Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Patrick W. Pearlman
Deputy Consumer Advocate
The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

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Pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") Rules, 47 C.F.R § 1.415, the National Association of State Utility Consumer Advocates ("NASUCA")[1] hereby submits its reply comments in these proceedings.

I. INTRODUCTION AND SUMMARY.

Predictably, most of the telecommunications carriers and their industry groups (collectively, "carriers") filing comments urged the Commission to consider itself unconstrained by the Constitution, Congress, agency or judicial precedent in broadly preempting states' historic role in regulating carriers' billing practices.

[1] NASUCA is a voluntary association of 43 advocate offices in 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g., Ohio. Rev. Code* Ch. 4911; 71 *Pa.Cons.Stat. Ann.* § 309-4(a); *Md. Pub.Util.Code Ann.* § 2-205; *Minn. Stat.* § 8.33; *D.C. Code Ann.* § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

Simultaneously, these same commenters argue that the Commission is severely constrained in its ability to adopt more specific truth-in-billing and point of sale disclosure rules by the First Amendment. The carriers and their representatives are fundamentally wrong on both points.

Likewise, many of the carriers suggest that state regulation of their billing practices, or Commission adoption of more specific truth-in-billing and related rules, will harm consumers, by driving up carriers' operating costs, by overwhelming consumers with information, and by stymieing carriers' innovative billing practices. These arguments are largely unsubstantiated, contradict carriers' prior comments suggesting consumers prefer line items because they want "more information about the costs government imposes, not less," and are inconsistent with record evidence of substantial consumer confusion, anger and frustration with the "innovative" manner in which carriers have billed them to date.

NASUCA, state regulators and other consumer advocacy groups rightly opposed the Commission's tentative conclusion that it should reverse its prior truth-in-billing decisions and preempt states from regulating carriers' billing practices. NASUCA and others provided the Commission with compelling arguments supporting the adoption of more specific, non-exclusive, federal truth-in-billing and point of sale disclosure rules. NASUCA reiterates its arguments, and supports the state regulators' and consumer groups' comments and urges the Commission to issue an order consistent with those comments.

II. THE CARRIERS' GENERAL OPPOSITION TO ADDITIONAL FEDERAL TRUTH-IN-BILLING REGULATION IS UNFOUNDED.

A. Competition Alone Does Not Adequately Protect Consumers.

In addition to addressing the Commission's specific proposals in the *Second FNPRM*, most of the carriers challenge the Commission's conclusions that additional truth-in-billing and related rules need to be adopted in order to alleviate consumer confusion and frustration engendered by carriers' billing practices under the current truth-in-billing rules. The carriers' arguments can be distilled to the following related arguments: the(ir) market is highly competitive, competition is the best constraint on carrier behavior and increased government regulation is micro-management of business decisions best left to carriers.

The carriers' arguments appear to presume that the Commission is both ignorant of conditions in the telecommunications market and unjustifiably concerned about consumer confusion and frustration over carriers' billing and related practices. Neither is true.

In regular reports on the telecommunications industry, the Commission graphically describes the growth of competition in the wireless and wireline telecommunications markets in the United States.[2] Even if the Commission did not conduct such reports, industry reports – such as CTIA's reports on the wireless

[2] *See, e.g., Trends in Telephone Service*, Wireline Competition Bureau – Industry Analysis and Technology Division, Tables 9.6 & 9.7 (tracking growth in competitors' market share from 1984 through 2003); Tables 11.1 – 11.3 (tracking growth in wireless subscribership from 1984 through June 2004) (rel. June 2005).

industry[3] – and stories in both the industry press and broader media would have informed the Commission that there is competition in these industries. The Commission is certainly well aware that market forces impact carriers' business practices. Likewise, however, the Commission is well aware that the "invisible hand" of the market does adequately protect consumers from vague, misleading, fraudulent or otherwise unreasonable billing and related practices.

The Commission initially recognized this critical point in response to carriers' comments that billing issues should be left to the competitive marketplace, writing: "We therefore reject the threshold arguments that certain classes of carriers should be wholly exempted from complying with the guidelines that we announce today solely because competition exists in the markets in which they operate."[4] Similarly, the Commission noted that "[e]ven in competitive markets, however, disclosure rules are needed to protect consumers."[5] In orders issued since the 1999 Truth-in-Billing Order ("*1999 TIB Order*"), the Commission has repeated concerns that carriers could abuse the latitude given them to pass their regulatory costs through to customers by misleadingly labeling line item charges or imposing charges that exceed their compliance costs.[6]

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[3] *See* CTIA, *Semi-Annual Wireless Industry Survey*, "Year End 2004 Estimated Wireless Subscribers" (2005) (available at: http://files.ctia.org/img/survey/2004_endyear/slides/EstSubscribers_4.jpg).

[4] *1999 TIB Order* at ¶ 14; *see also id.* at ¶ 11.

[5] *Id.* at ¶ 7.

[6] *See, e.g., In the Matter of Federal State Joint Board on Universal Service*, Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, ¶ 54 (rel. Dec. 13, 2002); *In the Matter of Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, Policy Statement, File No. 00-72, FCC 00-72, ¶¶ 4-5 (rel. March 1, 2000) ("*Advertising Joint Policy*").

In all these efforts, the Commission has not left it to market forces alone to control carriers' communications with consumers about the most material term of carriers' service – price.[7] Studies suggest that the Commission's reluctance to entrust consumer protection to the "invisible hand" of the marketplace was well-founded. At least one recent study by economists from Harvard and M.I.T. suggests that producers in competitive markets have an incentive to create "noise" that distorts the pricing signals consumers receive because "markups associated with noise are remarkably robust: they do not decline rapidly as competition increases."[8] Articles in the media likewise indicate that competition does not necessarily compel carriers to send accurate price signals to customers and potential customers.[9]

Nor is the Commission's assessment of widespread consumer confusion and frustration regarding carriers' billing practices misplaced. The Commission cited evidence of that confusion and frustration as the basis for its initial foray into regulating carriers' billing practices in the *1999 TIB Order*.[10] There was evidence aplenty in the record developed in response to NASUCA's March 31, 2004 petition that customer confusion and frustration with carriers' billing practices has

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[7] On this point, NASUCA and the Commission agree. Price is the most important consideration for consumers. *See, e.g.*, NASUCA Petition (CG Docket No. 04-208) at 37-39; *Advertising Joint Policy* at ¶ 13. Likewise, carriers' billing statements are the single-most important communication between carriers and their customers regarding price. *See, e.g.,* Qwest Comments at 5.

[8] *See* Xavier Gabaix, *et al.*, "Extreme Value Theory and the Effects of Competition on Profits," 3 (March 7, 2005) (available at http://econ-www.mit.edu/faculty/download_pdf.php?id=906).

[9] *See, e.g.*, Edward C. Baig, "Cellphones top lists of what gets us steamed," USA Today, Section A at 1-2 (May 19, 2005); Jesse Drucker and Almar Latour, "The Spread of Hidden Fees," Wall Street Journal, D1 & D5 (April 13, 2004); Ellen Simon, "Your cell phone company knows you hate it," Associated Press (June 4, 2004).

[10] *1999 TIB Order* at ¶¶ 3-4, 15.

continued since 1999, and perhaps even increased. After all, nearly 20,000 comments were filed with the Commission by individual consumers in CG Docket No. 04-208 and, as far as NASUCA can tell, none of those comments expressed satisfaction with carriers' billing practices or the descriptions of their various line item surcharges.

In addition, the Commission noted the large number of consumer complaints received by its Consumer and Government Affairs Bureau's ("CGB"). The CGB's quarterly reports indicated a consistent, upward trend in the number of customer complaints regarding wireline and wireless carriers' billing and marketing practices.[11] At least one carrier noted that the number of complaints received by the CGB for the Fourth Quarter of 2004 ("4Q04") decreased markedly from 3Q04 and claimed that this demonstrated the positive impact of carriers' "voluntary efforts to adopt more understandable billing practices."[12] adopting signing onto CTIA's Code. Dobson's proclamation of victory appears to be premature. According to CGB's new chief, billing complaints for both wireless and wireline customers skyrocketed in 1Q05. Wireless complaints soared from approximately 4,400 to over 7,000 complaints, while wireline billing complaints rose from approximately 11,200 to roughly 16,700 complaints.[13] The number of complaints received in IQ05 marks a return to the generally upward trend in complaints registered by the Commission

[11] *Second FNPRM* at ¶¶ 16-19.

[12] Dobson Comments at 3.

[13] Comments of Monica Desai, Chief, CGB to the National Association of Regulatory Utility Commissioners, Consumer Affairs Committee, 2005 Summer Meeting, Austin, Texas (July 24, 2005).

over the past several years, and the decrease in 4Q04 appears to be an aberration. And although some carriers seek to trivialize the numbers,[14] the number of consumer billing complaints received by the Commission annually far outstrips the number of slamming complaints the agency receives.[15] Both Congress and the Commission considered carriers' slamming practices sufficiently problematic to warrant more rigorous protection and enforcement mechanisms to protect consumers; Commission action to address carriers' billing practices is equally justified, if not more so.

Moreover, other comments supporting NASUCA's petition in CG Docket No. 04-208 pointed out facts that are well-known to regulators and industry: Not all consumer complaints regarding carriers' billing practices go to the Commission. Hundreds of thousands of customer complaints are received by state regulators and consumers' groups every year.[16] Few consumers even think to contact the Commission, in far-off Washington, D.C., in order to complain about the bill they receive for service at home or office, or the carrier misrepresentations they are given at the carrier's local retail outlet or during a sales pitch over the telephone.[17] In short, the Commission's tentative conclusion to adopt additional truth-in-billing and point of sale disclosure rules, rather than rely on competitive market conditions,

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[14] *See, e.g.*, Dobson Comments at 3 n. 5.

[15] *See* NASUCA Reply Comments (CG Docket No. 04-208) at 44-45.

[16] *See* Consumer Groups' Comments at 2; NAAG Comments at 2-3.

[17] *See* Christopher A. Baker and Kellie K. Kim-Sung, *Understanding Consumer Concerns About the Quality of Wireless Telephone Service*, AARP Public Policy Institute Data Digest No. 89, at 4 (July 2003).

was reasonable, justified, and consistent with prior Commission determinations.

