireless service is by its very nature not confined to any specific state or locality, so that it is impossible for carriers to predict with any accuracy the federal, state and local charges that will ultimately appear on a prospective customer's bill. Moreover, many local governments are balancing revenue shortfalls by adding new taxes to wireless bills.[58/] For this very reason, some carriers provide their customers with approximate ranges of anticipated government charges at

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[56/] *See CTIA Consumer Code for Wireless Services* at Section 1. Specifically, carriers subscribing to the *Code* must make available at the point of sale and on their websites: (a) the calling area for the plan; (b) the monthly access fee or base charge; (c) the number of airtime minutes included in the plan; (d) any nights and weekend minutes included in the plan or other differing charges for different time periods and the time periods when nights and weekend minutes or other charges apply; (e) the charges for excess or additional minutes; (f) per-minute long distance charges or whether long distance is included in other rates; (g) per-minute roaming or off-network charges; (h) whether any additional taxes, fees or surcharges apply; (i) the amount or range of any such fees or surcharges that are collected and retained by the carrier; (j) whether a fixed-term contract is required and its duration; (k) any activation or initiation fee; and (l) any early termination fee that applies and the trial period during which no early termination fee will apply. *Id.*

[57/] *See* NASUCA Comments at 54.

[58/] *See, e.g.*, Alexandria to Tax Cell Phones as Other Revenue Drops, The Washington Post, Thursday, June 16, 2005; Page VA03 (*available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/15/AR2005061500780.htmsurpl) (starting in September, Alexandria, Virginia residents will be taxed $3.00 a month for wireless service).

the point of sale and provide tools on their Internet sites that allow prospective customers to estimate the amount of government charges that would appear on their bill based on their specific calling patterns.[59/]

In light of the success of the *Code* and the lack of any evidence that carriers have misled prospective customers, any point of sale disclosure requirements beyond those contained in the *Code* are not warranted. The Commission should therefore reject NASUCA's request that carriers be required to provide their customers with the option of terminating service up to 45 days after receipt of their first bill.[60/] Such a rule would work a substantial harm on carriers and is unnecessary in light of existing protections that ensure accurate disclosure. CTIA is unaware of *any* long-term contract-based industry in which consumers are granted such an unequivocal right to terminate. Imposing such a requirement here — in the absence of any legitimate showing that carriers are misleading customers about the total costs of service — would amount to a significant overreaching on the part of the Commission. Indeed, such a rule would in effect amount to prohibited rate regulation under section 332(c)(3), because it would prohibit a carrier from billing a customer for all of the charges, *including* any government-mandated charges, that customer has legitimately accrued because the carrier failed precisely to predict the actual amount of such charges at the point of sale. Finally, such a rule would effectively provide those customers seeking to "game the system" with an easy means of obtaining more than two months of free service, because they would have the right to cancel service at their option more than one month after receiving their first bill, and thus raise the costs of wireless service for all other customers.

59/ *See, e.g.*, https://www.cingular.com/customer_service/additional charges.

60/ *Id*.

V. THE COMMISSION HAS AMPLE AUTHORITY TO PREEMPT STATE TRUTH-IN-BILLING REGULATION.

Just last month, the Supreme Court reaffirmed the supremacy of the Commission's judgments in addressing complicated telecommunications policy issues under the Communications Act.[61/] Once again, that judgment is needed to ensure that the CMRS industry continues to thrive in a deregulatory environment that has provided consumers with ever-increasing benefits. As explained in detail in CTIA's opening comments,[62/] the Commission should follow through with its conclusions in the *Second FNPRM* and preempt any state regulation that would undermine the careful federal balance set by the Commission — promoting CMRS competition while imposing government regulations only in the face of actual market failures. It has ample authority to do so. First, a long line of precedent supports the Commission's authority to preempt state regulations where necessary to implement national policy.[63/] Second, opponents of Commission preemption are mistaken when they argue that the Communications Act limits the Commission's authority with respect to preemption of CMRS billing regulations.[64/] Third, the opposing parties are likewise wrong when they argue that the Commission's authority to preempt is limited by a "presumption" against preemption. There is no such presumption applicable here.[65/]

61/ *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

62/ CTIA Comments at 17-37.

63/ *See* Section V.A below.

64/ *See* Section V.B below.

65/ *See* Section V.C. below.

A. The Commission is authorized to preempt state truth-in-billing rules.

State rules are preempted when compliance with both federal and state law is a "physical impossibility" or "when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[66/] If the Commission wishes to preempt, no "express congressional authorization to displace state law" is necessary.[67/] Instead, the Commission need only establish that preemption will "'reasonab[ly] accommodat[e] . . . [the] conflicting policies that were committed to the agency's care by the statute,'"[68/] even if the Commission seeks to fully occupy a field.[69/]

Opponents of preemption do not challenge the Commission's authority to act with respect to the regulation of wireless bills. Indeed, they urge the Commission to act.[70/] Section 201(b) of the Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest" to implement the Act, including the statute's mandate that "[a]ll…

66/ *Mount Olivet Cemetery Ass'n v. Salt Lake City,* 164 F.3d 480, 486 (10th Cir. 1998) (considering preemption of local zoning ordinance) (citing *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996)). *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

67/ *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982)).

68/ *Id.* at 61 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

69/ *Id.* at 64. Of course, as set forth in CTIA's opening comments, numerous other bases for preemption also exist. CTIA Comments at 38-42.

