Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.

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SUMMARY

The comments demonstrate a general agreement that it will be useful to consumers – and not onerous for carriers – if carriers' invoices separate charges carriers must pass through to end users from those charges carriers choose to pass through to end users. That is the approach Nextel advocated in our opening comments and it is the approach advocated by NASUCA and AARP, among others. As we explained, defining "mandatory" charges as those that carriers are required to pass through will not burden carriers that have conformed their practices to the guidance the Commission already has provided on that subject. In addition, as we also explained and as various consumer groups agree, that approach is useful because it separates charges on which carriers cannot differ from those charges on which carriers may differ, thus helping consumers choose among the rate plans and service offerings of wireless carriers.

There is not agreement, however, with the suggestion that carriers ought not be permitted to put line items on their bills to recover the costs of complying with government mandates that they are not required to pass through to consumers. Such charges include federal universal service fees, which are nominally assessed on carriers although the Commission has long recognized that it is permissible (though not required) for carriers to pass those costs through to end users. As a letter from the Indiana Utility Regulatory Commission that we previously placed in the record shows, there would be a great temptation for governmental authorities to attempt to hide taxes by assessing them on carriers if carriers were not permitted to pass them through. In the letter in question, the Indiana commission complained that carriers were passing through a gross receipts tax levied on carriers rather than end users. If carriers are precluded from passing them

through via a separate line item almost any tax could be disguised in a similar manner, thus depriving consumers of information regarding the extent of taxes imposed on their wireless services.

That illustrates that there are significant First Amendment concerns at issue, and those concerns extend to the proposal to require standardized labels on the separate categories of charges on carriers' bills. The key legal point missed by advocates of standardized labels is that there will be no need for standardized labels if carriers are separating mandated charges from non-mandated charges. As long as carriers comply with such separation and label each section of the invoice in a manner that adequately and accurately explains the distinction, consumers will have the information they need to make informed decisions. The key practical point missed by advocates of standardized labels is that carrier billing systems have limitations and any change to those systems may be time-consuming and costly – costs that ultimately are borne by consumers. Once mandatory charges are separated from other charges in the manner proposed by most of the commenters, the Commission cannot justify restricting carrier speech by requiring the use of specific language mandated by the government.

After balancing the costs and benefits of any regulations it adopts, it is vital that the Commission make clear that any additional state regulation would conflict with this balance and therefore should not be adopted. As Nextel and other carriers have shown, it is most efficient for wireless carriers – and hence most beneficial for consumers – to operate without regard to state borders. Wireless carriers developed complex national billing and back office systems before states embarked on the recent "onslaught of state regulation that is making nationwide service more expensive" (as the Commission accurately described matters in ¶ 49 of the *Further Notice*). It would be extremely expensive and contrary to the public interest to attempt to retrofit those nationwide billing and back office systems to accommodate state-by-state differences. There is no good legal or public policy reason to impose those costs on carriers (and ultimately consumers) – one set of reasonable regulations is all that is needed.

This conclusion is supported by the comments as no commenter has provided a sound basis for the Commission to depart from its tentative conclusion that it has authority to preempt state regulations that conflict with the balance it strikes. The comments of the National Association of Attorneys General (NAAG) are the most comprehensive of those challenging the Commission's authority, but they misconstrue the Communications Act and incorrectly apply the Supreme Court's holdings concerning the authority of federal agencies.

NAAG repeatedly contends that Congress "preserved" state regulation of "other terms and conditions" of wireless service in Section 332(c)(3)(A). In fact, that is the linchpin of its argument that the Commission lacks authority to adopt regulations that preclude the adoption of additional regulations. But Section 332(c)(3)(A) does not preserve anything. Congress knows how to preserve a state role. In Section 332(c)(7), for example, entitled "Preservation of Local Zoning Authority," Congress stated that "nothing in this Act" affects state or local authority over certain zoning decisions. In contrast, in Section 332(c)(3)(A), entitled "State Preemption," Congress stated merely that "nothing in this paragraph" prohibits state regulation of the terms and conditions of wireless service. Thus, Congress did not itself preempt state regulation of the terms and conditions of wireless service, but it also did not preserve such regulation for the states.

Nor did Congress prohibit the Commission from preempting in the exercise of its authority under other provisions of the Communications Act.

In addition to misreading Section 332(c)(3)(A), NAAG reads it without context. In other provisions of the Communications Act Congress gave the Commission broad regulatory power over wireless carriers combined with instructions to deregulate as competition develops. The wireless market has become intensively competitive over the last decade. In those circumstances, it comports with Congress's intent for the Commission to adopt only those rules that are necessary and to prevent the states from adopting additional regulations.

In *City of New York v. FCC*, 486 U.S. 57, 64 (1988), the Supreme Court held that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." Because Congress has given the Commission broad authority over wireless carriers and instructed the Commission to forbear from unnecessary regulation, permitting states to impose additional requirements on wireless carriers would both conflict with the Commission's careful balancing of the costs and benefits of wireless regulation and frustrate the goal of having only those regulations that are necessary in light of the competitiveness of the wireless market. Therefore, it would be a permissible exercise of the Commission's authority to make clear that a carrier in compliance with Commission-imposed billing and point of sale rules may not be subjected to additional requirements under state law. Indeed, the Commission would be neglecting Congress's instruction that the wireless industry be deregulated as competition develops if it were to permit states to adopt such regulation in addition to those the Commission deems necessary.

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INTRODUCTION

Pursuant to the May 18, 2005 Second Further Notice of Proposed Rulemaking[1] of the Federal Communications Commission (the Commission), Nextel Communications, Inc. and Nextel Partners, Inc. (collectively Nextel) hereby submit the following reply comments regarding billing format and point of sale disclosure by Commercial Mobile Radio Service (CMRS) carriers.

The record in this proceeding confirms – and indeed no party could dispute – that the CMRS market is intensely competitive and operates in large part without regard to state borders. Congress has made clear that the Commission must balance the costs and benefits of CMRS regulations and forgo those that would unnecessarily burden carriers and impede competition. As Nextel urged in its initial comments and reiterates herein, the Commission must therefore adopt only those regulations specifically targeted to ensure that consumers have the information they need to make informed choices, and

[1] *See Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, CG Docket No. 04-208 (rel. March 18, 2005) (hereinafter *Second Report and Order*).

refrain from those that unduly burden wireless carriers and hamper the now vibrant competition in the CMRS market.

Specifically, Nextel agrees with a wide array of parties – including other CMRS carriers, state utility commissions, and state consumer advocates – that carriers' bills should separate "mandated" charges (those that carriers are *required* to collect from customers) from non-mandated charges (those that carriers *choose* to collect from customers). On balance, there is also agreement among these parties that carriers should disclose to consumers at the time of sale information about the material rates and terms of service – so long as that information is within the carriers' knowledge and control.

Once these steps are taken, consumers will have in hand the crucial information they need to make an informed choice among CMRS providers. Carriers recognize that they have an obligation to provide consumers with clear and non-misleading information in their bills. But additional regulatory restrictions, such as the outright prohibition of any line-item charges urged by some commenters, are not only unwarranted but also likely to disserve the Commission's truth-in-billing goals. Similarly, additional billing requirements, such as the use of constitutionally questionable standardized labels advocated by other commenters, would impose significant burdens on carriers, with no real consumer protection benefits.

Overall, the comments here demonstrate that the Commission must strike a careful balance between wireless consumers' need for truthful information to take advantage of their plentiful competitive options and the substantial costs imposed on carriers by even seemingly small changes to highly complex CMRS billing systems. Having struck that balance, the Commission has the legal authority to preserve it.

Accordingly, the Commission should adopt uniform national rules, as needed to protect consumers, and prohibit the states from adopting additional billing or disclosure regulations, which would disturb that carefully balanced federal regime.