B. The Commission's Proposed Rules Hardly Represent Micro-Management Of Carriers' Billing Decisions And Are Not Unreasonably Burdensome.

1. The Commission is Not Micro-Managing Carriers' Billing Decisions.

The Coalition for a Competitive Telecommunications Market ("CCTM") protests that the Commission's proposed rules constitute nothing less than "micro-management" of the carriers' billing decisions.[18] This assertion is patently ridiculous. Using CCTM's logic, federal regulation of carrier decisions regarding marketing scripts and efforts (*i.e.*, slamming rules) and exit from a particular market served by a carrier (*i.e.*, discontinuation of service rules) similarly represent "micro-management" of the carrier's business. However, these requirements have worked quite well for years and have not interfered with a carrier's ability to manage its operations.

The Commission's authority to adopt rules establishing reasonable services, classifications, charges, etc. over interstate telecommunications service is firmly established in Sections 201 and 205 of the Act.[19] Significantly, none of the other carriers suggested that Commission rules represented unlawful or unreasonable "micro-management" of carriers' billing practices or point of sale disclosures.

2. The Commission's Proposals Are Not Unreasonably Burdensome.

Most carriers instead complain that the Commission's proposed rules are an

[18] Coalition for a Competitive Telecommunications Market ("CCTM") Comments at 14.

[19] *See* 47 U.S.C. §§ 201, 205.

unnecessary and unreasonable burden on their business practices.[20] NASUCA addressed the proposed rules' necessity in the preceding section. NASUCA will now address why the Commission's proposed rules are not unreasonably burdensome.

The most frequently cited basis for the carriers' claim that the proposed rules are unreasonably burdensome is the cost associated with making changes to their billing and other "back office" systems.[21] Without question, compliance with the Commission's proposed rules will impose costs on carriers. Similarly, there will be costs associated with the changes the rules would require in the manner in which carriers market their services to consumers. NASUCA is hardly in a position to quantify the carriers' costs of compliance with the Commission's proposed rules – but apparently neither are most of the carriers. Although many carriers decried the costs and difficulties associated with compliance, few accepted the Commission's request to quantify the financial or operational impact of its proposed rules on their operations.[22]

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[20] *See* NTCA Comments at 1-2; SBC Comments at 5-6; USTA Comments at 5; Verizon Comments at 8-9.

[21] *See* CCTM Comments at 15-16; MCI Comments at 3-4, 7; SBC Comments at 9; Sprint Comments at 15; Verizon Comments at 10-12.

[22] For example, with regard to its standardized labeling proposal, the Commission sought comment on the "pragmatic considerations" associated with that proposal. In connection with its request for "pragmatic considerations," the Commission wrote:

> What would be the monetary costs of such a requirement? *We encourage commenters to address this issue with utmost specificity*, such as data on how many bills they generate per month, a description of what billing systems would have to be changed, and *what the estimated costs of such changes would be* for the number of bills they generate. We particularly seek comment on the nature of the economic impact of such a requirement on small entities . . . . We also welcome comment on *a comparison of such costs with current costs of compliance with any state-specific billing category labeling requirements*.

One carrier that did attempt to quantify the financial impact of the Commission's proposed rules – SBC Communications, Inc. ("SBC") – estimated that it would cost the company $1.6 million to redesign its billing systems to establish separate sections for mandated or other charges.[23] Another carrier, MCI, estimated that it would cost the company approximately $5.3 million to implement the Commission's proposal to separate government mandated charges and, paradoxically, that this cost would be greater if the Commission limited such charges to only those mandated by, and remitted to, the government.[24] MCI also suggested that its compliance cost estimate did not include additional costs of "marketing" the new format and training customer service representatives ("CSRs") regarding the format,[25] but made no attempt to quantify those costs, let alone explain what "marketing" or training was needed to explain the new format.

However, since MCI and SBC have millions (or tens of millions) of customers, their estimated costs to comply with the billing format changes required by the Commission's proposals are not unreasonably large – less than a dollar per customer in any event. Moreover, NASUCA notes that MCI, at least, appears to have no trouble making frequent changes to its billing systems when those changes

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Second FNPRM at ¶ 46 (emphasis added). *See also id.* at ¶ 44 ("[W]e seek further comment on the mechanics of placing government mandated fees and taxes in a bill separate from all other charges.").

[23] SBC Comments at 9.

[24] MCI Comments at 3-4.

[25] *Id.* at 4.

are initiated by the company to introduce new and increased line item charges.[26]

Other carriers at least described their billing systems[27] or the number of bills rendered annually or monthly[28] but, as noted below, most of those carriers' discussions of their billing systems relates to the purported burden of state billing regulations rather than the Commission's tentative conclusions regarding separating government mandated charges or using standardized labels to describe charges on customers' bills.

The best evidence that the economic and operational burdens of complying with the Commission's tentative conclusion is not unreasonable is supplied by the fact that the largest wireless carriers are already separating such charges pursuant to the Assurance of Voluntary Compliance ("AVC") agreements executed by Sprint, Verizon Wireless and Cingular.[29] They have come into compliance voluntarily, albeit under threat of enforcement actions by state Attorneys General, and apparently have done so without any major disruption to their operations or impact

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[26] When NASUCA filed its March 31, 2004 petition in CG Docket No. 04-208, it noted that MCI had recently increased its Carrier Cost Recovery Charge from 0.5% to 1.4% and, in conjunction with that increase, had increased its property tax charge from 1.03% to 1.4%. NASUCA Petition (CG 04-208) at 14-15. Shortly after NASUCA filed its petition, MCI changed its Carrier Cost Recovery Charge from a percentage assessment to a fixed, $0.85 monthly charge. Beginning February 1, 2005, MCI increased the Carrier Cost Recovery Charge to $0.99 per month (bringing it in line with the other wireline carriers' monthly "regulatory" line items). In addition, MCI added a new, "paper billing fee" of $0.99 per month to customers who did not receive their bills via the Internet. In other words, MCI managed to make five changes to its billing systems within two years. The cost and complexity of making changes to billing systems, marketing materials and CSRs' training to reflect these changes in its customer surcharges certainly was not problematic.

[27] *See, e.g.,* Cingular Comments at 12-13; CCTM Comments at 15.

[28] *See* Qwest Comments at 7.

[29] *See* Cingular Comments at 47-49; Sprint Comments at 17-18; Verizon Wireless Comments at 39-40.

to their profitability.[30] Similarly, while MCI's and SBC's cost estimates are not pocket change, they are scales of magnitude less than industry's estimates of implementing other regulatory mandates like wireless E911, number portability or compliance with CALEA.[31]

As for the estimated costs of complying with standardized labels, none have been supplied by the carriers. Presumably some of the costs of bringing billing systems into compliance with the Commission's proposal to separate government-mandated from other charges would be shared with efforts to implement standardized labeling of carrier line item charges. Interestingly, at least one carrier supports the use of standardized labels for line item charges that recover the costs of regulatory compliance (as well as standardized descriptions of charges) in order to eliminate customer confusion and reduce carriers' litigation costs resulting from inconsistently or confusingly labeled line items.[32]

C. Enforcement Of The Current Truth-In-Billing Rules Would Not Solve the Problem

Several carriers assert that what is needed is not more regulation but better enforcement of the Commission's existing truth-in-billing regulations.[33] As both Commissioners Copps and Adelstein made clear in their dissenting comments in the *Second FNPRM*, in over six years since their adoption the Commission has not once

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[30] *See, e.g.*, Cingular Comments at 12-13.

[31] *See* Dobson Comments at 4 & n. 9, *citing* Thomas M. Lenard and Brent D. Mast, *Taxes and Regulation: The Effects of Mandates on Wireless Phone Users*, The Progress & Freedom Foundation, Progress on Point Release 10.18 at 2 (Oct. 2003); *see also* Cingular Comments (CG Docket No. 04-208) at 18-20.

[32] Dobson Comments at 7-8.

[33] *See, e.g.*, NTCA Comments at 2-4; Qwest Comments at 3-4; SBC Comments at 4, 6-7.

issued a notice of apparent liability to any carrier for violating its truth-in-billing rules.[34] This is striking given the number of carriers subject to those rules, the length of time the rules have been in effect, the number of billing-related complaints submitted to the Commission annually, and the numerous examples of misleading or deceptive carrier line items cited by NASUCA and others in CG Docket No. 04-208.[35]

The fact is that the truth-in-billing principles and guidelines adopted by the Commission in its *1999 TIB Order* are too broad and general to lend themselves to enforcement action, whether initiated by the Commission, state regulators or private citizens. NASUCA's petition and the comments both in support and opposition highlight the problem. NASUCA and others maintain that line items denominated like AT&T's "regulatory assessment fee," which recovers a multitude of operating expenses – such as costs associated with regulatory compliance and proceedings, property taxes and access charges – are not clear, accurate and non-misleading. Carriers maintain that these charges fully comply with the rules.

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[34] *See Second FNPRM*, Statement of Commissioner Jonathan S. Adelstein, Approving in part, dissenting in part, at 2 ("The FCC's current Truth-in-Billing rules have not been the basis for a single Notice of Apparent Liability in the six plus years that they have been in effect."); *id.*, Statement of Commissioner Michael J. Copps, Approving in part, dissenting in part, at 2 ("The majority says that with the states preempted, the Commission will not hesitate to enforce its truth-in-billing requirements. But to date all the Commission has done is hesitate. In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today—the only ones I find involve slamming. Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.").

[35] Further cause for pessimism about Commission enforcement is supplied by the fact that, even after the Commission ascertained that carriers have been recovering their contributions toward the provision of interstate telecommunications relay service ("TRS") through line items – in direct violation of the Commission's 1993 order – no enforcement action will be taken. *See Second FNPRM* at ¶ 23 n. 64.

Instead of ruling whether specific line items challenged by NASUCA comply with current truth-in-billing rules, the Commission instead proposes new rules and cites such line items as grounds for adopting clearer rules.