70/ *See, e.g.*, Attorneys General Comments at 1 (urging Commission to adopt rules prohibiting certain carrier practices); Consumer Groups Comments at 6-13 (same); Initial Comments of NARUC (filed June 24, 2005) at 2 ("NARUC Comments") (same); NASUCA Comments at 2-3 (same).

practices . . . for and in connection with" communication service be just and reasonable.[71/] None of the parties opposing preemption has challenged the Commission's conclusion in the *Declaratory Ruling* that "a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b)."[72/]

Unable to confront directly the legal bases for Commission preemptive authority, opponents resort to misdirection. The state Attorneys General, for example, float the novel theory that preemptive federal regulations may only be promulgated if there are specific state regulations to preempt.[73/] Leaving aside the fact, conceded by the state Attorneys General, that state truth-in-billing rules applicable to wireless carriers *do* in fact exist,[74/] the claim has no basis

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[71/] 47 U.S.C. § 201(b). Section 205(a) similarly empowers the Commission to "determine and prescribe what will be a just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable." 47 U.S.C. § 205(a). The Commission has multiple statutory sources of authority over billing matters, CTIA Comments at 42 n.114. As held in the *Declaratory Ruling*, those state billing regulations that are effectively rate or entry regulations are already preempted by the Act itself. Indeed, as Verizon Wireless points out, several proposed state billing rules would run afoul of the express preemption provision of section 332(c)(3) of the Act. Verizon Wireless Comments at 18.

[72/] *Declaratory Ruling* at 6460 ¶ 25. The state Attorneys General argue that section 201(b) of the Act does not independently preempt any state regulations. Attorneys General Comments at 25. Although there is a circuit split on that issue, *compare Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *with Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002), that debate has no bearing on the question whether, under *City of New York*, the Commission may preempt state laws inconsistent with its own regulations promulgated under section 201(b).

[73/] Attorneys General Comments at 23-24. In a similar vein, NASUCA first concedes that "[p]reemption may result not only from acts of Congress but also from acts of federal agencies acting within the scope of their congressionally delegated authority." But then it feigns ignorance of the Commission's citation of sections 201(b) and 205(a) of the Act as potential sources of such authority and attacks the Commission for not explaining how state truth-in-billing regulations conflict with federal regulations. NASUCA Comments at 25-26.

[74/] Attorneys General Comments at 24 n.92.

in precedent.[75] The Supreme Court has left no doubt that the "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances *the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area*."[76] The Commission has done so time and again — *e.g.*, for any state laws enforcing section 315(b) of the Act,[77] for state structural separation requirements for information services,[78] and for any state entry regulations for VoIP services.[79] Here, as in other cases, clarification from the Commission that its rules preempt state regulations will deter needless — and costly — future litigation over whether the Commission's rules do or do not preempt existing or future state truth-in-billing rules.

75/ The state Attorneys General rely on *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 195 (D.C. Cir. 1995), which stands for the unremarkable proposition that preemption challenges to existing state regulations must be ripe before they are subject to judicial review. The case says nothing about whether the Commission may issue preemptive regulations in the first instance.

76/ *City of New York*, 486 U.S. at 64 (emphasis added)(citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *De la Cuesta*, 458 U.S. at 152-54). The state Attorneys General invocation of *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985), is not to the contrary. Attorneys General Comments at 21-22. That case involved a question of whether agency regulations preempted the field where the agency *disclaimed any intent* that its regulations be preemptive. *Hillsborough*, 471 U.S. at 714.

77/ Declaratory Ruling, *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934 As Amended*, 6 FCC Rcd 7511, 7512 ¶ 12 (1991) ("*Lowest Unit Charge Order*"), *on recon.*, 7 FCC Rcd 4123 (1992), *pet. for review dismissed sub nom.*, *Miller v. FCC*, 66 F.3d 1140 (11th Cir. 1995).

78/ *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (affirming FCC preemption of state structural separation rules on jurisdictionally mixed enhanced services).

79/ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) ("*Vonage Holdings Corp.*").

NASUCA objects that the Commission has not identified any change in law or fact that justifies its possible change of course vis-à-vis the validity of local truth-in-billing regulations since six years ago.[80/] As the Supreme Court recently reaffirmed in *Brand X*, "'the agency . . . must consider . . . the wisdom of its policy on a continuing basis'" and it is only "[u]nexplained inconsistency" that is unlawful.[81/] In any case, NASUCA's argument disregards the *fundamental change* to truth-in-billing regulation implemented by the Commission's March Order — CMRS carriers are now subject to federal truth-in-billing regulations.[82/] The new consumer protections at the federal level radically alter the balance between state and federal interests, as the Commission must now determine if state regulations will interfere with its ability to set policy through its national rules. NASUCA also ignores both the proliferation of state regulations,[83/] and the growing burdens and costs of those regulations on wireless carriers in an era where their plans, their customers' calling patterns, and their network footprints cross more and more state boundaries.

B. Nothing in the Communications Act impairs the Commission's authority to issue preemptive truth-in-billing regulations.

Though opponents of Commission action raise a variety of statutory objections to preemption, they largely evade the question at hand — whether the Commission has the

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80/ NASUCA Comments at 24, 27; *see also* Attorneys General Comments at 24 ("Moreover, in interpreting section 332(c)(3) [in the past], the FCC expressed its understanding that market forces and state regulation can coexist.").