I. THE MAJORITY OF COMMENTERS AGREE THAT SEPARATING MANDATED FROM NON-MANDATED CHARGES WILL BENEFIT CMRS CONSUMERS WITHOUT UNDULY BURDENING CMRS CARRIERS.

There is a broad agreement among CMRS providers, NARUC, individual state commissions, NASUCA, and other consumer groups in support of the Commission's tentative conclusion that government mandated charges be placed in a section of the bill separate from all other charges.[2] Furthermore, Nextel and the majority of other large CMRS carriers agree with NARUC and NASUCA that the Commission should define "mandated" charges as those that the carrier is legally required to collect directly from the user and remit to a federal, state, or local government.[3] These commenters persuasively explain why that definition is preferable to the alternative which would include all compliance-related charges that carriers may elect to pass through to consumers. The latter definition would permit in the "mandatory" section of the invoice pass-through charges that will vary from carrier-to-carrier, thus defeating the purpose of placing variable charges in the "non-mandatory" section of the invoice. Moreover, NASUCA and NARUC observe that defining mandated charges as those required to be passed

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[2] *Second Report and Order* ¶ 39. *See e.g.,* CTIA Comments at 3-4; T-Mobile Comments at 8; Sprint Comments 17-18; NARUC Comments at 2; NASUCA Comments at 3; AARP et. al. Comments at 9; NAAG Comments at 9; Texas OPC Comments at 2.

[3] NARUC Comments at 2-4; NASUCA Comments at 3-12; AARP et. al. Comments at 8-9; NAAG at 10; Texas OPC Comments at 2-6; Nextel Comments at 8-10; Sprint Comments 18-19; Cingular Comments 46-49; Verizon Wireless Comments at 39-40.

through "is a narrower and more accurate definition that conforms to the commonly understood, and logical, meaning of what is 'mandated' by the government."[4]

In addition, the record establishes that defining mandatory charges as those that carriers are required to collect from consumers comports with prior Commission guidance and existing legal enforcement agreements on the subject. NASUCA, for example, points out that this definition is consistent with the Commission's initial truth-in-billing order, its universal service decisions, and the Joint FCC/FTC Policy Statement on Advertising.[5] Moreover, as the Commission itself recognized and numerous parties joined Nextel in confirming, that definition is consistent with the Assurance of Voluntary Compliance (AVC) agreements negotiated between the Attorneys General of over thirty states and Verizon Wireless, Cingular Wireless and Sprint.[6] Given these pre-existing legal pronouncements, a number of commenting CMRS carriers, like Nextel, already have altered their billing systems to separate out required pass-through charges. As a result, these carriers will not be unduly burdened should the Commission adopt such a requirement. Moreover, these carriers reasonably relied on the Commission's previous guidance, and it would be unfair for the Commission now to adopt a definition of mandatory charges inconsistent with these previous pronouncements and thereby force carriers to overhaul their invoice design a second time.

The state commissions and consumer advocate groups also agree with Nextel that defining mandatory charges in this way will further the Commission's goals. As NASUCA concludes, this approach will "reduce or eliminate consumers' confusion

[4] NASUCA Comments at 4; NARUC Comments at 3.
[5] *See* NASUCA Comments at 7-10.
[6] *See e.g.,* NASUCA Comments at 11-12; Cingular Wireless Comments at 48-49; Sprint 18-19.

regarding the charges that appear on their monthly telephone bills."[7] Another state commission commenter adds that the bright line drawn by this distinction will be easier for the Commission to administer, implement, and monitor than the alternative definition.[8] Most importantly, as Nextel has previously explained, by separating out those government-mandated charges on which carriers *cannot differ*, consumers can easily identify and compare the charges that *can differ* among carriers. NASUCA agrees that this will ensure informed consumer choices, allowing consumers to benefit from "an apples-to-apples comparison of government mandated charges."[9] The comments thus reveal a prevailing consensus that carriers should separate out "mandated" from "non-mandated" charges and that mandated charges should include only those charges that carriers must pass through to consumers.

II. ANY POINT OF SALE DISCLOSURES SHOULD ONLY REQUIRE CARRIERS TO DISCLOSE MATERIAL RATE INFORMATION WITHIN THEIR KNOWLEDGE AND CONTROL AT THE TIME OF SALE.

Numerous parties also joined Nextel in generally agreeing that carriers should disclose to potential customers at the point of sale the "material rates and terms of service."[10] NAAG's comments describe such disclosures as "critical" and, as Cingular Wireless puts it, requiring wireless carriers to provide such information during the sales transaction is key to achieving the "fundamental goal underlying the TIB rules, the provision of clear, accurate, non-misleading information to consumers so that they may meaningfully compare competing service offerings."[11] Already a condition of the AVC agreements and a tenet of the CTIA Consumer Code, such disclosures should be required

[7] *See* NASUCA Comments at 4.
[8] *See* Texas Comments OPC at 3.
[9] *See* NASUCA Comments at 11.
[10] *Second Report and Order* ¶ 55.
[11] Cingular Wireless Comments at 55.

of all wireless carriers to allow consumers to engage in meaningful, informed comparison shopping among sellers.[12]

As Nextel explained in its initial comments, however, the Commission must clarify that carriers are only required to provide information about applicable monthly taxes and surcharges that are in existence when the transaction occurs. Because any estimate of future government charges or adjustments to existing taxes and fees is plainly outside of carriers' knowledge and control, it would be patently unreasonable to expect carriers to do more. No commenter suggests otherwise. And, indeed, NAAG specifically mentions that the disclosure should include "a clear statement of what taxes and regulatory fees *are in effect at the time of sale*."[13]

Moreover, Nextel agrees with the comments stating that disclosure requirements in excess of those mandated under the AVC agreements are unnecessary and unwise. For example, as Verizon Wireless and Cingular explain, the AVC agreements allow carriers to provide a range or maximum level for charges that are assessed according to locale in recognition of the wide variation in locale-dependent surcharges.[14] Again, carriers cannot be expected to estimate charges that are outside their knowledge and control. Furthermore, consumers who have been informed of the maximum possible rate in effect at that time cannot claim to have been improperly misled if they are charged that maximum rate. Thus, Nextel agrees with these commenters that there is no need to cabin the range to 10 or 25 percent; so long as the range of potential charges provided is

[12] Any Commission rule or policy governing such "point of sale" disclosures should, however, retain flexibility in the disclosure format so that carriers can adjust disclosures to meet the needs of customers. For instance, a customer purchasing a single handset at a storefront location may want a different disclosure statement than a large business or government customer signing a contract for 100 units.
[13] NAAG Comments at 12 (emphasis added).
[14] Verizon Wireless Comments at 46; *see also* Cingular Wireless Comments at 56.

accurate and clearly stated, the use of ranges of wireless carrier charges is not unreasonable.

Nextel does disagree with NASUCA's recommendation that the disclosure rules should allow customers to renege on their contracts without penalty up to 45 days after receiving their first bill.[15] Assuming the Commission adopts its proposed disclosure requirement, such a post-billing cooling off period would be wholly unnecessary. The very purpose of the disclosure rule is to ensure that customers learn the material rates and terms of service at the time of sale, before completing the transaction, and well before receiving their first monthly bill. If a customer's bill reveals that the point of sale disclosure was inaccurate, than the carrier will have violated the Commission's rule and relief should be granted accordingly, obviating any need for the 45-day window. Moreover, even setting aside the proposed disclosure rule, customers are already protected by sufficient grace periods. Both the AVC and the CTIA Consumer Code give customers at least a 14-day window in which to terminate without penalty and Nextel allows its customers to cancel a contract without material consequence within 15 days (30 days in California).

III. ADDITIONAL BILLING RESTRICTIONS ARE UNWARRANTED.

Once consumers are informed of the material rates and terms of service at the point of sale, and mandatory charges are separated from other charges in CMRS bills, consumers will possess the key information that they need to choose among the abundant competitive options for wireless service. There is simply no justification for additional billing prohibitions or requirements. Such regulations will only serve to impose substantial costs on carriers without any real benefit to consumers.