In sum, the Commission has had six years to enforce its truth-in-billing rules to address consumers' growing complaints involving wireless and wireline billing practices. It has shown no enthusiasm for enforcement in the past and NASUCA is skeptical that the Commission would enforce its current rules more vigorously in the future if left in place.

III. BILLING OF GOVERNMENT-MANDATED AND NON-MANDATED CHARGES.

A. Carriers' Opposition To A Separate Section For Government-Mandated Charges Is Without Merit.

As one would expect, many of the carriers oppose the Commission's tentative conclusions that, if carriers elect to list charges in separate line items, government-mandated charges must be placed in a separate section of the customer's bill,[36] while consumer advocates and state regulators favor such an effort.[37] The carriers' opposition is based on their assertion that adding a separate section for government-mandated charges is: (1) unreasonably burdensome or expensive, (2) not justified by the record evidence, and/or (3) likely to confuse customers. Each assertion is without merit.

[36] *Second FNPRM* at ¶ 39.

[37] Surprisingly, perhaps, some carriers and their industry associations supported the Commission's tentative conclusion and favor the clarity a separate section for government-mandated line items would add to customers' telephone bills. Cingular Comments at 52-53; CTIA Comments at 3-7; Nextel Comments at 7-8; Sprint Comments at 18-19; T-Mobile Comments at 8; USTA Comments at 3-4; Verizon Wireless Comments at 39-40.

First, with the exception of MCI and SBC, carriers who claim that a Commission rule requiring the segregation of government-mandated charges from all other charges appearing on a customer's bill is unreasonably burdensome or expensive offer nothing but generalizations to support their claims. For example, BellSouth simply asserts that "forcing carriers to restructure their bills would be extremely expensive" since "billing systems are large, complex systems that are not easily manipulated."[38] CCTM asserts that there are "hundreds if not thousands, of different bill designs being used today, as more and more carriers customize their bills to differentiate their services from competitors."[39] These assertions hardly satisfy the Commission's directive that commenters "address this issue with utmost specificity."[40]

More importantly, the largest CMRS providers (*e.g.*, Cingular, Sprint, and Verizon Wireless) are already separating government-mandated charges from other charges on their customers' bills and support the Commission's tentative conclusion on this point.[41] Similarly, CTIA supported the Commission's tentative conclusion to separate government-mandated fees from other charges on customers' bills.[42] These commenters agreed with consumer advocates and state regulators that a separate section for government-mandated charges may help reduce consumer confusion regarding the origin and amount of the line items they pay each month. If

[38] BellSouth Comments at 8-9.

[39] CCTM Comments at 15.

[40] *Second FNPRM* at ¶ 46.

[41] Cingular Comments at 47-49; Sprint Comments at 17-19; Verizon Wireless Comments at 39-40.

[42] CTIA Comments at 8.

separating government-mandated charges from other carrier charges on customers' bills posed unreasonable technical or economic challenges, NASUCA doubts that so many carriers or industry associations would support the Commission's tentative conclusion.

Second, several carriers are opposed to the Commission's proposal to create a separate section on customers' bills for government-mandated charges on the grounds that there is no evidence in the record supporting adoption of the rule. As NASUCA previously discussed, this assertion flies in the face of the Commission's own findings regarding the number of customers complaining that they are confused and frustrated by "regulatory" charges that appear on their bills.[43] Those findings are corroborated by comments filed in response to the *Second FNPRM* by the Consumer Groups and NAAG.[44]

Opponents of the Commission's proposed rule also suggest that there is no evidence that separating government-mandated charges from other charges will, in fact, reduce consumer confusion.[45] The carriers' comments turn agency rulemaking on its head by putting the burden on the agency to demonstrate not only that its proposed rules are reasonable but also demonstrably effective.

Finally, some carriers actually suggest that separating government-mandated charges from other charges on customers' bills will only confuse customers. For example, BellSouth suggests that customers are used to seeing

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[43] *See Second FNPRM* at ¶¶ 16-18.

[44] Consumer Groups Comments at 2-4; NAAG Comments at 2-4.

[45] *See, e.g.,* AT&T Comments at 6-7; BellSouth Comments at 8.

taxes appear in the same section with the charges with which they are associated and that a separate section would frustrate the customer because it would be merely a listing of charges with no readily available reference point. CCTM suggests that the fact the Commission seeks comment on what line items should be considered "mandated" demonstrates that its proposal will lead to greater customer confusion.[46]

These arguments hardly militate against requiring carriers to place government-mandated line items in a separate section of the bill, in order to reduce the consumer confusion and frustration evident in the record in CG Docket No. 04-208 regarding charges that appear to be, but are not, government imposed. With regard to BellSouth's concern about separating taxes from the services they are associated with, NAAG's suggestion regarding the order of sections appearing on consumers' bills[47] is a reasonable solution to one point that NASUCA had not previously addressed (*i.e.*, precisely where on the bill should a government-mandated charges section go).

B. Option One Appropriately Distinguishes "Mandated" From "Non-Mandated" Charges.

All consumer advocates and state regulators submitting comments on this topic agreed that the Commission should adopt its first proposal for defining "mandated" charges (*i.e.*, amounts that a carrier is *required* to collect directly from

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[46] CCTM Comments at 16.

[47] NAAG Comments at 9.

customers, *and remit* to federal, state or local governments).[48] Significantly, many carriers and their trade associations likewise recommended Commission adoption of the first option for defining those charges that are mandated.[49] In contrast, the arguments put forth by those carriers supporting adoption of the Commission's second proposal for defining what constitutes government-mandated charges[50] are simply illogical.

For example, AT&T asserts that the first option proposed by the Commission for defining "government-mandated" charges is "plainly too narrow" because there would be no qualifying charges other than those that are already required by law to be separately set forth from other carrier charges.[51] This point fails entirely to address the point of the Commission's proposal (*i.e.*, what line items go in a section of the bill specified for government-mandated charges). Under current rules, government-required charges may already be required to be set forth separately but as individual line items placed on bills together with line items that are clearly not required to be imposed. Thus, carriers may place a state's E911 fee (government required) on a bill in the same section as a carrier's USF fee (government authorized but not required) or its "carrier cost recovery" charge (purely discretionary). This state of affairs generates the consumer confusion the

[48] Consumer Groups Comments at 7-9; Missouri PSC Comments at 4; NAAG Comments at 10; NACA Comments at 3; NARUC Comments at 3-4; NASUCA Comments at 3-12; Texas OPUC Comments at 2-6.

[49] Cingular Comments at 47-49; CTIA Comments at 8-9; Nextel Comments at 8; Sprint Comments at 18-19; Verizon Comments at 40; Verizon Wireless Comments at 39-40.

[50] *See, e.g.*, AT&T Comments at 6-7; BellSouth Comments at 8; CCTM Comments at 14.

[51] AT&T Comments at 6 n. 10.

Commission's proposal seeks to alleviate. AT&T actually offers another example that makes the case for adopting the first option for defining government-mandated charges, namely confusion over separating line items that recover a carrier's USF contribution from line items that recover the carrier's administrative costs associated with its USF contribution. If the Commission adopts the first option there should be no confusion since neither the USF charge nor the USF administrative fee would be placed in a "government-mandated charges" section of the bill.

AT&T's universal service example also highlights the problem inherent in carriers' suggestions that the Commission should include any charges remitted to the government in the definition of "government-mandated" charges. CCTM, for instance, argues that the USF contribution should be included in such a section of consumers' bills because the revenues produced by the charge are remitted to the government and carriers have little choice but to recover their USF assessments through a line item.[52] However, as AT&T pointed out, putting the USF contribution line item in a "government-mandated charges" section of the bill would result in universal service-related line items appearing in two different sections of the bill, which could confuse consumers.

MCI suggests that the Commission's proposal may more easily persuade consumers that false charges are valid and make them less likely to inquire into the basis for those charges or comparison shop among providers.[53] This is nonsense.

[52] CCTM Comments at 17.

[53] MCI Comments at 5-6.

The line items that appear in a "government-mandated charges" section are going to be few in number under the Commission's first proposal, making it easy for regulators (if not consumers) to spot invalid charges, and should be uniform among carriers allowing regulators and consumers to make straightforward comparisons.

C. Other Considerations.

1. Carriers Overstate the 1st Amendment Protections Extended to Their Line Items and Billing Practices.

NASUCA has previously discussed why the First Amendment does not prohibit the regulations the Commission proposes to adopt in its petition and reply comments in CG Docket No. 04-208. None of the carriers set forth any new arguments that NASUCA and others supporting more specific labeling and formatting requirements have not already responded to and NASUCA urges the Commission to adopt the reasonable regulations on the commercial speech embodied in the carriers' billing statements to consumers. Further, NASUCA wishes to make it clear that it concurs in NAAG's First Amendment analysis as well.[54]

2. The Carriers' Arguments Against Further Separation of Charges on Consumers' Bills Ring Hollow.

In its comments, NASUCA advocated for additional separation of carriers' line item charges on customers' bills, namely into a "government-mandated charges" and a "carrier imposed charges" section. NASUCA notes that NAAG proposed a similar bill format but also indicated where a "carrier imposed charges"

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[54] *See* NAAG Comments at 7-9.

section should go on the bill.[55] NASUCA supports placement of a section for "carrier imposed charges" on the customer's bill consistent NAAG's suggested placement of this category of charges.

NASUCA also recommended that, since the Commission has determined not to limit carriers' ability to utilize line items to recover their operating costs, it should adopt rules at least requiring carriers to disaggregate the costs recovered in their line items to the maximum extent possible, in order to allow those charges to be labeled accurately and for consumers to be able to ascertain precisely what the source of the charge is and the amount being assessed to recover such costs.[56] Such line items should be described by the cost(s) they recover (such as "State Property Tax Recovery Fee" or "Access Charge Recovery Fee"). By requiring carriers to disaggregate their costs recovered through line items, there are no valid First Amendment concerns regarding standardized labeling since the Commission is not adopting a specific label for such charges; instead, carriers will know what to call their cost recovery line items by the nature of the particular cost being recovered.