81/ *Brand X*, 125 S. Ct. at 2699-700 (quoting *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984).

82/ *Second Report and Order* at 6456 ¶ 16 ("We conclude that CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b)'s requirement that billing descriptions be brief, clear, non-misleading and in plain language.").

83/ *See, e.g.*, Verizon Wireless Comments at 10-13; T-Mobile Comments at 12-15.

authority to preempt state law. Instead, they devote considerable effort to the claim that state regulations of the terms and conditions of wireless service is not *already* preempted by the Act.[84/] What these commenters appear to suggest is that section 332(c)(3)'s preservation of certain state regulations from *statutory* preemption functions as a bar to preemption by *Commission regulation* under its authority in 201(b) of the Act and elsewhere.[85/] Not so. As the Commission recently noted, "federal agencies have very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute."[86/]

Indeed, the Supreme Court confronted precisely this issue in *Geier v. American Honda Motor Co*. and held that agency regulations may preempt state law under standard conflict preemption principles notwithstanding a savings clause that would otherwise have preserved state authority.[87/] *Geier* involved a state-law tort claim based on a manufacturer's failure to install a driver's side air bag. The Court first considered whether action was preempted by the National Traffic and Motor Vehicle Safety Act's express preemption provision. The Court concluded that it did not, in light of a statutory savings clause preserving certain tort claims.[88/]

84/ Attorneys General Comments at 13-25.

85/ Attorneys General Comments at 24 ("The 1934 Act maintained the dual regulatory framework in section 332(c), and reinforced the states' important role in protecting consumers and ensuring reasonable terms and conditions of all telecommunications services, including wireless."); *see also, e.g.*, NASUCA Comments at 24; Attorneys General Comments at 15; Consumer Groups Comments at 15.

86/ Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Rcd 6830, 6839 ¶ 19 (2005); *see also Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 162 (1982).

87/ 529 U.S. 861 (2000).

88/ *Id.* at 868.

But the Court's holding with respect to *statutory* preemption did not save the state claim from *conflict* preemption with an agency regulation that addressed air bag requirements without requiring the defendant manufacturer to install them. Even though the DOT regulation in that case did not explicitly preempt the state law claim in question, the Court held that it preempted state tort law because permitting the suit to proceed would conflict with the regulation's underlying policy goals.[89/] The savings clause had no bearing on this analysis. Although the provision "remove[d] tort actions from the scope of the express pre-emption clause," it did not "foreclose or limit the operation of ordinary pre-emption principles [that] instruct us to read statutes as pre-empting state laws . . . that 'actually conflict' with the statute or *federal standards promulgated thereunder*."[90/]

Precisely the same analysis applies here (to the extent that section 332(c)(3)'s express preemption of rates and entry regulation does not already preempt state truth-in-billing rules). Section 332(c)(3) pointedly provides that

> 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.[91/]

Congress said nothing about the Commission's well-established authority to enforce valid regulations by preempting state laws inconsistent with them; it merely limited the scope of

89/ *Id.* at 881-82.

90/ *Id.* at 869 (emphasis added).

91/ 47 U.S.C. § 332(c)(3) (emphasis added).

section 332's *statutory* preemption.[92/] Indeed, Congress's 1993 amendments make clear the Commission's plenary authority over wireless services.[93/] In other provisions of the Communications Act, Congress has made clear that it knows how to craft statutory language that preserves state law from both statutory *and* agency preemption.[94/] But when such language is absent, agency preemption is permissible. Indeed, multiple courts have upheld agency authority to preempt state laws that are "otherwise *not* inconsistent with federal law,"[95/] notwithstanding the presence of savings clauses worded similarly to section 332(c)(3).[96/] In short, the objecting parties have ignored the Supreme Court's warning that "in a situation where state law is claimed

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92/ Several commenters also suggest that the legislative history of section 332(c)(3) demonstrates Congressional intent that the Commission not preempt state rules. Consumer Groups Comments at 15-16; NASUCA Comments at 41-42, 46. But to the limited extent the cited history is relevant, it speaks to Congress's intent with respect to *statutory* preemption, and not the Commission's authority to preempt.

93/ H.R. Conf. Rep. No. 103-213, at 497 (1993) (amendment of § 152(b) meant to "clarify that the Commission has the authority to regulate commercial mobile service"); *id.* at 490 (intent of § 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of *all* commercial mobile services") (emphasis added). As noted below, opposing commenters ignore this amendment to section 2(b) when quoting it.

94/ *See, e.g.,* 47 U.S.C. § 227(e)(1) (with certain exceptions "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on" unsolicited faxes, automatic dialing systems, etc.); *id.* § 532(g) (Commission regulations concerning leased access rules "shall not preempt authority expressly granted to franchising authorities under this subchapter.").

95/ *City of New York*, 486 U.S. at 64 (emphasis added).