[15] NASUCA Comments at 54.

A. Prohibiting The Use Of Line Items Would Disserve The Commission's Truth-In-Billing Goals.

Nextel disagrees with some state commenters' suggestion that the Commission should "reconsider its recent decision and prohibit the breakout of carrier add-on charges in telecommunications bills."[16] An outright prohibition on line items has no legal basis and runs counter to the principles underlying the Commission's truth-in-billing rules.

In denying NASUCA's request for such a prohibition, the *Second Report and Order* correctly explained that nothing in either the Commission's rules or the Communications Act prevents carriers from structuring their rates to include line items that are accompanied by a "brief, clear, non-misleading, plain language description of the service . . . . rendered."[17] In the universal service context, for example, the Commission has long explained that the costs of compliance with universal service may be passed through to consumers and recovered through line-item charges.[18] Stated otherwise, the use of line items in a carrier's rate structure is not inherently unreasonable, as some commenters seem to assume.[19]

Moreover, since false or misleading line-item descriptions are already prohibited under the Commission's rules, NAAG's proposed ban would only serve to keep accurate and non-misleading information from consumers. Information that, as the Commission observed, may be useful "to the consumer in better understanding the charges associated

[16] NAAG Comments at 1 & 7.
[17] *Second Report and Order* ¶ 23.
[18] *USF Contribution Order*, 17 FCC Rcd. 24952, 24979 (¶ 55) (2002).
[19] Line items – *i.e.* fixed recurring monthly charges – can be economically efficient and serve the public interest. For example, following the 1984 divestiture of AT&T and the Bell Operating Companies, the Commission found that the cost of the local loop connecting a subscriber's premises to the telephone company central office was not traffic sensitive. For that reason, the Commission found that it served the public interest to recover more of those costs through a fixed monthly subscriber line charge (SLC) instead of per-minute long distance usage rates. The Commission's decision to require such line items was upheld despite vigorous and substantial opposition. *See National Association of Regulatory Utility Commissioners* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985).

with their service and making informed cost comparisons between carriers."[20] Of particular concern, barring carriers from the use of all line items would prevent carriers from effectively communicating with their customers about the existence of, and costs of complying with, government mandates. For example, Nextel previously placed in the record a letter from the Indiana Utility Regulatory Commission instructing carriers to stop using a line item that identified amounts remitted by the carrier to the state under the Indiana Utilities Receipt Tax.[21] But if such accurate descriptions of charges were banned, government authorities would surely be tempted to hide taxes by assessing them on carriers rather than on consumers, who ultimately bear the burden of such taxes. Carriers would be forced to raise rates to meet such assessments but prevented from identifying the true nature of that increase in rates. Without the flexibility to include line items describing in clear and non-misleading terms the nature of certain charges, almost any tax or government imposed fee could be disguised in a similar manner.

For similar reasons, Nextel takes this opportunity to join Verizon Wireless[22] and Cingular Wireless[23] in calling on the Commission to clarify that CMRS carriers may recover the costs of interstate Telephone Relay Service (TRS) as a line item on customers' bills. In its *Second Report and Order*, the Commission noted the tension between its ruling that carriers are not prohibited from including non-misleading line items on bills and its prior conclusion that TRS costs could not be recovered in specifically identified line items. The Commission explained that it would address the

[20] *Second Report and Order* ¶ 23.
[21] Letter from William McCarty, Chairman, Indiana Utility Regulatory Commission (Aug 1, 2003), attached to Nextel's *ex parte* filing of Dec. 22, 2004, in these dockets.
[22] *See* Verizon Wireless Comments at 50-53.
[23] *See* Cingular Wireless Comments at 59-66.

issue in a future proceeding.[24] With respect to CMRS providers, Nextel urges the Commission to resolve this issue now by clarifying that that the TRS line-item ban is inapplicable to CMRS carriers.

The comments filed by Verizon Wireless and Cingular Wireless thoroughly trace the history of the Commission's regulation of TRS billing, demonstrating that the prohibition against recovering those contributions through a line item was adopted in response to the Commission's concerns about jurisdictional separations, i.e., the need to ensure that *interstate* TRS costs were recovered through *interstate* rather than *intrastate* charges.[25] Although CMRS carriers are required to contribute to TRS, they have never been subject to the Commission's jurisdictional separations requirements. While the Commission's recent orders have reiterated the existence of the TRS line-item ban,[26] the Commission has never addressed its application to CMRS carriers, explained why it should apply to them given that they are exempt from the Commission's jurisdictional separation rules, or explained how such a rate prescription would be consistent with the Commission's 1994 decision to deregulate wireless rates.[27] In addition, Cingular Wireless persuasively points to a line of Commission precedents allowing carriers that are not subject to jurisdictional separations requirements to recover the costs of complying with government mandates in any lawful manner.[28] Nextel thus urges the Commission to clarify that CMRS carriers are not subject to the TRS line-item ban and to

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[24] *See Second Report and Order* at nn. 64 & 86.
[25] *See Telecommunications Services for Individuals with Hearing and Speech Disabilities (TRS)*, Report and Order, 6 FCC Rcd. 4657, 4664 (¶36) (1991); *see also TRS*, Second Report and Order, 8 FCC Rcd. 1802, 1806 (¶ 22) (1993).
[26] *See TRS*, Third Report and Order, 8 FCC Rcd. 5300, 5305 (¶ 30) (1993); *see also TRS*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 12475, 12483 n.33 (2004).
[27] *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, 1478-81 (1994).
[28] Cingular Wireless Comments at 64-65.

allow CMRS carriers to recover their TRS contributions in the manner deemed lawful by the Commission's *Second Report and Order* – the use of non-misleading line items on customers' telephone bills.

B. Requiring Standardized Labels Is Unnecessary to Protect Consumers and Would Unduly Burden Carriers.

In their comments, the attorneys general, utility commissioners, and consumer groups advocate the use of universal standardized labels and billing formats. They claim that such restrictions on carriers' communication with their customers either regulate conduct outside the scope of the First Amendment or lawfully restrict commercial speech. But these commentators flatly ignore both the flawed legal grounds for their position and the practical burdens of adopting such regulations.

As Nextel's opening comments explained, requiring universal labels would unconstitutionally infringe upon carriers' commercial speech in violation of the First Amendment. The suggestion that requiring carriers to use specific words in communicating charges to their customers regulates conduct rather than commercial speech is simply risible.[29] Commercial speech is plainly at issue here.

Under the third and fourth prongs of the *Central Hudson* test, government regulation of commercial speech must be "in proportion to [the state's] interest" and "designed carefully to achieve the State's goal."[30] In claiming that mandating standardized labels would meet this test, the state commenters fail to address the fact that such one-size-fits-all labels would be utterly unnecessary if, as Nextel and others advocate, the charges that carriers must pass through are separated from other charges

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[29] Indisputably, the government interest at stake is "[]related to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
[30] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

and carriers use clear, non-misleading labels that sufficiently explain this distinction. Once these steps are taken, consumers will possess the necessary tools to make informed choices among carriers. Because standardizing labels will garner no real consumer protection gains, there is simply no justification for infringing on carriers' commercial speech in this way.