IV. COMBINATION OF FEDERAL REGULATORY CHARGES IN LINE ITEMS.

Most of the carriers addressing this portion of the *Second FNPRM* argue that combining two or more federal regulatory charges into a single charge is not

[55] NAAG Comments at 9. NAAG referred to such charges as "Category 2 Charges" whereas NASUCA characterized them as "carrier imposed charges." *Id.*

[56] NASUCA Comments at 18-20.

unreasonable under Section 201(b) of the Act.[57] The carriers' arguments should be rejected since this billing practice is inconsistent with prior Commission pronouncements on the issue and clearly is unreasonable because it inhibits consumers' efforts to ascertain either the source of charges appearing on their bills or whether the amount of the charge bears any reasonable relationship to the costs allegedly being recovered.

Several carriers suggest that, so long as their line items combining several federal regulatory programs into one charge are clear, accurate and non-misleading, they should be allowed.[58] This argument simply begs the ultimate question. NASUCA and others argued, in response to the *Second FNPRM* and in CG Docket 04-208, that line items that combine two or more regulatory programs into one charge are neither clear, nor accurate, nor non-misleading.[59] In any event, it goes without saying that the more programs are lumped together in one line item, the more difficult it becomes to fashion a label for the charge that actually is clear, accurate and non-misleading.

Many of the carriers also argue that the Commission should allow line items that combine costs associated with two or more regulatory programs because this will keep a consumer's bill simpler.[60] It is ironic that the carriers argue for simpler,

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[57] AT&T Comments at 11; CCTM Comments at 21-22, 52-53; CTIA Comments at 16-17; MCI Comments at 7-8; Nextel Coments at 18; Qwest Comments at 14-15; SBC Comments at 9-10; T-Mobile Comments at 10; Verizon Comments at 48-49; Verizon Wireless Comments at 48-49.

[58] *See, e.g.*, AT&T Comments at 11.

[59] *See* NASUCA Comments at 20-22; Consumer Groups' Comments at 12. *See also,* NASUCA Reply Comments at 20-21, 42 (CG Docket No. 04-208).

[60] CCTM Comments at 22; Nextel Comments at 58; MCI Comments at 7-8; Nextel Comments at 18.

lump-sum charges now when in response to NASUCA's petition in CG Docket No. 04-208, many of the same carriers argued that consumers prefer more information and find the line item charges on their bills helpful in understanding the true costs of government regulation.[61]

The carriers simply want to have their cake and eat it too. Having persuaded the Commission that there is no reason to limit carriers' use of line items, the carriers now want simplified bills with fewer charges by combining as many government programs as they wish. If consumers want to know what they are being charged – and how much they are being charged – to pay for government mandates, then they must be able to ascertain that information readily from their bills.

Government too has an interest in the clear presentation of such information since the source and amount of the charge is being attributed to it. As NASUCA pointed out previously, lumping together two or more regulatory programs into one line item makes it difficult for consumers to ascertain the origin of the charge (without referring to the small print on carriers' bills or websites), the service to which the charge applies, and the amount associated with the particular program.[62] Prohibiting carriers from combining multiple regulatory costs in one line item is also consistent with the Commission's finding that "it is an unreasonable practice

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[61] *See, e.g.*, "State Watchdogs Seek to Ban Baffling Line-Item Phone Fees," Wall Street Journal, D4 (March 31, 2004)("I'm surprised that anyone thinking of consumers first would want to eliminate information that explains to consumers what those fees are for," quoting Verizon Wireless spokesman Jeffrey Nelson).

[62] NASUCA Comments at 20-22.

for carriers to include any costs that do not accurately reflect the carrier's actual obligation to the specific governmental program that the line item purports to recover."[63]

Prohibiting carriers from combining such costs in one line item is also necessary in order to allow consumers and regulators to determine whether the carrier has demonstrated that it is recovering only its costs directly associated with the regulatory program in the line item. As the Commission noted, "the burden rests upon the carrier to demonstrate that the charge imposed on the customer accurately reflects the specific governmental program fee that it purports to recover."[64] Combining two or more regulatory programs into one lump-sum charge will make it difficult, if not impossible, for consumers or regulators to ascertain whether carriers' claims that they are recovering only their actual costs of compliance with a regulatory program. Lump sum charges that combine multiple regulatory costs are simply little better than carrier charges that recover a grab bag of operating expenses under the moniker "miscellaneous."[65]

Some of the carriers' specific arguments are worth noting. For example, SBC notes that the Commission permits carriers to bundle services and offer that bundle at a single price and then asserts that "[s]ubscribers would expect no less for surcharges."[66] This analogy is particularly inapt. While carriers may bundle their

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[63] *Second FNPRM* at ¶ 28.

[64] *Id.* at ¶¶ 28-29.

[65] *See* NASUCA Reply Comments (CG Docket No. 04-208) at 18-20; 42.

[66] SBC Comments at 9.

services and charge one rate for that bundle, regulatory surcharges are quite different. For one thing, regulatory surcharges represent exogenous costs since they are ostensibly imposed as the result of government action rather than the carrier's business judgment. More importantly, if government is going to be blamed for a particular line item, it has a substantial interest in the carrier not overstating its costs of compliance and then pocketing a windfall misleadingly attributed to the government.

Verizon Wireless offers an interesting rationale for lumping together multiple regulatory programs into one line item, namely the fact that the amount attributable to a particular federal regulatory program, when stated on a per customer, per month basis, often "constitutes less than one cent ($0.01)."[67] NASUCA finds this justification interesting because it alleged in the March 30, 2004 petition – at point never addressed by the Commission – that amounts being charged in some carriers' regulatory line items appear to over-recover their compliance costs.[68] Given that many of the regulatory charges imposed by carriers range upwards from a dollar or more, per customer, per month, Verizon Wireless' argument appears to confirm NASUCA's suspicions. In any event, if compliance with a regulatory program imposes *de minimis* costs on carriers, then one must question why the carrier needs to recover these costs in a line item at all.[69]

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[67] Verizon Wireless Comments at 48-49.

[68] NASUCA Petition (CG Docket No. 04-208) at 42.

[69] It goes without saying that the carrier could recover such *de minimis* compliance costs in its monthly or usage-based rates. The choice is ultimately the carrier's – but if the carrier opts for a line item charge, then it should be prepared to break that charge out on a program-specific basis.

V. PREEMPTION OF INCONSISTENT STATE REGULATION.

As NASUCA suggested in its initial comments, the issue of whether to preempt state regulation of carriers' billing practices is the critical focus of the carriers' comments and, as one would expect, those comments unanimously favor sweeping action by the Commission. Just as predictably, consumer advocates, consumers and state regulators oppose that effort by the Commission. The carriers argue, wrongly, that all of the bases for Commission preemption of state regulation of carriers' billing practices – *e.g.,* express preemption and implied preemption – are satisfied here. Before turning to the lack of merit in the carriers' arguments under each of these points, NASUCA believes some "big picture" items need to be noted.

First, the carriers assert that the "patchwork quilt" of state regulation of their billing practices unreasonably burdens their operations and stands to thwart federal policy to create vibrant competition in the national telecommunications market. A basic and fundamental flaw undermines the carriers' arguments: wireline and wireless carriers' billing and related practices have been subject to varying degrees of state regulation for years, if not decades.[70] Competition has not been stymied by such regulation, in any event, moreover, if state regulation has at times been burdensome, that is simply a by-product of Congress' intent to preserve dual federal-state regulation of the telecommunications industry, consistent with

[70] In remarks to NARUC's Consumer Affairs Committee, CTIA's Vice President for Strategic Relations suggested that states are attempting to regulate wireless carriers like monopolies. Remarks of K. Dane Snowden to the National Association of Regulatory Utility Commissioners, Consumer Affairs Committee, 2005 Summer Meeting, Austin, Texas (July 24, 2005). That suggestion that states' limited regulation of wireless carriers to date is equivalent to states' (now historic) regulation of local telephone monopolies is pure hyperbole.

the Constitution and embodied in the Act.

In remarks delivered to NARUC's Consumer Affairs Committee on July 24, 2005, CTIA's Vice President for Strategic Relations questioned the need for state regulation of wireless billing practices, asking "what problem are we trying to solve that does not have an answer or a process"?[71] NASUCA suggests that the Commission ought to ask the same question from a more appropriate perspective: With the wireless industry experiencing "unprecedented growth"[72] over the past decade, what problem is presented by states' continued jurisdiction over wireless carriers' billing and related practices, as "other terms and conditions" of wireless service, that requires a remedy as extreme as preemption? The answer that should be obvious "none."

Second, in their comments supporting preemption most of the carriers fail to distinguish between CMRS providers and wireline carriers, and the statutory scheme applicable to them under the Act. Indeed, some carriers do not appear to distinguish between local and interexchange wireline carriers in their comments. These distinctions are not trivial, however; they express Congress' intent regarding how the dual federal-state regulatory scheme applies.

A. There Is Room For Both Federal And State Regulation Of Carriers' Billing Practices.

In their comments the carriers suggest that regulation of carriers' billing practices presents a Hobson's choice: Either the Commission's regulation of

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[71] *Id.*

[72] *Id.*

carriers' billing practices is exclusive, or allegedly inconsistent and burdensome state billing regulations will stymie the development of a competitive telecommunications market. Clearly, state regulation has not prevented the development of a competitive market. Nothing prevents the Commission from adopting truth-in-billing regulations as a national framework from which states may build. In other words, the Commissions truth-in-billing regulations can serve as guidance for state commissions, a "model" set of regulations that states may adopt or supplement if they conclude that additional requirements are in the public interest. Indeed, that was precisely the framework that the Commission adopted in 1999, when it first promulgated truth-in-billing regulations, aimed primarily at interstate wireline carriers.

Wireless carriers correctly note that their market is, in many respects, national. Wireless service is indeed mobile and is not necessarily constrained by state boundaries – though many wireless carriers' licensed areas do lie entirely within a single state. Certainly many wireless carriers offer regional or national pricing plans, that to some extent they market their services accordingly, and their "back office" systems and customer care functions operate on either a national or regional basis. NASUCA certainly recognizes these facts, just as Congress, the Commission and state regulators do. But these characteristics of wireless service are not so different from wireline service that the Commission should (or could) preempt states from continuing to regulate CMRS providers billing and related practices as "other terms and conditions" of their service.