96/ *See International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (savings clause in section 505(e) of the Clean Water Act providing that "'[n]othing *in this section*' [of the Act] . . . shall affect an injured party's right to seek relief under state law" does not preclude agency preemption based on authority provided by its overarching authority to accomplish its duties under "other provisions of the Act.") (emphasis in original); *see also Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1414 (4th Cir. 1994) ("The natural reading of the phrase, 'nothing in *this* section shall restrict' does not preclude preemption by *other* sections of the RCRA.") (emphasis in original).

to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected.'"[97/]

This error is highlighted by the opponents' choice of precedent. For example, on page 24 of their comments, the state Attorneys General invoke *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *Cellular Telecom. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1995), and *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469 (6th Cir. 1997). *Ting* involved the preemptive effect of sections 201(b) and 202(a) of the Act on claims under state consumer protection and contract laws; *Cellular Telecom*. upheld the Commission's conclusion that section 332(c)(3) did not preempt state law mandating universal service contributions; *GTE* ruled that section 332(c)(3) did not on its face conclusively preempt a state administrative complaint between a wireless carrier and a reseller. *None* of these cases addressed whether the Commission could issue preemptive regulations with respect to wireless billing practices.

Other efforts to raise statutory barriers to Commission action are likewise unavailing. Several commenters assert that section 2(b) of the Act, which restricts Commission regulation of certain intrastate services, limits the Commission's preemptive authority in this docket.[98/] NASUCA, for example, argues that section 2(b) still operates in those areas where Congress has not curtailed its scope.[99/] But that is precisely what Congress has done with respect to wireless regulation, in a portion of section 2(b) ignored by NASUCA and others.[100/] Congress expressly

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97/ *City of New York*, 486 U.S. at 64 (quoting *De la Cuesta*, 458 U.S. at 154).

98/ NARUC Comments at 11, 13; Consumer Groups Comments at 17; Arizona Corporation Commission Comments (filed June 24, 2005) at 9; NASUCA Comments at 30, 34.

99/ NASUCA Comments at 30 (discussing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)).

100/ Consumer Groups Comments at 17.

limited section 2(b)'s application to wireless services by making the provision subject to the Commission's authority over wireless services established in sections 332 and 301 of the Act.[101] Section 332(c)(1) provides that CMRS services will be regulated as common carriers and prohibits the Commission from exempting such services from the requirements of section 201 of the Act. Because section 2(b) functions as a limitation on Commission (and not state) authority, section 332(c)(1) necessarily frees the Commission to regulate CMRS providers generally by directing that they be treated as common carriers under Title II without further qualification.[102] The legislative history, moreover, makes clear that this was precisely Congress's intent,[103] and the courts have agreed.[104] Along similar lines, section 301 provides the Commission with authority over the use of wireless services "from one place in any State . . . to another place in the same State."[105] The Supreme Court also has held that section 201(b) is itself a jurisdictional grant to the Commission that permits it to regulate notwithstanding section 2(b).[106]

101/ 47 U.S.C. § 152(b) ("[e]xcept as provided in . . . section 332, and subject to the provisions of section 301").

102/ *See generally* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework that is "Hog Tight, Horse High, and Bull Strong*," 50 Fed. Comm. L.J. 547 (1998).

103/ *See* note 93 *supra*.

104/ In *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd on other grounds sub. nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Eighth Circuit rejected the Commission's local pricing regulations based on the jurisdictional bar in section 2(b), but approved them with respect to CMRS providers. "Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers." *Id.* at 800 n.21 (citations omitted).

105/ *See* 47 U.S.C. § 301(a). Even if the Commission were to consider section 332(c)(3)'s carve out as an indication of Congress's sense of the proper scope of state authority, this clause cannot trump Congress's clear vesting of authority with the Commission to issue rules as

Further, as explained in CTIA's opening comments, even if section 2(b) somehow applies to wireless services (which it does not), the Commission retains authority to preempt state regulations under the impossibility framework of *Louisiana PSC v. FCC*,[107/] as it has recognized in the past.[108/] For example, the Commission had little difficulty preempting the Georgia Public Service Commission's attempt to regulate BellSouth's voicemail services and order that the company cease providing the service as an intrastate offering.[109/] Though the Commission concluded that the Georgia order negated federal policies with respect to enhanced services,[110/] the question remained whether the Commission had the power to preempt the intrastate aspect of the Georgia order. The Commission held that it could given the jurisdictionally mixed nature of voice mail services.

> Complying with the Georgia Order only for the intrastate portion of the voice mail service additionally assumes that BellSouth could market an interstate-only voice mail service. . . . Most customers want voice mail service for both interstate and intrastate use.

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necessary to promote the public interest. Indeed, as the Supreme Court has made clear, even language indicating congressional intent written into the United States Code itself cannot override a clear jurisdictional grant like the one in section 201(b) of the Act. *See New York v. FERC*, 535 U.S. 1, 22 (2002).

106/ *AT&T Corp.*, 525 U.S. at 380-81.

107/ 476 U.S. 355 (1986).

108/ *See* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1506 ¶ 257 n.517 (1994) (determining that the Commission has "authority under *Louisiana PSC* to preempt [state] regulation" of "other terms and conditions" if it finds that such regulation "thwarts or impedes our federal policy").

109/ Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619 (1992), *aff'd mem. sub nom. Georgia Pub. Serv. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

110/ *Id.* at 1623 ¶ 20.