Moreover, as a practical matter, advocates of standardized labels fail to recognize that even small changes to wireless carriers' billing systems can impose significant costs on carriers, costs that are ultimately borne by consumers. Multiple state-by-state "small" changes to a single, enterprise-wide national billing system will most assuredly do so. In its initial comments, Nextel explained that CMRS billing systems are highly complex interdependent systems which are inordinately costly and time-consuming to implement, and even more so to adjust. The attached declaration of Mark Byers provides additional detail on this point.[31] In particular, because CMRS billing systems like Nextel's have inherent limitations such as character limits, complying with a standardized label requirement would likely require a complete overhaul of existing systems. Even small changes such as moving a line of optically readable characters or changing the font size can completely derail carriers' interdependent billing and back office systems, at huge costs to carriers that, ultimately, result in higher rates for consumers.[32]

Recognizing that standardized labels are unworkable for this very reason, the comments of the Missouri Public Service Commission (Missouri PSC) report its findings that "carrier billing system limitations do not allow for 'uniform' labeling of services or

[31] Exhibit A, Declaration of Mark Byers (hereinafter *Byers Decl.*). For example, it cost Nextel 2000 to 2500 hours of service, at rates of $200 to $250 an hour, and a year of development, to implement a required change to the Federal Programs Cost Recovery Fee. *See id.* ¶ 10a.
[32] *Id.* ¶ 10f.

categories of service."[33] As the Missouri PSC concluded, the use of standardized "labeling may not alleviate consumer confusion" and any theoretical clarification afforded by standardized labels is, in reality, more than outweighed by carriers' substantial compliance burdens.[34] So long as carriers separate out charges that they are required to collect from customers from other charges and describe this distinction in clear and non-misleading terms, the Commission should refrain from adopting standardized labels that would violate the First Amendment, provide no benefits to consumers, and impose substantial – and costly – compliance burdens on carriers.

If the Commission nonetheless continues to believe that further guidance on the labeling of charges is warranted, Nextel urges the Commission to adopt BellSouth's suggestion and establish labels that serve as safe harbors for carriers, rather than mandating the use of specific language.[35] As BellSouth explains, by establishing safe harbor labels, the Commission can provide guidance to carriers while avoiding First Amendment concerns. In addition, carriers would not be forced to incur the substantial costs involved in overhauling their billing systems, but could, over time, conform to the safe harbor labels in the course of maintaining or updating their billing systems.

IV. THE COMMISSION'S REGULATIONS SHOULD DISPLACE STATE LAW.

Whatever regulations the Commission adopts with respect to billing requirements or point of sale disclosures, the Commission should make clear that its rules preclude states from adopting additional requirements on wireless carriers given the muti-state nature of wireless services and wireless carriers' operations. Because wireless carriers

[33] Missouri Public Service Commission Comments at 6-7.
[34] *Id.* at 8.
[35] BellSouth Comments at 12-14.

generally operate without regard to state borders, it is most efficient for those carriers – and consumers – if they are governed by one set of reasonable requirements. The best way to achieve that result is for the Commission to rely on its own authority to displace state law with respect to wireless carriers by following Congress's instruction to ensure that wireless practices are just and reasonable and Congress's instruction to deregulate as competition develops. After determining what level of regulation is warranted, the Commission should make clear that additional requirements would frustrate the achievement of its deregulatory goals. That would prevent states from imposing a patchwork of conflicting state laws and regulations. In addition, it would provide true national guidance on billing and disclosure issues – something that will benefit both carriers and consumers.

A. Complying With A Patchwork of State Billing And Disclosure Regulations Would Excessively Burden National CMRS Carriers And Wireless Customers with No Countervailing Public Interest Benefit.

As the Commission recognized in the *Second Further Notice of Proposed Rulemaking*, states' adoption of inconsistent billing regulations "mak[es] nationwide service more expensive for carriers to provide and rais[es] the cost of service to consumers."[36] In its comments, however, NARUC claims that there is no "factual . . . predicate" for this conclusion.[37] Similarly, NASUCA denies that "the burden of complying with such regulations is excessive" and asserts that the record is "skimpy, at best" as to carriers' compliance burdens.[38] Nothing could be further from the truth. As the attached declaration of Mark Byers explains in detail, adjusting the complex

[36] *Second Report and Order* ¶ 52.
[37] NARUC Comments at 7.
[38] NASUCA Comments 32-33.

nationwide billing systems used by the major CMRS carriers to comply with such state regulations would be exceedingly burdensome.

Like the other major CMRS providers, Nextel operates a billing system, called "Ensemble," that is actually a complicated enterprise-wide network of interdependent systems that perform a myriad of communication functions in addition to invoice, billing, and accounting activities.[39] Using these systems, Nextel operates a national network for order entry, pricing, rating, recording, customer care, bill presentation, collections, and certain other functions, all of which function without regard to state lines.[40] That national model has allowed Nextel to provide a consistent product and customer experience across state lines while also taking advantage of economies of scale and other efficiencies that have decreased the price of wireless service, and permitted the introduction of a variety of new voice and data services – much to the benefit of wireless consumers and the public.[41]

Ensemble's development and implementation required an initial investment of over $1 billion dollars, and maintenance and upgrades cost Nextel hundreds of millions of dollars annually.[42] For Nextel to redesign its nationwide billing and back office systems to accommodate as many as 50 different systems and to integrate those state-specific systems into its national network would multiply these already enormous costs. The additional expenditures would be astronomical. Moreover, as individual states adopt and modify billing regulations, Nextel will be required to make adjustments to bring its systems into compliance with these multiple moving targets. As costly as systems are to

[39] Byers Decl. ¶¶ 3-4.
[40] *Id.* at ¶¶ 3, 6, 8.
[41] *Id.* at ¶¶ 8-9.
[42] *Id.* at ¶ 10b.

implement, they can be even more costly to change.[43] Due to the complexity of the interdependent systems, even a small modification – like a change in font size – can significantly increase the risk of system errors, causing delays and increasing costs even further.[44]

Such balkanization of seamless nationwide systems is antithetical to the creation and maintenance of a "rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[45] For the Commission to permit such balkanization would damage the interests of interstate communications and interstate customers, the well being of which is entrusted to the Commission.[46]

In short, the burdens on CMRS carriers from complying with a patchwork of state billing regulations have been well documented and are clearly excessive. For CMRS carriers, the stakes are high. They are also high for consumers, who will ultimately bear the increased costs.

Because the burden of wireless state regulation on interstate commerce is out of proportion to any potential benefit and because CMRS is fundamentally mobile, CTIA correctly stated that, as with Voice over Internet Protocol, state regulation of CMRS will

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[43] *Id.* at ¶¶ 10a & e, 11-12.
[44] *Id.* at ¶ 10f.
[45] 47 U.S.C. § 151.
[46] *See New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980). While NAAG contends that national wireless communications carriers are no different than other businesses that would like to avoid the cost of compliance with state-by-state regulation, it is important to remember that the development of national wireless networks, and of nationally uniform pricing, back office systems, and procedures as a reflection of their nationally uniform service delivery, were the direct result of the 1993 amendments to the Communications Act. Those amendments expressly encouraged the creation of seamless national wireless networks, consolidated substantial regulatory authority over both intrastate and interstate wireless calling within the FCC, and constrained or reduced the amount of regulation affecting wireless communications. Allowing states to independently regulate in a way that breaks apart the national systems developed pursuant to that mandate, at enormous cost, in order to achieve incremental or speculative benefits to consumers at best, punishes national carriers for implementing Congress's will and undermines achievement of the benefits to the public that Congress sought to foster.

almost certainly have the practical effect of regulating interstate commerce, contrary to Commerce Clause principles.[47] In addition, because the cost of compliance with multiple state rules would be high, they would have the effect of discriminating in favor of carriers that provided service only in one state – and discrimination is "destructive of the very purpose of the Commerce Clause."[48] NAAG argues that the Commerce Clause is not implicated by state regulation of CMRS, but its argument is based primarily on its mistaken reading of Section 332(c)(3)(A) – which it misreads as an affirmative preservation of state authority.[49] NAAG does correctly state, however, that not every conceivable state rule would burden interstate commerce in a manner that violates the Commerce Clause.[50]

We do not urge the Commission to conclude that every regulation of CMRS by a state would violate the Commerce Clause. However, the Commission should not ignore the burdens on interstate commerce that would result from regulation by multiple states and the potential for discrimination. Such concerns are a primary reason why the Commission should exercise its congressionally delegated authority to preempt states from adopting or enforcing billing regulations in excess of those the Commission has determined are necessary to protect consumers.[51]

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[47] CTIA Comments at 29-30.