For example, when the Commission first adopted truth-in-billing regulations in 1999, wireline interexchange carriers' services and operations were, in many ways, national as well. Many interexchange carriers in 1999 offered regional or national pricing and calling plans to customers, just like CMRS providers. Similarly, the larger interexchange carriers – *e.g.*, AT&T, MCI, Sprint – marketed and advertised their service on a regional or national basis in 1999. Likewise, such carriers' "back office" systems and customer care functions were operated on either a national or regional basis when the Commission first adopted truth-in-billing regulations in 1999. Yet the Commission concluded that its truth-in-billing regulations should operate as a framework governing carriers' billing practices and that states should be free to adopt additional regulations so long as they were not inconsistent with the Commission's regulations.[73] Continued state regulation of interexchange carriers' billing practices did not apparently eliminate or hinder the competitive nature of the interexchange carriers' market – if anything, that market experienced additional competition from regional Bell operating companies' ("RBOCs") entry into the interLATA market under Section 271 of the Act. Moreover, to the extent the large interexchange carriers have seen their subscriber base shrink and usage and revenues decline, there is *nothing* to suggest that these phenomena were produced by states' regulation of their billing practices. Rather, competition from RBOCs and increased use of alternative forms of telecommunications service – such as wireless or Internet-enabled services – appear to have accounted for these developments.

B. The Carriers' Description Of Burdensome State Billing Regulation Is

[73] *1999 TIB Order* at ¶ 26.

Irrelevant and Overblown.

1. State Regulations May Not be Preempted Solely on the Grounds That Compliance Is "Burdensome."

Carriers wrongly suggest that the Commission may preempt states from regulating their billing and related practices because such regulations impose economic and operational burdens that are purportedly inconsistent with the Commission's deregulatory policies. The D.C. Circuit Court of Appeals rejected just such an argument in a decision upholding the Commission's preemption of state efforts to regulate the rates local carriers charged interstate carriers for DNP (*i.e.*, local disconnect for nonpayment) service, the D.C. Circuit Court of Appeals emphasized the limited scope of federal preemption. The court wrote:

> We doubt, however, that the FCC may preempt state regulation – *in light of Section 2(b)* – simply on the grounds that it is economically irrational or even that it imposes too great an economic burden on carriers engaged in both interstate and intrastate communications. . . . *That the dual approach [to setting carriers' depreciation rates] was burdensome to the carriers or even interfered with the FCC's goal of accelerating technological advances was not sufficient justification for preemption*. That case suggests that the FCC may not preempt solely because state regulation of a matter of primarily local interest (which directly impacts on rates for intrastate services) conflicts with its ideas of sound federal economic or regulatory policy.[74]

In other words, Congress preference for competition does not trump the limits on Commission jurisdiction it placed on the Commission in Sections 2(b), 332(c)(3) and other provisions of the Act.

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[74] *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990) (emphasis added), *citing Louisiana PSC*, 476 U.S. at 372, 376.

2. The Allegations of Burdensome State Regulations Are More Sound than Fury.

Furthermore, the parade of horribles trotted out before the Commission as examples of overly intrusive or inconsistent state billing regulations simply does not hold up under closer scrutiny. It is telling that so few carriers even bothered to identify specific examples of state regulations that necessitated preemption by the Commission.[75] Most carriers simply repeat the same catechism that it's too burdensome to comply with "50 different states' billing regulations" and never provide examples that support their claims.

Of the examples of state regulations identified by some carriers, it is hard to see how these particular regulations impose an unreasonable burden on the carriers' operations in any way, let alone how those regulations either make it impossible to comply with the Commission's rules or frustrate Congress' purposes and objectives in the Act. CCTM, for example, notes that Illinois' certificate application form requires applicants to describe how they plan to bill for their

[75] *See, e.g.*, AT&T Comments at 14-15 (decrying wireline carriers operating under "patchwork quilt" of state regulations); BellSouth Comments at 4 (one unidentified state may have unidentified rules governing billing language in bills while another, unidentified state may have different unidentified rules); CTIA Comments at 21 (easier to follow one national rule than the unidentified requirements of fifty individual states); Dobson Comments at 1 (noting the "alarming increase" in the state regulation of wireless billing practices); MCI Comments at 13-14 (compliance with patchwork of state disclosure requirements requires constant reprogramming of billing software); Nextel Comments at 29-30 (complaining of carriers having to satisfy 50 different sets of rules relating to matters such as font size); T-Mobile Comments at 1 ("multiple" – yet unnamed – state legislatures and commissions have decided to regulate wireless carriers as if they were monopolist incumbents"); US Cellular Comments at 9 (50 states adopting different and contradictory requirements regarding the content of wireless bills). When NASUCA filed its petition for declaratory ruling, it identified twenty-two regulatory line items imposed by sixteen wireline and wireless carriers as being problematic under the *1999 TIB Order* and other orders issued by the Commission. NASUCA Petition at 12-22. Many of the carriers hastened to criticize NASUCA's petition as too general or not comprehensive enough to justify the Commission action sought The carriers' comments complaining about having to comply with "50 different states' billing regulations" are clearly far more general than the discussion of specific carrier line items in NASUCA's petition.

services. Such questions, CCTM asserts, indicates that a carrier's billing practices can be used to deny entry into the market.[76] CCTM cites as another example of "unreasonable" state regulation Maine's rules requiring billing agents and aggregators, as well as carriers, to register with the state commission, and allowing the commission to deny registration to any entity engaged in prohibited false or deceptive billing practices.[77]

On their face, the examples cited by CCTM are clearly reasonable measures adopted by the states in the exercise of their police power to regulate utilities and protect consumers. Moreover, NASUCA is unaware of Illinois or Maine ever having denied a certificate application or registration submitted to them since the states' rules have been in effect. The Maine rule does not necessarily even apply to carriers since it requires billing agents and aggregators register with the state commission. At any rate, the Commission surely cannot be inclined to prohibit states from protecting their citizens by barring entities that have engaged in false or deceptive billing practices from operating within the state.

Another example of "unreasonable" state regulation deserves attention. In its comments, Cingular creatively provides an example of what a bill might look like if a carrier had to comply with if each state were free to prescribe labels, typefaces and font sizes, etc. for carriers' bills.[78] Of course, as Cingular notes, the example bill is "purely hypothetical," does not "represent any particular state's actual

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[76] CCTM Comments at 7 & Exhibit A (Question 17).

[77] *Id.* at 8 & Exhibit B.

[78] Cingular Comments at 16-17.

formatting or labeling requirements," and was invented to illustrate a "worst case" result of conflicting state regulations.[79] As a concoction entirely divorced from reality, Cingular's sample bill deserves no consideration whatsoever. But the carrier does cite other examples – this time of proposed state regulations that have been stayed by the state commission and state legislation that has been proposed but not enacted.[80] Cingular also notes that AARP has proposed a Model Act for states to consider in enacting consumer protection laws addressing wireless billing practices.[81] Proposed laws, or regulations that have been stayed, logically cannot conflict with existing federal laws. Likewise, they cannot represent an onslaught of increasingly aggressive state regulation of carriers' billing and related practices.

For its part, SBC cites another California law, namely Section 786 of the Public Utilities Code, as an example of a state law that "can easily conflict" with the Commission's rules.[82] Upon closer examination, this provision – which has been in effect for twenty years or more – merely requires carriers to denote "[e]very charge imposed on business or residential telephone subscribers in response to rules or regulations of the Federal Communications Commission," and the total of all

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[79] *Id.* at 16 fn. 45.

[80] *Id.* at 27-28 (*citing* to California P.U.C. "consumer bill of rights" regulations, as well as pending legislation in California, Connecticut, Massachusetts, New Jersey, New York and Wisconsin. The status and precise details of these proposed bills is not addressed by Cingular).

[81] *Id.* at 28 & fn. 82. NASUCA notes that AARP's initiative to develop a Model Act governing wireless billing and related practices seems to alleviate much of the wireless carriers' concerns that they may have to comply with 50 different state regulations governing their billing practices. AARP's effort is similar to the approach taken in when adopting Uniform Commercial Code states have generally adopted to govern commercial transactions on a fairly uniform basis.

[82] SBC Comments at 14. SBC does not bother to describe just how the California law in question would make compliance with the proposals currently being considered by the Commission impossible.

charges "imposed pursuant to tariff of the Federal Communications Commission" as being "imposed by action of the Federal Communications Commission."[83] Granted, the notation required by this provision of California law might confuse customers if the Commission adopts rules requiring government-mandated charges to be separated and if it adopts the first option for defining such charges. But this hardly amounts to the "impossibility of compliance" needed to justify conflict preemption.[84]

T-Mobile and Verizon Wireless also offer examples of state efforts to regulate carriers' billing practices that they claim impose unreasonable burdens or conflict with the Commission's rules. None of the examples hold up under scrutiny. For example, T-Mobile asserts that it had to alter a number of billing and customer care systems and train employees nationwide in order to comply with California's now-stayed consumer bill of rights rules.[85] The company's statement that, while "California may have been the first state to develop a comprehensive regime of this sort applicable to wireless, it probably will not be the last. . . ,"[86] hardly supports its assertion that the Commission must preempt all state regulation of carriers' billing practices. The other examples of allegedly burdensome state regulation provided by T-Mobile – namely one or two states that impose different requirements regarding

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[83] Cal. Pub. Util. Code § 786(c)(1)-(2).

[84] *Florida Lime Growers*, 373 U.S.132 (1963).

[85] T-Mobile Comments at 14. To the extent T-Mobile suggests that the Commission should preempt state regulations of carriers' billing practices under a "conflict" theory of implied preemption, the fact that T-Mobile admits that it was able to comply with the now-stayed California rules undermines any claim that "conflict" preemption is appropriate based on "impossibility of complying with both federal and state regulations."

[86] *Id.* (emphasis added). T-Mobile's admission that California's consumer bill of rights regulations represented the "first," and to date only, regulatory program of its sort similarly undermines its suggestion that carriers are under an "onslaught" of increased state regulation.

the duration of wireless contracts, or service trial periods[87] – likewise fail to justify federal preemption of state laws governing carriers' billing and related practices.