> Given that most users will want both jurisdictional usages, it is not likely that a separate interstate service would find acceptance, especially in the mass market. Even if a separate interstate service were extremely inexpensive, a customer who wanted both jurisdictional services would find it uneconomical and unnecessary to subscribe to a BellSouth interstate service and a competitor's service that offered both interstate and intrastate portions. It would additionally be necessary to seek to explain to customers why intrastate use was unavailable. Therefore, it is additionally not feasible to comply with the Georgia Order only for the intrastate portion of the service because it is not possible to market an interstate voice mail service separately.[111]

The same analysis would apply to wireless services, for there is no simple way to distinguish between the "intrastate" and "interstate" portions of the service.[112] Services are sold in buckets of undifferentiated minutes; users are mobile, and their location is not tracked for each call.[113] Because there is no way to permit the states to continue to regulate the *intrastate* portion of the service without regulating the interstate portion, preemption would be justified on standard conflict principles — even if section 2(b) applied.[114]

111/ *Id.* at 1622 ¶ 15 (footnotes omitted). Numerous other cases have followed the same analysis. *See California*, 39 F.3d at 931-33 (9th Cir. 1994) (affirming FCC preemption of state structural separation rules on jurisdictionally mixed enhanced services); *Vonage Holdings Corp.* at 22423-24 ¶¶ 31-32 (concluding that there is no way to separate VoIP service into inter- and intrastate components).

112/ *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16017-18 ¶ 1044 (1996) (subsequent history omitted) (noting the difficulty of ascertaining the intra- or interstate nature of a CMRS call because "customers may travel from location to location during the course of a single call").

113/ *See id.*

114/ *Cf. Vonage Holdings Corp.* at 22418-19 ¶ 23. Nor does section 414 apply here. NASUCA's argument that preemption would render the statute "superfluous" is without basis. NASUCA Comments at 49. As explained in CTIA's opening comments, whatever effect the provision may have in cases in which the Commission does not explicitly preempt state rulings, both the courts and the Commission have consistently interpreted this provision to yield to the substantive terms of the Act. CTIA Comments at 45.

Finally, several commenters argue that other provisions of the Act, which are not applicable to billing regulations, demonstrate that states have *some* role in telecommunications regulation.[115/] No one has suggested otherwise. The argument of the state Attorneys General that the carriers seek an unregulated market free of *any* state consumer protection regulations therefore misses the mark.[116/] Both the *Second FNPRM* and CTIA endorse the view that state consumer protection laws of general applicability should continue to apply. What these laws *may not* do, however, is be enforced in a manner that would conflict with the policies embodied in the Commission's truth-in-billing rules.

It must be remembered that not only did Congress largely nationalize wireless regulation in 1993, but that radio services have *always* been an area in which federal authority has held primacy.[117/] Regardless of where Congress has drawn the federalism line in other areas, precedent leaves no doubt that the Commission is well within its authority to preempt local billing regulation of CMRS services where it reasonably concludes that such regulation conflicts with Commission billing policies that the opposing commenters concede lie within the Commission's authority to adopt.

115/ *See, e.g.*, Consumer Groups Comments at 18 (discussing sections 253 and 258 of the Act).

116/ Attorneys General Comments at 24.

117/ 47 U.S.C. § 301; Report and Order, *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems* ("*Cellular Communications Systems*"), 86 F.C.C.2d 469, 503-05 ¶¶ 79-83(1981); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.").

C. There is no "presumption" against the Commission's authority to preempt state truth-in-billing rules.

Several commenters suggest that some sort of "presumption" against preemption undermines the Commission's authority to preempt local regulation in order to implement a national policy.[118] The Supreme Court has squarely rejected this argument.

New York v. FERC involved regulations issued by the Federal Energy Regulatory Commission that asserted jurisdiction over retail transmission services in the electricity industry, even though these transmissions traditionally fell within the domain of state regulation.[119] Like the commenters in the current proceeding, opponents to FERC's action argued that a presumption against preemption preserved state authority against federal intrusion.[120]

These arguments were unavailing. The Supreme Court unanimously held that the so-called presumption against preemption has no applicability when the issue concerns an agency's authority to preempt state law.[121]

> The other context in which "pre-emption" arises concerns the rule "that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). This is the sort of case we confront here — defining the proper scope of the federal power. *Such a case does not involve a "presumption against pre-emption,"* as New York argues, but rather requires us to be certain that Congress has conferred authority on the agency.

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[118] Consumer Groups Comments at 19; Attorneys General Comments at 14.

[119] 535 U.S. 1, 16 (2002).

[120] *Id.* at 17.

[121] Three justices dissented with respect to a separate issue, but joined this portion of the Court's holding. *Id.* at 29 (Thomas, J., dissenting).

> As we have explained, the best way to answer such a question — *i.e.*, whether federal power may be exercised in an area of pre-existing state regulation — "is to examine the nature and scope of the authority granted by Congress to the agency." *Ibid*. *In other words, we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.*[122]

The Court went on to hold that FERC had ample authority to act in light of the Federal Power Act's grant of jurisdiction over the "transmission of electric energy in interstate commerce."[123] In precisely the same manner, as discussed above, the Communications Act gives the Commission broad jurisdiction over interstate "communication by wire and radio"[124] and the explicit authority to ensure that "practices . . . for and in connection with" these communications are just and reasonable by "prescrib[ing] such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act.[125] The Commission also, as noted above, has plenary authority over all wireless service — whether interstate or intrastate. No "presumption" suggests that this grant of authority does not mean what it says. The Commission has authority to preempt state regulations that it reasonably concludes would conflict with its national truth-in-billing framework.[126]

122/ *Id.* at 18 (emphases added) (parallel citations omitted) (alteration in original).