[48] *Granholm v. Heald*, 125 S.Ct. 1885, 1896 (2005), *quoting Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

[49] As we explain *infra*, at pp. 23-26, Section 332(c)(3)(A) does not bar the Commission from exercising its authority under other provisions of the Communications Act to preempt additional state regulation of CMRS billing.

[50] *See* NAAG Comments at 29.

[51] In its Commerce Clause analysis, NAAG ignores entirely the fact that the Commerce Clause prohibits state regulation which, as a matter of economic practicality, forces companies to implement changes in the way they conduct business in other states, or affects pricing in other states. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). That is the case with much of the proposed and recently enacted state regulation of the wireless carriers' back office and customer relationship procedures. In part, this occurs because the handset – the consumer interface of the wireless world – is a mobile resource that is physically located and used a substantial amount of the time outside the state of residence of the customer with whom

B. The Commission Has Authority To Preempt State Law And Should Exercise That Authority.

The Supreme Court has held that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[52] The Court has repeatedly "emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected, for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'"[53] Rather, "if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,'" it is permissible.[54]

This is a classic case where the Commission has been charged with balancing conflicting policies. Section 332(c)(1), entitled "Common Carrier Treatment of Commercial Mobile Services," provides that wireless carriers are subject to Title II regulation except insofar as the Commission specifies otherwise.[55] With respect to the first part of that instruction, the Commission has broad authority, including authority to ensure that all "charges, practices, classifications, and regulations" are "just and

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the contract is made. In part, also, this occurs because of the high cost deterrent to building and maintaining state-specific systems, and the need to average the cost of uniform systems that meet the most stringent state requirements at any point in time (if that were even possible) across a national customer base in an effort to remain competitive with local carriers. *See* Byers Decl. ¶¶ 8d; 10d; 11-14. The courts have applied these principles in many contexts. Contrary to NAAG's assertion, recent cases involving the Internet have found state regulation invalid for practically forcing one state's regulatory regimen onto out-of-state activity. *See American Booksellers Foundation v. Dean,* 342 F.3d 96, 104 (2d Cir. 2003). State securities regulation has been held invalid where it caused securities sellers in other states to receive a lower price in the face of a nationwide tender offer. *See Edgar v. Mite Corp.,* 457 U.S. 624, 642-4 (1982). Even the telegraph cases which NAAG cites in support of its position upheld regulations solely because they affected only post-transmission activity (the manual delivery of messages) occurring within one state.

[52] *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

[53] *Id., quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).

[54] *City of New York., quoting United States v. Shimer*, 367 U.S. 374, 383 (1961), and *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

[55] 47 U.S.C. § 332(c)(1).

reasonable."[56] But in subjecting wireless carriers to common carrier regulation in 1993, Congress simultaneously instructed the Commission to forbear from applying most Title II provisions if a review of "competitive market conditions" supported the conclusion that regulation was not desirable.[57] In 1996, Congress reiterated and broadened that instruction by adopting Section 10, which provides for forbearance from any Title II provision,[58] and Section 11, the biennial review provision that requires the Commission to regularly review its regulations and eliminate regulations that are no longer necessary "as a result of meaningful economic competition."[59]

In short, the Commission has broad authority with respect to wireless carriers – authority that is sufficiently broad, in the Commission's view, to justify the adoption of regulations governing billing and point of sale disclosures. But the Commission also has clear instructions not to regulate beyond what is necessary in light of competition, and the wireless industry is now vigorously competitive.

In that situation, it would upset the balance struck by the Commission, at Congress's direction, for states to adopt regulations that the Commission has decided are not necessary in light of competitive circumstances. In the language of the Supreme Court's agency preemption jurisprudence, it would conflict with the balance the Commission strikes and frustrate achievement of Congress's deregulatory goals for states to do so.[60] With respect to the latter point, it bears emphasis that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the

[56] 47 U.S.C. § 201(b).
[57] 47 U.S.C. § 332(c)(1)(A) & (C).
[58] Section 10 is codified at 47 U.S.C. § 160.
[59] Section 11(a)(2), 47 U.S.C. § 116(a)(2).
[60] *See City of New York*, 486 U.S. at 64.

area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."[61] Since a federal decision that no regulation is warranted may have preemptive effect, a decision that a certain level of regulation is warranted, but no more, would similarly have preemptive force.

Wireless carriers should be subjected to one set of reasonable regulations, and no more. More specifically, the Commission should make clear that states may not adopt additional regulations beyond those the Commission deems desirable with respect to billing matters and point of sale disclosures. Beyond that, the Commission also should make clear that carriers that comply with the Commission's regulations may not be found liable under state laws of general applicability. In that respect, it is important to distinguish between garden variety state law actions, such as state contract claims concerning whether a carrier has complied with its contractual requirements, and state law claims, typically pursued by means of class actions, that essentially seek to adopt regulatory requirements by means of the application of vaguely worded state laws. The garden variety claims should not be preempted, but claims that would impose liability on a theory that a carrier should have done more than is required by applicable federal regulations should be preempted. Thus, for example, if the Commission adopts the distinction between mandatory fees and other fees supported by Nextel, NASUCA and AARP, among others, and authorizes carriers to collect non-mandatory fees such as universal assessments by means of line items, a carrier should not be subjected to liability

[61] *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983).

under any state law on the theory that collecting non-mandatory fees by means of line items is inherently deceptive.[62]

C. NAAG Errs In Attacking The Commission's Tentative Conclusion That It Has Authority To Preempt.

The comments filed by the NAAG include a lengthy section arguing that the Commission erred by tentatively concluding that it has authority to preempt. It is NAAG that errs. NAAG fails to acknowledge the many cases holding that federal agencies – not just Congress – have authority to preempt. It also misreads Section 332(c)(3)(A) of the Act by claiming that it "preserves" state regulation of the "terms and conditions" of wireless service.

1. *The Commission has authority to preempt.* NAAG argues that state law is preempted "only when Congress intends that result."[63] That is not so. As the Supreme Court has reiterated, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected, for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'"[64] NAAG accuses Nextel of arguing that federal agencies are "free to preempt state law as they see fit."[65] That is not quite right, but the appropriate standard of review is deferential: "if the agency's choice to pre-empt 'represents a reasonable accommodation of the conflicting policies that were

[62] Similarly, as we stated in our opening comments, it is important for the Commission to be the only interpreter of its regulations. Some of those regulations will necessarily require, for example, "clear and conspicuous" disclosures. If more than one adjudicator decides what such requirements mean, the result is likely to be the same as if different state commissions adopted different specific regulations concerning matters such as the font size of disclosures.
[63] NAAG Comments at 13.
[64] *City of New York v. FCC*, 486 U.S. at 64, *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).
[65] NAAG Comments at 22, *citing* Nextel's Opening Comments at 12.

committed to the agency's care by the statute,'" it will be upheld by the courts.[66] As Nextel has shown, adopting reasonable regulations and preempting states from adopting additional requirements would reasonably accommodate Congress's broad grant of authority to the Commission to regulate wireless carriers with its instruction to regulate sparingly.

While NAAG may wish that federal agencies did not have the power to preempt, it is clear from Supreme Court precedent that they do. "Federal regulations have no less pre-emptive effect than federal statutes."[67] If a federal agency has authority to adopt regulations, it has authority to preempt as well. That may be made clear by considering a conflict preemption situation in which it is impossible to comply with state as well as federal regulations. If, for example, the Commission were to adopt a requirement that a particular label be used to denote a particular category of fees, states would be preempted from requiring carriers to use a different label.