For its part, Verizon Wireless cites various state laws that the Commission has already preempted in the *Second FNPRM* (*e.g.*, Vermont, Georgia), as well as proposed legislation in certain states that it broadly characterizes, without any supporting details, as regulating wireless carriers' billing practices.[88] Without any description of what the proposed laws do, it is impossible to determine what billing practices they regulate or how, let alone conclude that they should be preempted under a "conflict" theory of implied preemption.

On the other hand, Qwest's comments contradict the assertions made by the foregoing carriers' comments. Qwest notes that while "some Qwest states have regulations regarding billing," "those regulations *do not generally affect the fundamental format of the bill*" but rather "primarily focus on differentiating between regulated and nonregulated services and making clear which services can result in a denial of local service and which cannot."[89] Such billing regulations hardly warrant preemption under any theory of preemption.

In any event, the carriers consciously disregard the fact that they have the

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[87] *Id.* at 15 fn. 36-37. State laws setting the maximum duration of a carriers' contract term clearly do not implicate thousands of software, hardware, etc. changes. None of the matters addressed in the carriers' comments – such as separating certain charges on the bill, or giving certain labels to charges, or requiring separate line items for federal regulatory programs, are affected by whether the maximum term of a service contract is one year. Similarly, state laws setting service trial periods hardly implicate massive changes to billing systems. In fact, as T-Mobile concedes, the CTIA Code has a 14-day trial period, the AVCs provide for 14-day trial periods, and carriers are already complying with these requirements without apparent difficulty. *See, e.g.*, *In the Matter of Cingular Wireless LLC*, Assurance of Voluntary Compliance, ¶ 31 (Effective July 21, 2004).

[88] Verizon Wireless Comments at 11-12.

[89] Qwest Comments at 7-8 fn. 17 (emphasis added).

means to obtain relief from state laws or regulations governing their billing and related practices without the Commission taking the extreme step of preempting those laws altogether – namely lobbying the states. Nothing prevents carriers from opposing state legislative or regulatory initiatives aimed at regulating their billing practices and indeed, they have done so with some success. Carriers appear to have succeeded for now in blocking the California commission's proposed "consumer bill of rights" regulations. Similarly, carriers appear to have succeeded in defeating legislation in Louisiana that would have increased the state tax imposed on wireless carriers' service.[90]

Likewise, carriers ignore another source of relief from state laws, namely the courts. Wireless carriers have challenged, with success in some cases, state laws on the grounds that they amount to state regulation of "entry" or "rates charged" for wireless service.[91] The fact that carriers have these avenues available to them justifies continued faith in the principles of federalism embodied in the Constitution and the Act, and compels the conclusion that state preemption is the exception rather than the rule – contrary to the carriers' wishes.

Before moving on, there is one last point worth addressing, namely some carriers' near manic obsession with the notion that states are regulating the

[90] Dobson Comments at 4 fn. 8.

[91] *See, e.g., Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000); *but see Fedor v. Cingular Wireless Co*rp., 355 F.3d 1069 (7th Cir. 2004); *Cellular Telecommunications Industry Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999); *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 343 F.Supp.2d 838 (W. D. Mo. 2004).

minutiae of their bills, such as font and typeface.[92] Though there is much clamor about states regulating billing font and typeface, NASUCA was unable to find even one example of such a state regulation in the carriers' comments. In fact, to the best of NASUCA's knowledge, only one state – California – has even proposed a particular font size (10 point, no typeface specified) for telephone billing statements, and that requirement was stayed by subsequent action of the state commission.[93] Moreover, the California commission's proposal was modeled on 1998 California law that requires 10-point font for written service orders and solicitation materials.[94]

In short, the carriers' claims about state regulations governing the minutiae of their bills bring to mind the familiar story of Chicken Little – except in this case, the carriers fit the role of Foxy Loxy, with federal and state officials expected to provide the barnyard cast.

3. The Carriers Exaggerate the Difficulties of Complying with State Laws Governing Billing Practices.

In order to support their assertions that an exclusive national framework must apply to carriers' billing practices, the carriers exaggerate the difficulties of complying with both state and federal laws governing their billing practices. Some carriers, for example, suggest that it is virtually impossible for them to know which state's laws or regulations regarding their billing practices apply. CTIA, for

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[92] *See*, *e.g.*, Cingular Comments at 16-18; Nextel Comments at 29; *but see* Qwest Comments at 7 n. 17.

[93] *See* General Order No. 168, Part 2, Rule 8(e) (Cal. P.U.C. 2004).

[94] California Public Utilities Code § 2890(b). This section provides, in pertinent part: "When a person or corporation obtains a written order for a product or service, the written order shall be a separate document from any solicitation material. The sole purpose of the document is to explain the nature and extent of the transaction. Written orders and written solicitation materials shall be unambiguous, legible, and in a minimum 10-point type."

example, asserts that there may be no nexus between the subscriber's mobile service and the state in which the customer's billing address is located, that increased use of Internet billing could result in customers moving from one state to another and the carrier being none the wiser. A similar situation, CTIA claims, arises in the context of unified billing covering multiple phones for subscribers located in different states (multiple family members or employees on a single plan for example).[95] The difficulty here is purely contrived. The Commission itself has addressed, and rejected, similar assertions in the context of universal service support for wireless eligible telecommunications carriers ("ETCs").

In a March 17, 2005 order, the Commission concluded that the customer's billing address determines the location of the customer for purposes of calculating universal service support attributable to that customer, rejecting claims that support could be arbitraged by conniving carriers or subscribers.[96] The same rationale applies for determining which state's billing laws apply – the law of the state where the customer receives his or her bill governs. This approach also resolves any problems regarding multiple family members or employees on a single account – the law of the state where the customer is located, for billing purposes, governs matters relating to collection of the bill; it should apply equally to the contents of the bill.

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[95] CTIA Comments at 24; *see also* Dobson Comments at 5; MCI Comments at 13.

[96] *See In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 10245, ¶¶ 80-83 (2005). The Commission found that relying on billing address was simpler than utilizing the Multiple Taxation Source . . . to determine the location of the customer for support. It also cited comments that indicated that customers and carriers do not attempt to "game" support by intentionally misidentifying their billing address. *Id.*

Other carriers claim that state regulation of their billing practices will make it difficult for them to provide innovative billing – such as billing via the Internet or rendering bills in languages other than English.[97] As noted in the foregoing paragraph, whether a customer signs up for Internet billing or not, the carrier will undoubtedly have determined the address of his or her residence or business when service was initiated. Regardless of whether the customer later moves but receives the bill electronically, the billing laws of the state where the initial address was fixed should govern billing disclosures, practices, etc. Similarly, there is absolutely no reason to believe that carriers cannot adapt either the Commission's proposed rules, or additional state rules, to bills rendered in other languages. Whether bills are rendered in Spanish or Swahili, Urdu or Inuit, there are phrases analogous to "government mandated" or "carrier imposed" or "taxes," etc. If the carrier has the resources to develop foreign language bills, it presumably has the resources to ensure that those bills conform to state (or federal) billing laws.

A few carriers complain that state regulation of their bills interferes with their ability to maximize limited billing space and format.[98] This complaint does not square with reality. Wireless bills often consist of five, ten or even more pages, printed front and back. Long distance bills are nearly that long. Carriers have had little difficulty in finding new charges to add to bills, new places to put them, and new ways to describe those charges – often in fine print on the back of one or more pages of the bill. It is safe to assume that carriers will be able to find ways to adapt

[97] CTIA Comments at 11-12; MCI Comments at 8.

[98] T-Mobile Comments at 9.

state billing rules to the space carriers allow for their billing statements – just as they are doing today.

4. Carriers Likewise Overstate the Interstate Character of Their Billing Practices.

At least one carrier suggests that interstate and intrastate communications are "inextricably intertwined" on carrier bills, since charges for both services are typically included on the customer's bill.[99] It appears that BellSouth is staking out an "impossibility" basis for federalizing regulation of carriers' billing practices. This effort is unavailing. Though carrier bills may include interstate and intrastate charges, they are rendered to a customer who is clearly physically located within a state, and efforts to collect the bill are subject to state laws governing collection practices, as well as state laws regarding deceptive trade practices, false advertising, etc. States also have their own taxes and tax structures. BellSouth's argument would, by logical extension, turn local telephone service into an interstate service subject to preemption simply by including interstate charges on that bill. This is clearly wrong.[100]

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[99] BellSouth Comments at 5. BellSouth also notes that the Commission's original truth-in-billing rules generally applied to both interstate and intrastate service as a means of verifying carrier changes pursuant to the slamming provisions in Section 258 of the Act. Of course, BellSouth overlooks two important facts here. First, BellSouth ignores the fact that Section 258 authorized the Commission to adopt rules governing slamming and specifically provided for state enforcement of such rules for intrastate services. Second, BellSouth overlooks the fact that the Commission recognized state truth-in-billing rules and created federal rules to apply concurrently with states' rules, not supersede them.

[100] BellSouth's argument does, however, prove a point made in NASUCA's initial comments in this proceeding, namely that the practical reach of the Commission's proposed preemption is to federalize virtually every aspect of telecommunications service because interstate and intrastate services are often bundled, as are intrastate wireline and wireless service. NASUCA Comments at 50-52.

C. In Their Discussion of Bases for Preemption, The Carriers Pointedly Ignore The Protections Extended to Our Federalist System.

Several critical points need to be made with regard to the carriers' comments urging preemption of state laws governing carriers' billing and related practices. First, not one of the carriers acknowledged that Congress' intent "is the ultimate touchstone"[101] in determining whether federal law preempts state law. Second, none of the carriers bothered to note that the burden on the party claiming preemption is high,[102] that any statutory construction indulged in should favor states,[103] and that the presumption is against preemption.[104] Finally, the carriers pointedly ignore judicial precedent that, where matters within states' historic police powers are involved – and consumer protection and regulation of public utilities are indisputably within that power[105] – Congress' purpose to preempt must be "clear and manifest."[106]

Instead, the carriers assume that the Commission has virtually unbridled power to determine when state laws should be preempted in furtherance of the Commission's goals. For example, a number of carriers assert that the Commission

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[101] *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *see also English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

[102] *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *see also Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir., 1998). For purposes of this proceeding, that burden falls on the commenters supporting preemption.