123/ *Id.* at 18-19 (quoting 16 U.S.C. § 824(b)).

124/ 47 U.S.C. § 151.

125/ 47 U.S.C. § 201(b).

126/ Opponents of Commission action offer no authority to counter *FERC*'s clear holding. NASUCA cites *Medtronic v. Lohr*, 518 U.S. 470 (1996). NASUCA Comments at 28 n.84. But Medtronic did nothing to question the ability of an agency to issue preemptive regulations. And NASUCA ignores precedent like *Geier* that makes clear that an agency may issue preemptive regulations even in the face of a statutory saving clause that curtails the preemptive reach of a federal statute's provisions.

Indeed, even if the so-called presumption against preemption could apply to agency preemption cases, notwithstanding the Court's holding to the contrary, it would not apply here. In *FERC*, the Court explained that the presumption against preemption applies in cases in which a court is trying to determine whether "a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority. In such a situation, the Court 'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'"[127/] But this presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence."[128/] Such is the case for regulation of radio services like CMRS services, as discussed above.[129/] Indeed, this restriction on the presumption against preemption is reinforced by the very statutory preemption case heavily cited by the state Attorneys General.[130/]

VI. PREEMPTION SERVES THE PUBLIC INTEREST.

Just as there is no doubt about the Commission's authority to preempt inconsistent state truth-in-billing rules, there can likewise be no question that preemption is the best way to "'reasonab[ly] accommodat[e] . . . [the] conflicting policies that were committed to the agency's care by the statute.'"[131/] CTIA's opening comments set forth in detail the important national

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[127/] *FERC*, 535 U.S. at 17-18 (citations omitted) (quoting *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)).

[128/] *United States v. Locke*, 529 U.S. 89, 108 (2000).

[129/] *See supra* note 117 and accompanying text.

[130/] *Cf. Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) ("Thus, we do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.").

[131/] *City of New York*, 486 U.S. at 61 (quoting *Shimer*, 367 U.S. at 383).

deregulatory policies served by preemption and the importance of preemption in preserving the robustly competitive wireless marketplace.[132/]

In contrast, defenders of a patchwork of state-by-state truth-in-billing regulation appear to rest on the unstated assumption that more and different regulations by more and different regulators must serve the public interest. Indeed, NASUCA seems to believe that because the CMRS industry grew when no federal truth-in-billing regulations applied, adding yet more state regulations will be costless even though the Commission has added national rules to the equation.[133/] The opposite is true. In a market characterized by national billing plans and multi-state service offerings, increasingly balkanized billing regulations seriously threaten the continued ability of carriers to provide existing services at currently affordable rates and also to roll out attractively priced broadband and other new services.

A. A patchwork of state regulations imposes costs on carriers and consumers alike.

As noted above, the opening comments of Verizon Wireless, Nextel, and Cingular describe in detail the considerable costs attendant on satisfying disparate billing regulations in multiple states.[134/] These costs are passed on to consumers and threaten the carriers' ability to offer national plans. Carrier billing systems are vastly complex, utilizing millions of lines of code and may cost up to $1 billion to purchase.[135/] As state efforts to regulate wireless bills proliferate, the ability of these systems to function comes under increasing pressure. It is not

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132/ CTIA Comments at 17-23.

133/ NASUCA Comments at 39.

134/ Cingular Comments at 12-18; Nextel Comments at 4-8; Verizon Wireless Comments at 14-16.

135/ Nextel Comments at 5.

correct that variations in local billing rules simply require the "tweaking" of software. Wireless billing systems are not word processors with easily manipulated fonts. They are data processing systems with limited font and typeface flexibility.[136/] Cingular estimates that developing and deploying fifty variants of its billing system under a worst case regulatory scenario would create costs in the hundreds of millions of dollars.[137/]

These costs affect more than just the bottom line of wireless carriers; they inevitably raise prices for consumers. Moreover, they are the predictable result of letting a patchwork of state-by-state regulation evolve rather than implementing a clear, and stable, set of national rules. As explained in CTIA's opening comments, excessive state regulation will deter carriers from offering subscribers new and efficient subscription and billing mechanisms such as Internet billing. National one-rate plans did not become the norm until a carrier first introduced them.[138/] If similar innovations are to follow, carriers need the flexibility to tailor their billing practices to consumer demands, not regulatory dictates. On the other hand, if carriers must conform their bills to multiple billing regimes, their compliance costs inevitably rise as they try to harmonize operations across multiple state borders.

136/ Cingular Comments at 17-18.

137/ Cingular Comments at 15.

138/ Ninth Report*, 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, 20644 ¶ 113 (2004) ("AT&T Wireless's Digital One Rate plan, introduced in May 1998, is one notable example of an independent pricing action that altered the market and benefited consumers. Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of MOUs to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges.") (footnote omitted).

As discussed in CTIA's opening comments, and contrary to the contention of several state commenters,[139/] permitting states to enforce Commission regulations is no solution. First of all, such delegation is unlawful in light of the D.C. Circuit's holding in *USTA II*,[140/] as NASUCA recognizes.[141/] Further, delegating Commission authority to state officials creates the same problems of disparate enforcement as do individual state regulations. This is especially the case where, as here, the rules in question are best implemented as standards that ensure clear disclosures rather than as rigidly prescriptive truth-in-billing rules that regulate the precise terms and format of each line item. In such an environment, enforcement decisions will inevitably take on a substantive character, leading, in effect, to inconsistent rules from state to state.[142/]

B. Local billing regulations of wireless services do not serve any public interest.

State-by-state regulation of wireless billing practices is a solution in search of a problem. Proponents of a patchwork of inconsistent billing rules offer no arguments to justify the costs of such a regime.