NAAG acknowledges that conflict preemption includes not only cases where it is impossible to comply with state and federal law, but also situations where differing state and federal requirements will frustrate achievement of the full purposes of the federal scheme.[68] NAAG, however, fails to address that aspect of conflict preemption and Congress's instruction that the Commission deregulate as competition develops. Congress has instituted a deregulatory regime, and it would frustrate the achievement of that deregulatory goal for states to adopt regulations after the Commission has considered the costs and benefits of regulation and struck the appropriate balance.

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[66] *City of New York*, 486 U.S. at 64, *quoting United States v. Shimer*, 367 U.S. 374, 383 (1961), and *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).
[67] *Capital Cities*, 467 U.S. at 699.
[68] *See* NAAG Comments at 23.

That is particularly so with respect to wireless carriers' billing and back office systems because compliance with multiple requirements in these areas can be extremely expensive. Wireless billing systems are complex and wireless carriers spend considerable sums to develop, maintain, and enhance them. As noted above, Nextel spent more than $1 billion to develop its "Ensemble" system, spends hundreds of millions of dollars per year to maintain it, and upgrades typically cost $40 million or more each year. And while the system has numerous capabilities, it is only as flexible as it was designed to be – and it was designed before states recently embarked on what the Commission properly termed "an onslaught of state regulation that is making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."[69] As we stated in our opening comments, redesigning a billing system that was not developed to accommodate state-by-state regulation is comparable to redesigning an office building to hold a swimming pool on its roof after construction is complete and the building is occupied. The costs of retrofitting are far higher than the costs of designing the capability from the start. In short, as explained in greater detail in the attached declaration of Mark Byers, state regulation of systems designed to be consistent from state-to-state may be extremely costly. Therefore, it would be eminently reasonable for the Commission to conclude that it should not subject wireless carriers – and, ultimately, wireless consumers – to the costs and burdens of state-by-state regulation.

2. *Congress did not preserve state regulation of other terms and conditions of wireless service.* NAAG also misconstrues Section 332(c)(3)(A) by stating at least three times that it "preserved" state regulation of the terms and conditions of wireless service.[70]

[69] *Second Report and Order* at ¶ 49.
[70] *See* NAAG Comments at 16, 21, 22.

Section 332(c)(3)(A) does not *preserve* anything. Section 332(c)(3)(A) merely provides that by preempting state regulation of rate and entry in 1993, Congress did not intend to preempt regulation of other terms and conditions. The provision, entitled "State Preemption," first bars states from regulating "the entry of or the rates charged by any commercial mobile service" and then adds that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." That is not the language of preservation. Congress preserves a state role by stating that nothing *in the Act* authorizes preemption. That is the language of Section 2(b), for example, which states that "nothing in this Act" authorizes the Commission to regulate the intrastate rates of wireline carriers.[71] It is also the language of Section 332(c)(7), which was adopted contemporaneously with Section 332(c)(3)(A). Section 332(c)(7), entitled "Preservation of Local Zoning Authority," states that "nothing in this Act" shall limit state or local authority over certain decisions relating to the placement of wireless towers. That is the language of preservation.

Again, however, Congress did not preserve a state role in adopting Section 332(c)(3)(A), but merely stated that it did not preempt. Congress did not affect the authority of the Commission, acting within the scope of its authority under the Act, to conclude that it would frustrate the purposes of the Commission's regulatory (and deregulatory) scheme if states imposed additional regulations on wireless carriers.

For those reasons, the savings clauses and presumptions cited by NAAG are not pertinent. The savings clauses are guides to how to read Congress's actions. Similarly, the presumptions are guides to determining whether Congress intended to preempt in certain circumstances. Nextel does not contend that Congress intended to preempt state

[71] 47 U.S.C. § 152(b).

regulation of other terms and conditions in 1993. Nextel instead encourages the Commission to exercise its authority to preempt now given the highly competitive nature of the wireless marketplace. The canons of construction relied upon by NAAG are no more relevant here than in *Fidelity Federal*, where the Federal Home Loan Bank Board preempted states from prohibiting due-on-sale clauses and states argued that preemption was not warranted because "real property law is a matter of special concern to the States."[72] The Supreme Court made clear that the canon of construction against preemption was not applicable because "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law .... Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority."[73]

Nor is the House Committee report NAAG cites dispositive.[74] The House Committee stated that it intended "terms and conditions" to include "matters such as customer billing information."[75] We do not disagree. Nextel agrees that the House Report does not indicate Congress' desire to legislatively preempt CMRS billing matters. Rather, Section 332 allows the Commission to use its own preemptive authority based on the other provisions in the Communications Act that give the Commission broad authority, but instruct the Commission to deregulate as competition develops.[76]

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[72] *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153.
[73] *Id.* at 154.
[74] *See* NAAG Comments at 17.
[75] H.R. Rep. No. 103-111, at 253, 261 (1993).
[76] A court would properly be suspicious of that legislative history if it were argued that it "preserved" a state role. To the extent that some House members or staff intended the legislative history to have that effect, that raises the question why Congress did not draft the text of the statute to preserve a state role. That failure suggests that any members favoring preservation of state authority over the terms and conditions of wireless service lacked the ability to place such preservation into the statute.

Acceptance of NAAG's approach would severely undermine the ability of Congress and the Commission to deregulate in the face of competition. It appears that in NAAG's view Congress's failure to expressly preempt permits states to regulate as they wish – even where Congress has given clear instructions to a federal agency to deregulate as competition develops. But Congress does not intend to have unnecessary federal regulation replaced by unnecessary state regulation.

Accordingly, the Commission should adhere to its tentative conclusion that it has authority to preempt. It should exercise that authority by ruling that states may not adopt billing or point of sale requirements in addition to those adopted by the Commission. It should also make clear that carriers that are in compliance with its rules may not be found liable under generally applicable state laws on the theory that their billing or point of sale disclosures are inadequate.

CONCLUSION

For the foregoing reasons, Nextel urges the Commission to (1) require carriers to separate out those charges they are required to pass through to consumers from other charges; (2) require carriers to disclose only information that is within carriers' knowledge and control at the point of sale; (3) forgo additional billing prohibitions or requirements; and (4) exercise its own delegated authority to preempt state regulation of billing and disclosure requirements to preserve the balance struck by the Commission's regulations.

Respectfully Submitted,

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July 25, 2005

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

DECLARATION OF MARK BYERS

I, Mark Byers, do hereby, under penalty of perjury, declare and state as follows:

1. My name is Mark Byers. I am Senior Director for Billing Lifecycle Management for Nextel. My business address is Nextel Communications, 593 Herndon Parkway, Herndon, VA 20191. I have held that position since 2004. Prior to that time, I was Senior Director of Strategic Marketing. I hold a bachelor's degree in marketing from Fairfield University in Fairfield, Connecticut.

2. My current duties include the development, implementation, and management of billing services and marketing programs for Nextel's consumer, business, and government customers. I am personally responsible for multiple aspects of Nextel's computerized and automated billing and back office systems, including the Ensemble billing system. I have detailed familiarity with the billing systems and how they interact with all parts of the customer lifecycle.

3. The term "billing system" as applied to the wireless telecommunications or CMRS industry is a misnomer. The billing system is actually a large, integrated part of a massive computerized system with multiple subsystems that run many aspects of Nextel's

business, including (but not limited to) order entry, customer care, rating and recording of each call, fraud detection, bill presentation, invoice generation, invoice printing, and payment accounting and collection activities. The reach of these interrelated systems is so vast that there is almost no aspect of a wireless carrier's business that is untouched by them. Servicing the varied needs of millions of customers is only possible through the use of such highly automated integrated (and highly complex) systems, just as it would be impossible to operate a large bank or credit card company without such systems.