[103] *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 7867, 780-81 (1947).

[104] *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *N.Y. Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).

[105] *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

[106] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *N.Y. Blue Cross Plans*, 514 U.S. at 655.

should preempt state laws governing their billing and related practices because compliance with those laws is expensive, or difficult, or produces bills that consumers do not like or disclosures that consumers do not want or need. None of these points, even if conceded for sake of argument, are recognized among the narrow bases for preempting state law.[107] Moreover, based on their erroneous assumption that the Commission has broad powers to preempt, the carriers improperly urge upon the Commission a construction of the Act's provisions that broadens, rather than limits, that power. Finally, the carriers provide pitifully little specificity in their comments to establish that state laws governing both wireless and wireline carriers' billing and related practices are preempted, either expressly or impliedly, by the Act.

NASUCA urges the Commission to bear in mind the critical principles regarding preemption that the carriers ignore. These principles must guide its decisions regarding preemption of state laws, validly enacted in accordance with their historic and traditional police powers. If the Commission applies these principles to its consideration of the comments in this proceeding, then NASUCA is optimistic that the Commission will properly conclude that preemption of state laws regarding carriers' billing and related practices is inappropriate.

D. State Regulation Of Carriers' Billing Practices Is Expressly Preserved, Not Preempted, By The Act.

Most of the carriers pass over the question of express preemption of state laws regulating carriers' billing and related practices, and instead focus on whether

[107] *See Maryland PSC v. FCC*,supra..

federal preemption of such laws is implied. However, some carriers actually suggest that the Act expressly provides the Commission with authority to preempt states' laws and regulations, or at least argue that nothing in the Act expressly limits the Commission's authority to preempt such state laws. These arguments rely upon the broadest possible reading of the authority delegated to the Commission under the Act, coupled with the most narrowly constrained reading of the authority reserved to states under the Act. This reading of the relevant provisions of the Act is entirely self-serving and entirely unsupportable.

Of the wireline carriers, only MCI attempted to argue that the preemption proposed by the Commission is expressly authorized under the Act, citing Sections 201 and 205.[108] However, the company fails to offer any explanation why these provisions, which have been in the Act since it was enacted in 1934, suddenly justify preemption of traditional state regulations governing wireline carriers billing and related practices. The fact is, neither section expressly provides for such preemption, both are subject to the limits on Commission jurisdiction set forth in Section 2(b), nor do these sections make "clear and manifest" Congress intent that state regulation of such practices should be preempted.

Most carriers addressing express preemption focus on the Act's provisions dealing with wireless service and their arguments focus on Sections 2(b) and 332(c)(3)(A) of the Act. The carriers suggest that, despite the clear language in Section 332(c)(3)(A), Congress did not intend to broadly preserve states' authority over "other terms and conditions" of commercial mobile services and that the phrase

[108] MCI Comments at 12.

"*except that this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services" means that Congress was preserving state authority "*only* against the preemptive effect of Section 332(c)(3) itself."[109] Thus, they argue, Section 332(c)(3)(A) does not stand as an impediment to the Commission later identifying a particular basis for preemption. Cingular even adds that Section 332(c)(3)(A)'s legislative history supports its argument because Congress noted that "nothing *here* shall preclude a state from regulating other terms and conditions of commercial mobile services."[110]

To say the carriers are reading Section 332(c)(3)(A)'s reservation of state authority narrowly is a significant understatement. For one thing, the carriers ignore entirely the later provisions of Section 332(c)(3)(A), which provide for states' reassertion of authority over CMRS providers' rates. The second sentence of the section, for example, provides that "[n]othing in this subparagraph shall exempt [CMRS providers] (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of

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[109] *See* Cingular Comments at 31; CTIA Comments at 43; Nextel Comments at 22; Verizon Wireless Comments at 28 (emphasis original).

[110] Cingular Comments at 31, *citing* H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 261 (original emphasis).

telecommunications service at affordable rates."[111] More importantly, the final provision of Section 332(c)(3)(A) authorizes states to petition the Commission for authority to regulate rates of any CMRS provider under certain conditions.[112]

While it is true that the Commission has set a fairly high bar for states seeking such authority,[113] nevertheless it is clear that Section 332(c)(3)(A) is less a limited, temporary reservation of state authority over "other terms and conditions" of commercial wireless service than a less-than-absolute restriction on states' authority to regulate wireless carriers rates. If, as the wireless carriers argue, Section 332(c)(3)(A) does not limit the Commission's authority to preempt state regulation over wireless carriers' other terms and conditions of service, then the section's provisions authorizing states to reassert authority over wireless carriers' rates makes absolutely no sense. The Commission should not presume Congress intended such radically inconsistent outcomes in Section 332(c)(3).

Furthermore, Cingular's stunted reading of the legislative history puts all the emphasis on one word – "here" – and ignores the lengthy discussion of what Congress intended "other terms and conditions" of wireless service to encompass. NASUCA can just as easily, and with far better reason, focus on the word "still" in the following passage of the legislative history: "It is the intent of the Committee

[111] 47 U.S.C. § 332(c)(3)(A). Granted, this provision of the section does not specifically mention state regulation of CMRS providers' rates, but it does mention "rates" and ensuring that "rates" are "affordable." Since, as every regulator knows, wireless carriers foam at the mouth at the mere hint of state commissions having any authority over their rates, this is not an insignificant reservation of authority to states.

[112] *Id.*

[113] *See CMRS 2nd R&O.*

that the states *still* would be able to regulate the terms and conditions of these services."[114] Congress' use of the word "still" in the legislative history clearly indicates that the reservation of state authority over other terms and conditions was meant to be preserved, undisturbed by subsequent action of the Commission.[115] Cingular's suggestion that the power to preempt virtually all states' regulations of commercial wireless providers' "other terms and conditions" of service is expressed by Congress' use of "here" in Section 332(c)(3)(A)'s legislative history. This brings to mind the point in the Supreme Court's admonition that "Congress does not . . . hide elephants in mouseholes."[116]

In addition, the carriers claim that the Act's other savings clauses – particularly Sections 2(b) and 414 – do not limit the Commission's ability to preempt state regulation of CMRS providers' billing and related practices.[117] The carriers' claims are mistaken. For example CTIA notes that Section 2(b), which preserves states' authority over intrastate telecommunications service, "specifically exempts wireless services from its scope."[118] Of course, only in a footnote does CTIA acknowledge that Section 2(b)'s exemption for wireless service is "subject to section 332," which preserves states' authority over other terms and conditions of wireless

[114] H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 261 (emphasis added).

[115] In this regard, "still" has the meaning "then or now or for the future as before." *See Oxford American Dictionary* at 672 (1980).

[116] *American Library Ass'n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005), *quoting Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

[117] Cingular Comments at 32-33; CTIA Comments at 45-46.

[118] CTIA Comments at 46, *citing* 47 U.S.C. § 152(b).

service.[119] Nor does the legislative history of Section 2(b) justify the conclusion that Section 2(b)'s exemption of wireless service from the intrastate services regulated by states opened the door for broad preemption of states' authority over other terms and conditions of wireless service by the Commission.[120]

For its part, Cingular claims that Section 2(b) simply preserves state authority over purely intrastate services; where a service is jurisdictionally mixed and cannot be separated into interstate and intrastate components, the Commission's authority prevails in case of a conflict.[121] This argument obviously begs the question whether the "conflict" basis of implied preemption applies. NASUCA addresses, and rebuts, this point later in its comments.[122]

The carriers lastly assert that Section 414 does not limit the Commission's purported broad authority to preempt state jurisdiction over other terms and conditions of commercial mobile services. The carriers note that the Commission has observed that Section 414 does not "preserve state law causes of action or remedies that contravene express provisions of the Act," and that courts interpret

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[119] *Id.* n. 127.

[120] *Id.* n. 130, *citing* H.R. Conf. Rep. No. 103-213, at 490, 497.

[121] Cingular Comments at 33-34. Cingular also claims that the Supreme Court has ruled that the practical effect of Section 2(b) is limited by operation of Section 201(b). *Id.* at 34 n. 93, *citing Iowa Utilities Bd.*, 525 U.S. at 380-81 [sic]. Cingular actually miscites the portion of the Court's decision that it is referring to. That portion, contained in a footnote, merely states that, for those matters addressed by the local competition provisions added to Title II of the Act by the 1996 amendments, Section 2(b)'s practical effect may be limited. For those matters not covered by the 1996 amendments, however, Section 2(b) "*continues to function*." *Iowa Utilities Bd.*, 525 U.S. at 381 n. 8 (emphasis added).

[122] *See infra*.

this section as yielding to substantive terms of the Act.[123] The carriers' arguments are not particularly compelling. As NASUCA and other commenters have pointed out, state regulation of wireless carriers' other terms and conditions of service, as broadly defined in Section 332(c)(3)(A)'s legislative history, hardly contravenes the express provisions of the Act. Such authority was expressly intended. There are no other, substantive terms of the Act to which such state authority must yield.

Nowhere do the carriers address the other provisions of the Act, cited by NASUCA in its initial comments, which preserve state authority over various aspects of telecommunications service provided within their borders.[124] As NASUCA pointed out, these other provisions of the Act make clear Congress' intent that the historic, federal-state regulatory regime governing the telecommunications industry should be preserved and maintained, and state authority preempted only when absolutely necessary, and then as narrowly as possible. The carriers – unfortunately with encouragement from the Commission – turn this regulatory model completely on its head.[125]

E. Preemption Of State Regulation Of Carriers' Billing Practices Should Not Be Implied Under The Act.

As NASUCA noted in its initial comments, where Congress does not expressly preempt state law, preemptive intent may nonetheless be implied under

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[123] Cingular Comments at 34 n. 95-96 (citations omitted); CTIA Comments at 45 n. 126 (citations omitted).

[124] NASUCA Comments at 34-35 (discussing Sections 253 and 258 of the Act); *id.* at 49-50 (discussing Section 414 of the Act)..