As noted above, those commenters decrying hypothetical reductions of consumer protections overlook the fact that the Commission has just *expanded* its truth-in-billing

139/ CTIA Comments at 33-37.

140/ CTIA Comments at 35-37.

141/ NASUCA Comments at 18 ("Having chosen not to challenge the *USTA II* decision, NASUCA does not believe the Commission can now take action inconsistent with that ruling.").

142/ *See Lowest Unit Charge Order* at 7512 ¶ 12 (preempting state enforcement of federal "lowest unit charge" requirements of section 315(b) of the Act because "[r]ulings by courts in numerous jurisdictions around the country almost certainly" would frustrate that goal by "produc[ing] varying and possibly conflicting determinations among state courts and between those courts and the Commission").

regulations to encompass wireless carriers.[143] In other words, any preemption of state rules will be against a backdrop of *increased* consumer protections at the federal level. To be sure, the need for the new regulations is questionable in light of the declining number of billing complaints on a per-subscriber basis.[144] Furthermore, if it is indeed true, as NASUCA contends,[145] that many states have renounced any regulation of CMRS providers, the importance of preserving local authority with respect to CMRS carriers is even harder to fathom. Surely it cannot be an argument that the Commission should refrain from preempting because the authority NASUCA seeks to save is unimportant even under its own view. But even if "roughly half the states have exempted wireless carriers from any regulation by their utility commissions, so carriers do not have to comply with 50 different sets of billing regulations in any event," the regulations of those states that do regulate have extraterritorial effects, as described above and in CTIA's opening comments. The same considerations that favor a uniform national framework over a patchwork of regulations in fifty states apply with equal force if that number is and remains at twenty-five.[146]

Nor have any of the commenters explained why Commission enforcement of truth-in-billing rules across the telecommunications market will not adequately protect consumers. Several comments suggest that local rules are needed, but short of invocations to federal concerns, there are no substantive reasons given for these claims. Indeed, contrary to the

[143] *Second Report and Order* at 6456 ¶ 16.

[144] *See supra* notes 18-19.

[145] NASUCA Comments at 32.

[146] Of course, proposals to regulate wireless bills are, notwithstanding the claims of commenters like NARUC, NARUC Comments at 7 n.17, proliferating. *See* Cingular Comments at 28.

overblown fears of commenters like NASUCA,[147] ample room remains for states to act. First, they are able to bring complaints directly to the Commission by invoking section 208 of the Act if and when they become aware of unfair truth-in-billing practices. Second, even if the Commission preempts local billing regulations, state consumer protection laws will remain in effect and provide a state-specific tool to target unfair or deceptive practices by carriers.[148]

Moreover, a proliferation of different, often contradictory, state rules will harm the public interest by reducing the effectiveness of all rules. Bills that change from state to state to comply with local mandates may confuse their recipients. With billing becoming as mobile as the users of CMRS services, this problem promises to grow in the future. Indeed, the confusion problem applies to carriers as well. As Nextel points out, as more and more states regulate wireless billing, customer care representatives will have to determine which state laws apply to customers who may have subscribed to a service in one state, moved to another, but experienced a problem while traveling in a third.[149] Customers should have a uniform set of rights established and

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[147] NASUCA Comments at 23 ("Taken to their logical conclusion, the Commission's conclusions would eliminate any role for the states in regulating telecommunications carriers — whether providers of local service, intrastate long distance service or wireless carriers providing service within a state."). Of course, as explained above, the Act reserves many aspects of telecommunications regulation to the states and forbids Commission regulations to the contrary. *See supra* note 94.

[148] Of course, as the Commission has recognized, such local rules must not be used to impose backdoor regulations upon wireless carriers. Memorandum Opinion and Order, *Wireless Consumers Alliance, Inc.,* 15 FCC Rcd 17021, 17036-37 ¶ 28 (2000) ("[W]e read *Bastien* [*v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000)] as standing for the more general proposition, with which we agree, that state law claims may, in specific cases, be preempted by Section 332. We also read *Bastien* as standing for the proposition that it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332.") (footnotes omitted).

[149] Nextel Comments at 29-30.

enforced by the FCC, and not require a law degree to know whom to contact if they are not satisfied with a carrier's response to a complaint.

Proliferating regulations also will often conflict. For example, different states may have different views on which matters require "prominent" disclosure. If enough states weigh in, carriers may be forced to treat all disclosures as prominent, leaving consumers with a hard-to-read document written in boldface capital letters. It is difficult to see how this result serves the public interest, yet this is the very result requested by advocates of state-by-state regulation.