4. All wireless telecommunications companies must perform all of the aforementioned functions. There are also substantial economies of scale and scope associated with billing and associated back office systems. Stated differently, it would be much more costly, as well as a poor customer experience, for a large wireless carrier operating in a multi-state environment to have separate billing and back office systems to meet different service standards for customers in each state in which the carrier operated. I have personal knowledge of the disadvantages associated with multiple billing systems. Prior to 2001-2002, Nextel used a billing system called "TRIS" that was actually composed of twelve different copies of the same billing system as a result of Nextel's acquisition of multiple two-way radio providers over the years. TRIS was costly, inefficient and customer unfriendly for several reasons, primarily because it was necessary to duplicate identical functions twelve different times and because it made customer care very difficult.

5. For example, it is very convenient for a wireless customer to be able to call customer care from anywhere in the U.S. and have a care representative access the customer's account from a single database no matter which customer care center or representative is servicing the customer. It is also more efficient for the carrier. State-specific customer care systems would, similar to TRIS, likely require that a California customer traveling outside

California be transferred to the proper database or perhaps transferred to a different care representative, increasing both hold times and costs. Thus, in order to avoid costly duplication of functions and customer irritation, all national wireless carriers strive to perform such functions as part of highly integrated systems, in which sub-functions of what might colloquially be called the "billing system" are in fact shared widely with the other systems necessary to operate the business overall.

6. Since at least 1993 companies like Verizon Wireless, Nextel, AT&T Wireless, Cingular, T-Mobile, and Sprint, or their corporate predecessors, have developed quasi-national networks for voice and data transmission, with nationally available pricing plans such as the seminal Digital One Rate plan first offered by AT&T Wireless in 1998. A natural adjunct of this strategy was to develop software and back office procedures which mirrored the national scope of the transmission capabilities and pricing plans, which were visible at the point of sale.

7. Said another way, the "back office" is just a reflection of the front end activity of a wireless communications provider, and therefore has to be consistent with the manner in which customers actually use Nextel's services.

8. Thus, for example:

a. Customer information displayed for a customer care representative emanates from extensive software defined systems and processes that were never designed to track the location of the customer calling the customer care center, nor to provide different information and different prompts for the customer care representative depending upon the billing address of the caller.

b. Contracts and terms were largely standardized, and did not distinguish between customers who only originated calls from one state versus customers who travel with their wireless phones, possibly on a daily basis as they commute from home in one state to work in a neighboring state, and therefore may initiate their calls from a different state than the state of residence.

c. Systems for tracking the paths taken by wireless telephone calls, and pricing them, were developed based upon the cellular towers or cellular sites which originated the signal, and not whether the call likely originated on one side or the other of a state border.

d. The cost of national transmission and back office systems were generally spread across all customers no matter where they were located. This, in part, was because the contracting or customer relationship administration activities applied to customers universally; the associated costs were therefore averaged across the carrier's service area (the whole country in the case of national wireless carriers), and there was no de-averaging of the costs of servicing a customer in one state versus the costs of servicing a customer in another state.

e. Customers subscribing to multiple handsets, utilized variously in different states, were not required to enter into separate contracts, with separate terms for modification and termination, and separate customer care scripts or procedures to enter into the customer relationship. The customer for multiple handsets and subscribers was not required to choose from differing price plans applied to each of the phones, depending upon where the majority of a particular handset's use was expected to occur.

9. The benefits to consumers from wireless carriers following a national business model were numerous and manifest:

a. Subscribers whose homes or businesses were located in rural or sparsely populated states benefited together with subscribers in densely populated states from improved customer service as well as the economies of scale and scope obtained by not having to support costly and inefficient redundant billing and back office systems made necessary by the regulatory requirements of an individual state or states.[1]

b. According to the Bureau of Labor Statistics (BLS) of the U.S. Department of Labor, the cost of cellular telephone service has dropped 33% since 1997 alone when BLS first began tracking cellular telephone prices. Meanwhile, the list of services available to residents of both densely populated and sparsely populated states has multiplied to include text messaging, portable wireless internet access, paging services, digital photography, enhanced 911 emergency access, GPS, personal digital assistant tools, and no separate charge for long distance service. *See* Ninth Report on CMRS Competition, WT Docket No. 04-111, released September 28, 2004.

c. Roaming charges, which often confused and angered customers, have become much less common (or, in the case of Nextel, never existed), and confusion and complexity resulting from the differential pricing of multiple subscriptions to a single customer exist only to the extent the customer chooses to have different pricing plans for different phones.

10. There are still a number of wireless carriers which operate entirely within a single state.[2] These local wireless companies would enjoy a distinct competitive advantage over larger, multi-state or national wireless carriers if multiple state-by-state regulation of wireless carriers relating to contractual disclosures, limitations or notice periods for changing prices or pricing plans, bill presentation, and opt-out and record-keeping requirements, for example, had to be

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[1] Thus, while Nextel's affiliate, Nextel Partners, operates mainly in less densely populated areas of the United States than Nextel, the pricing of the two entities is virtually identical.

[2] The following are examples of wireless carriers that operate only within a single state: 1. Pioneer Telephone Cooperative (OK); 2. Sagebrush Cellular (MT); 3. Eloqui Wireless (TN); 4. Alaska Communications Systems (ACS) (AK); 5. Cross Telephone Company (OK); 6. ETEX Telephone Cooperative (TX); 7. Concho Cellular Telephone Co., Inc. (TX); 8. Cellular One of Amarillo (TX); 9. Five Star Wireless (TX); 10. Brazos Cellular (TX); 11. West Central Wireless (TX); 12. First Cellular of Southern Illinois (IL); 13. Thumb Cellular (MI); 14. Chariton Valley Wireless Service (MO); 15. Mid-Tex Cellular, Ltd. (TX); and 16. Bluegrass Cellular, Inc. (KY).

incorporated after the fact into the national wireless carriers' integrated operations, customer care, and billing systems. This is due to the historical development of the wireless industry generally and of the national wireless carriers in particular:

a. Systems which were developed on a national basis would have to be either duplicated or modified to meet the requirements of each state which independently regulated any of the major customer care, contracting, and billing functions performed by the present computer systems. By way of example, Nextel required 2000 to 2500 hours of development work at rates of $200-$250 per hour, and a year of development time, just to implement a change in its Federal Programs Cost Recovery Fee on a national basis. With state-specific regulation of customer contact procedures, billing, and contract terms, as many as 50 separate subsystems for those functions would have to be developed, while still feeding into the remaining, commonly-used elements of Ensemble and other back office systems.

b. The cost of the initial development of each state-specific customer care, contracting, and billing system would be staggering. The initial development cost three years ago of Ensemble was over $1 billion. Moreover, the combined internal and external costs of running all aspects of Ensemble is in the hundreds of millions of dollars per year, while the cost of necessary technological upgrades and enhancements runs between $40 million and $50 million per year. Multiplying the maintenance, upgrade and enhancement costs alone by 5 or 6 states, let alone 50 states, produces an enormous additional cost. Based on development cost estimates to comply with the proposed California consumer protection rules enacted in 2003, this could easily reach $15-$20 million in system development costs alone to support each state that imposes regulations impacting the integrated billing and back office systems, without even considering additional operational costs, such as the need for more customer care representatives.

c. Further costs are incurred for integrating state-specific billing elements into the remainder of the integrated, enterprise-wide billing and back office systems because of the interdependence of each part of the non-billing elements upon software code appearing in the billing elements. Ensemble alone already contains literally hundreds of data tables from which information is pulled to prepare a bill. The addition of the many tables that will be necessary to account for multiple state-specific billing requirements, each of which must interface seamlessly with the rest of Ensemble, would be a major undertaking in terms of time, cost, and the potential for unforeseeable, unexpected, and unpredictable errors.