C. Preemption would remove burdens to interstate commerce.

The clear mismatch between the costs and benefits of local wireless regulation implicates the dormant Commerce Clause. As NASUCA recognizes, state laws are invalid under the clause when their burdens are clearly excessive in relation to their purported benefits.[150/] That is precisely the case with respect to local regulation of wireless billing, for the reasons explained above. There are few, if any, entries on the benefits side of the ledger. Complaints about wireless billing are declining proportionate to the number of subscribers, and the Commission has just expanded federal truth-in-billing regulations to these services, further attenuating the need for yet more state-by-state regulation. This "need," such as it is, for more regulation must be weighed against the larger financial costs to carriers (and therefore customers) to customizing multi-million dollar billing systems to accommodate an ever mutating patchwork of disparate local requirements. Indeed, as explained in CTIA's opening comments, because of the inherently mobile nature of CMRS services, a patchwork of state regulations cannot help but

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150/ NASUCA Comments at 32.

place an unjustified burden on interstate commerce by having the "practical effect" of regulating commerce outside state borders.[151/]

Several commenters argue that Commerce Clause considerations do not apply because Congress has somehow "authorized" local regulations in section 332(c)(3) and/or section 2(b)[152/] of the Act. These arguments badly misconstrue the law. The state Attorneys General cite *White v. Massachusetts Council of Construction Employers, Inc.*[153/] for the proposition that Congress may authorize state regulations that would otherwise violate the Commerce Clause and, further, that section 332(c)(3) of the Act provides this authorization.[154/] But this argument fails to consider the import of *White*'s requirement that Congress "specifically" exempt the regulation from Commerce Clause challenge.[155/] As the Third Circuit has explained:

> The Supreme Court has found consent only where Congress has "affirmatively contemplate[d] otherwise invalid state legislation," *South-Central Timber*, 467 U.S. at 91-92, and "[w]here state or local government action is specifically authorized by Congress." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983). "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber*, 467 U.S. at 91. "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the

151/ CTIA Comments at 29-30. The state Attorneys General argue that Commerce Clause analysis with respect to mobile CMRS services is inapplicable because of the historic treatment of telegraphs. Attorneys General Comments at 28-29. But this strained analogy wholly overlooks the inability to constrain mobile services within geographic boundaries. This factor raises unique Commerce Clause concerns, as the Commission recognized in *Vonage*. *Vonage Holdings Corp.* at 22429-30 ¶ 41.

152/ NASUCA Comments at 31-32; Attorneys General Comments at 27.

153/ 460 U.S. 204 (1983).

154/ Attorneys General Comments at 27.

155/ *White*, 460 U.S. at 213.

> Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).[156/]

Section 332(c)(3) does not meet this standard because it merely limits the effect of the express preemption clause contained within the statute. It does not authorize any state regulation. The Supreme Court rejected an argument similar to that of the state Attorneys General in *New England Power Co.* In that case, a state argued that section 201(b) of the Federal Power Act provided an affirmative grant of authority to restrict interstate transportation of hydroelectric power. The provision in question curtailed the scope of statutory preemption by providing that the provisions of the Federal Power Act "'shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.'"[157/]

Even though the anti-preemption provision at issue was considerably more robust than the one found in section 332(c)(3), the Supreme Court nonetheless held that it did nothing to suspend operation of the Commerce Clause because it was "in no sense an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'"[158/] The Court explained that "by its plain terms, § 201(b) simply saves from pre-

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156/ *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 393 (3d Cir. 1987) (alterations in original) (parallel citations omitted).

157/ *New England Power Co.*, 455 U.S. at 341 (quoting 16 U.S.C. § 824(b)).

158/ *Id.* (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

emption under Part II of the Federal Power Act such state authority as was otherwise 'lawful.'"[159] Ordinary Commerce Clause analysis still applied to the state law in question.

So it is with section 332(c)(3). In limiting the effect of its express preemption provision, Congress in no way made it "unmistakably clear" that it was authorizing the states to engage in activity that would otherwise violate the dormant Commerce Clause.[160] Nor does an authorization argument based on section 2(b) fare any better.[161] That provision does not "authorize" any state regulation at all but functions instead as a check on Commission jurisdiction with respect to intrastate matters. As discussed above, moreover, whatever protection section 2(b) may once have offered to state wireless regulation was withdrawn when Congress amended section 2(b) to give the Commission full authority to regulate wireless services. As the Court established in cases like *New England Power*, statutes that contemplate the existence of state regulatory powers do not automatically exempt these powers from review under the Commerce Clause.[162]

CONCLUSION

As it considers the appropriate level of regulation to be applied to wireless carriers' billing practices, the Commission should ensure that it does not stifle the continuing growth of the wireless industry or hamper its ability to introduce new products and services that will

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159/ *Id.*

160/ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984).

161/ NASUCA Comments at 31.

162/ *New England Power Co.*, 455 U.S. at 341; *cf. Granholm v. Heald*, 125 S. Ct. 1885 (2005) (holding that discriminatory state direct shipment laws for wines are not immunized from Commerce Clause scrutiny by the 21st Amendment).

benefit consumers. Both the record developed in response to the *Second FNPRM* and the Commission's own statistics demonstrate that there is no need for additional regulation of wireless carriers' billing practices beyond those requirements that the wireless industry has already voluntarily imposed upon itself. Nor should the Commission permit state and local governments to upset its carefully calibrated national policies. Instead, the Commission should preempt state truth-in-billing regulations that conflict with federal policies, which favor robust competition over rigid regulation in the CMRS market. The public interest is best served by the creation of a uniform federal regime that reconciles the need for protecting consumers while avoiding a patchwork of overly prescriptive local rules.

Respectfully submitted,

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Michael F. Altschul
Senior Vice President, General Counsel
CTIA – The Wireless Association™
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

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