d. Given the great expense and trouble of modifying or replacing existing enterprise-wide billing and back office systems to accommodate the requirements of individual states, national wireless carriers would likely de-average the costs of such compliance so that these costs were borne only by the customers of the state imposing those requirements. The price charged to customers in the state choosing to independently regulate customer contact and billing functions would likely include (i) an allocation of the cost of the system elements utilized in common with residents of other states on a national basis, along with (ii) the costs of the redundant, state-specific point of sale and billing elements. This would necessarily render the cost of compliance for a national carrier higher than the price which must be charged by a local carrier, simply because of the state-versus-national scope of the carriers' respective businesses.

e. Cost, however, is far from the only or even the largest problem. The complexity of telecommunications carriers' computerized billing and back office systems creates a significantly enhanced risk of errors when any portion of the system, or the links to other portions of the system, have to be changed. To put it succinctly, in the world of telecommunications billing systems, change equals error. To illustrate the complexity inherent in these systems, our consultants tell us that the extent of computerization and accompanying reliance upon software code by national wireless telecommunications carriers is second only to that which is observed in the financial services industry. In part, that is because billing systems touch literally billions of transactions every month (every phone call is a transaction). Each one of these transactions must be accurately recorded, rated, presented, printed, and accounted for.

f. Because of the billing system's vast reach and extreme complexity, it is often impossible to predict the extent to which such errors may occur and how they might affect the customer experience even after 9-12 months of rigorous development and testing before system changes go live (as is typical). For example, a small change that slightly moved the location of the line of optically readable characters at the bottom of a bill prevented the "lock box" collecting facility from being able to note the bill payment automatically. This in turn resulted in invoices to customers that failed to reflect payments made, and a large increase in both customer dissatisfaction and the number of calls to customer care, which was costly to the carrier. In another example, a change in font size on a bill resulted in the carrier's inability to automatically redact bills subpoenaed by law enforcement, causing the process to have to be undertaken manually at significantly higher cost and causing significant delays in the availability to law enforcement agencies of the subpoenaed materials.

11. As an alternative, of course, the national wireless carriers could spread the cost of state-by-state compliance across their national customer base instead of de-averaging, thereby requiring residents of other states to subsidize the specific regulatory requirements of any particular state. However, this would still place them at a competitive disadvantage as compared to local carriers who would not have to change large existing systems that were developed on a national basis. Even in states where local competition is minimal, changes occasioned by another state would still result in higher overall telecommunications charges to residents of the non-regulating state.

12. The problem of shifting from a national billing and back-office system model to a series of local ones is compounded by the fact that regulation at any level, including the state level, is not static. As each state changes its own regulatory regime, or additional states enact their own regulations where none existed before (whether or not they actually conflict with those of other states), the process of having to build new processes and integrate them effectively with the existing elements of the integrated billing and back office systems which run virtually the entire business at Nextel, and the risk of errors, is repeated.

13. Consequently, even a decision to repeatedly upgrade to whatever is the most restrictive state-specific regulatory regime on any particular matter at a particular point in time – even if that were possible – would involve an endless cycle of change, immense costs, and greatly increased chances of errors resulting in customer dissatisfaction. This also places the national wireless carriers at a severe competitive disadvantage, either within the regulating state or even a non-regulating state (whose own local carriers do not have to make modifications as the national carriers must in order to comply with the laws of a sister state), or a combination of the two.

14. The wireless telecommunications industry is unique in terms of the impact which state-by-state regulation has upon it, as compared with other technology-dependent industries, for several reasons:

a. First, because of the fundamental character of a wireless communications handset as a traveling asset, it is virtually impossible to regulate intrastate calling without thereby regulating interstate calling. Unlike traditional circuit switched wireline telephony, whose subscribers use fixed facilities at a fixed location, a call which is entirely intrastate on one day when made by a particular subscriber, may be an interstate call when made the next day by that same subscriber to the same call recipient. For example, 23 % of Nextel subscribers' traffic originates on switches that are not the subscriber's "home" switch, which suggests a significant amount of highly mobile, and likely interstate, traffic. For that reason, billing systems cannot easily distinguish between interstate and intrastate calling. In addition, operational elements of the carrier's computer and software systems cannot practically be designed to create wholly self-contained systems for one state that merely interact on a call-specific basis and that enable wireline carriers to, for example, distinguish between intrastate and interstate calls.

b. While local wireline companies have traditionally been subject to both intrastate and interstate regulation and have generally been able to comply, that is largely because they were originally designed as local systems, interacting, for example, on a call-specific basis with interexchange carriers, in addition to the fact that they utilize fixed equipment located in a particular state.

c. While it is true that many companies operate using enterprise-wide software such as PeopleSoft or SAP, such companies do not rely upon such systems for the absolutely critical purposes of recording, rating, and generating accurate bills to customers as well as for customer care and accounting/collection purposes.[3] It is annoying and frustrating when, for example, PeopleSoft software refuses to allow a manager to approve employee attendance records electronically, but the consequences to the carrier and the public are far less dire than a billing system that cannot a) quickly and efficiently answer customers' questions about their bills; b) record or rate calls accurately; or c) correctly account for customer payments.

[3] Even such enterprise software systems present problems similar to those that exist with a national wireless carrier's billing and back office systems: Nextel and other companies regularly deal with complexities and problems with internal back office systems that, unlike Ensemble, do not directly impact the customer experience. Most back-office systems rely on "off-the-shelf solutions" as a baseline, but quickly become highly customized to meet the needs of the business. Unlike the consumer software market, corporate business software rarely is implemented without substantial modifications. Like the billing system, these modifications create a degree of complexity that cascades throughout many different systems. When it comes to customer information systems and a company's financial reporting systems, a business must go through extensive testing (sometimes lasting years) before changes can be implemented across the business.

Any large carrier that cannot perform each of these functions (and many others) quickly, accurately and efficiently for millions of customers will (together with its customers) suffer severe adverse consequences.

d. In addition to the increased cost of service and customer dissatisfaction, it is, in my professional opinion, a virtual certainty – unless the costs of state-specific regulation are exported to the residents of other states -- that certain specialized services which only the national carriers are in a position to provide through their national wireless facilities may no longer, as a matter of sheer economics, be available. An example of the type of service which likely would not have been introduced to date due to hypothetical, particularized, state specific regulatory requirements is Nextel's practice of providing billing information in certain electronic formats specified by several of its large customers. Many of Nextel's public sector and corporate accounts have contracts that require billing information for all units on an account to be provided in a particular electronic or digital format to allow for reconciliation, allocation and payments. Today, even minor changes in Nextel's bill presentation without advance warning and preparation can disable or otherwise prevent these customers from manipulating their bills. Multiple state specific requirements on bill presentation would likely make this practice of customized billing unworkable. For example, a recent single change to meet FCC Truth-in-Billing requirements required contract code changes to separate out discretionary charges, leading to substantial modifications of Electronic Data Interchange (EDI) and CD-based billing tools at a development cost of approximately $400,000 for that one seemingly simple change. In the future, multiple state-based requirements for bill presentation may make it prohibitively expensive to implement these changes while still providing customized billing.

15. While national carriers' systems do accommodate differences in state tax laws, that is feasible only because the need for flexibility to do so was known going in and was built into their billing systems at their inception.

16. In addition to other problems, compliance with state-specific regulation without a fixed location for the subscriber as confirmed by a caller's phone number automatically registering at the customer care center through Automatic Numbering Identification (ANI), would be uncertain, and confusion would exist over which state's laws are implicated by the caller. Customer care representatives are not attorneys, and it is unreasonable and customer unfriendly to make them decide legal questions.

17. While some of the proposed state-specific regulation is addressed to "consumer" contracts as distinguished from commercial contracts, having to split customers into groups, and to create separate systems to deal with each, merely compounds the problem of having to incur high system duplication costs and customer confusion.

18. Because of the additional complexity, vastly increased costs, and the high likelihood of errors resulting from changes to what are integrated nationwide systems, wireless customers and the national public interest would be poorly served by the proliferation of state-specific wireless regulation of contracting, customer care, and billing functions.

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