[125] *See Second FNPRM*, Separate Statement of Commissioner Michael J. Copps, Approving in part, dissenting in part, at 1-2.

certain circumstances.[126] Implied preemption doctrines are divided into two broad categories: "field" preemption and "conflict" preemption. The carriers pitch both categories of implied preemption to the Commission. Neither comes anywhere near the batter's box.

1. Neither the Act Nor the Commission's Regulations Regarding Carriers' Billing and Related Practices Demonstrate That Federal Law Occupies the Field.

In its comments, NAAG describes in detail the legal principles that govern the Commission's consideration of whether federal law so completely occupies the "field" of carriers' billing and related practices that state laws governing such practices must be preempted.[127] Rather than repeating NAAG's comments on the subject, NASUCA simply adopts them and incorporates them by reference here, in addition to the discussion of field preemption principles in its initial comments.

The arguments put forward by the carriers fail entirely to support their claim that federal law so comprehensively regulates the field of carriers' billing and related practices that it demonstrates a clear and manifest intent on Congress' part to preempt state law in the same field. For example, Cingular claims that the Act "asserted comprehensive federal control over the licensing and technical development of all radio systems," that this assertion of control "has characterized and guided the federal regulation of CMRS since the first commercial use of that technology," and that the Commission exercised "'federal primacy' over the areas of technical standards and competitive market structure for cellular service"

[126] NASUCA Comments at 25-26; *see also* NAAG Comments at 13.

[127] NAAG Comments at 21-23.

beginning in the 1970s.[128]

Fine and good – but the Commission's regulation of wireless technical standards (*e.g.*, governing the allocation of frequencies, licensing of wireless carriers, radio frequency emissions limitations, interoperability of wireless handsets, etc.) clearly has nothing to do with wireless carriers' billing and related practices.[129] The Commission's 1981 decision regarding the primacy of its technical standards for wireless service[130] and its 1994 decision implementing its authority over wireless rates and entry pursuant to Section 332,[131] both relied upon by the carriers,[132] merely reiterated what was already made clear by the Act – that state laws thwarting or impeding the Commission's rules implementing its rate and entry

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[128] Cingular Comments at 7-8.

[129] AT&T claims that the same reasoning set forth in the Commission's order finding exclusive jurisdiction over digital wireless handsets' compliance with the Commission's hearing aid compatibility requirements – obviously *a wireless technical standard* – applies to *wireline carriers' billing and other practices*. *See* AT&T Comments at 16-17 (emphasis added), *citing In the Matter of Section 68.4(a) of Commission's Rules*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 2005 FCC LEXIS 3490 (2005). The magnitude of the error contained in this justification for field preemption is simply breathtaking.

[130] *See Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469 (1981).

[131] *See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1421 ¶ 23, 1506 ¶ 257 n. 517 (1994) ("*CMRS 2nd R&O*"). CTIA suggests that the Commission concluded that it had authority to preempt state regulation of other terms and conditions of wireless service, notwithstanding Section 332(c)(3). *See* CTIA Comments at 43 & n. 118. This is not what the Commission said in the *CMRS 2nd R&O*, however. The Commission first noted that standards for preemption established in *Louisiana PSC* did not apply to the Commission's new rules because Congress had explicitly amended Section 332 to preempt local rate and entry regulation by states, without regard to Section 2(b). 9 FCC Rcd. 1506 ¶ 256 and n. 515. Next the Commission noted that its rules do not prohibit states from regulating other terms and conditions of CMRS. *Id.* ¶ 257. Only in a footnote did the Commission then suggest that it could preempt other terms and conditions of jurisdictionally mixed services that thwart or impede the federal policy creating regulatory symmetry (*i.e.*, its rules regulating CMRS providers' entry or rates). *Id.* n 517. This is hardly the sweeping assertion of preemption authority the carriers suggest. Moreover, if it was a sweeping assertion of preemption authority, burying it in a footnote near the end of a very long order governing matters other than "other terms and conditions" would be highly inappropriate.

[132] *See, e.g.*, Cingular Comments at 8, Verizon Wireless Comments at 5-6.

authority could be preempted.

Cingular then extrapolates from federal regulation of technical standards, which necessitates uniform interoperability standards for the nation's wireless network and which would be undermined if states adopted their own technical standards, to carriers' billing practices. To support this leap, Cingular notes that the Commission's authority over interstate wireline service and all wireless services extends to billing matters under Sections 201 and 205 of the Act.[133] Further, Cingular writes, the Commission found additional authority for its 1999 truth-in-billing regulations in Section 258 of the Act (governing verification requirements to control slamming and cramming) and Section 332. This, Cingular apparently suggests, amounted to the Commission's occupation of the field of regulations governing billing matters and other terms and conditions of wireless service.[134] This is hardly the case.

The Commission's authority to prescribe rates, etc. for interstate services under Sections 201 and 205 has been established for seventy years and has coexisted with identical state jurisdiction over intrastate rates during this time. Yet neither the Commission, nor any court, has ruled that the Commission's authority or regulations implementing its authority under these sections demonstrated that Congress intended federal law to occupy the telecommunications field exclusively. Indeed, such a conclusion would have been then, as it is now, completely inconsistent with Congress' intent as expressed in the various provisions

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[133] Cingular Comments at 8-9 (citations omitted).

[134] Cingular Comments at 9.

of the Act and its legislative history.

Section 332, which was amended more than a decade ago, expressly *preserved* state authority over "other terms and conditions" of wireless service, including billing practices, matters, disputes, consumer protection matters and any other matters generally understood to fall within "terms and conditions."[135] Nor did Section 258, added in 1996, express any clear or manifest intent that Commission regulations over carriers' verification procedures to deter slamming or cramming were intended to occupy the field of states' regulation of carriers' intrastate billing and related practices. Finally, if the foregoing provisions of the Act expressed a clear and manifest Congressional purpose to occupy the entire field of carriers' billing practices, it seems reasonable that the Commission would have made that determination in 1999. It did not for reasons that should be obvious.

Similarly Verizon Wireless asserts that the Commission has authority to occupy the field of states' regulation of wireless carriers' billing and related practices, despite the savings clause of Section 332(c)(3)(A), etc. Amazingly – in light of both judicial precedent and the lack of even a single case supporting its proposition – Verizon Wireless claims that the Commission "need only articulate its

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[135] *See* H.R. Rep. 103-111

intent" to occupy the field of wireless billing regulation in order to do so.[136] This is clearly not in accord with the courts' rulings on this matter.

CTIA likewise goes far afield with its field preemption arguments. Even if state billing and related regulations are not "rate regulations" *per se*, CTIA argues, they are "sufficiently close that they fall within the field of rate regulation that Congress clearly has assigned to the FCC and in which the Commission has now broadly regulated under its truth-in-billing rules."[137] This self-serving and purely subjective assessment of the nexus between "other terms and conditions" of wireless service, and "entry of" or "rates charged by" wireless carriers, is not in accord with courts' rulings, or even the Commission's past orders.[138] Moreover, while "close only counts in horseshoes and hand grenades," it certainly does not count in preemption analysis.

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[136] Verizon Wireless Comments at 24. Verizon Wireless claims the Commission's authority to occupy the field is "unquestionable" because the agency has asserted exclusive authority over other areas of wireless regulation, such as technical standards, noting Commission regulations governing wireless number portability, E911, coverage and buildout rules, and provisions allowing access to wireless service for persons with disabilities. *Id.* at 24-25. Such technical standards have always been associated with the nationwide operation of the wireless network, which the Commission exerted authority over even before 1993. Congress' preemption of entry and rate regulations addressed the issues associated with operation of the wireless network, just as its reservation of state authority over other terms and conditions of such service made it clear that this field of regulation was not being exclusively occupied.

[137] CTIA Comments at 39 & n. 93, *citing Southwestern Bell Wireless Inc. v. Johnson Bd. of County Comm'rs*, 199 F.3d 1185, 1193 (10th Cir. 1999). The *Johnson County Bd.* decision is plainly inapposite, since it found federal field preemption over local radio frequency emissions regulations. As noted above, radio frequency emissions fall within the scope of technical standards that the Commission has long regulated and which Congress specifically preempted states from regulating.

[138] *See, e.g., Fedor v. Cingular Wireless, LLC*, 355 F.3d 1069 (7th Cir. 2004); *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19908, ¶ 3 (1999); *In the Matter of Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17035-17036, ¶ 27 (2000) ("In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service."); *In the Matter of Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd. 1735, 1745 ¶ 20.

In sum, the carriers have provided nothing to indicate that the federal regulatory regime for wireless carriers established in Section 332(c) of the Act is so "clearly and manifestly" pervasive as to make reasonable the inference that Congress intended to leave no room for states to supplement the federal system, or to justify the conclusion that the federal interest in regulating carriers' billing and related practices is so dominant that the federal system should be assumed to preclude enforcement of state laws on the same subject. The same conclusion is even more strongly compelled for wireline carriers, where there is not even an analogue of Section 332 for carriers to which they can hitch their wagons.

2. State Laws and Regulations Governing Carriers' Billing and Related Practices Do Not Conflict with Federal Law Embodied in Either the Act or the Commission's Rules.

The carriers wrongly suggest that state laws governing their billing and related practices should be preempted because they conflict with either the "deregulatory scheme" adopted by Congress in the Act, or because they conflict with the Commission's rules. The carriers' arguments, and the underlying bases of those arguments, do not suffice to present a real conflict between states' billing laws and either the Act or the Commission's own billing regulations. NASUCA and others addressed in their initial comments the broad principles applicable to "conflict" preemption as consistently defined and applied by the courts, but the salient points bear repeating. In keeping with the judicial presumption against preemption, it is axiomatic that the existence and extent of conflict preemption is narrowly construed to preserve state law where possible, and that state law is preempted only to the extent that it actually conflicts with federal law.[139] Courts find conflict preemption in two instances: (1) when it is impossible to comply with both the federal and the state law, or (2) when state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[140] The state law in question must present an actual, not merely possible, conflict with federal statutes or regulations.[141] Furthermore, the conflict must be "of substance and not merely trivial or insubstantial."[142] Finally, if there actually is a conflict, state law is preempted only to the extent necessary to remove the conflict and no further, and courts must strive to accommodate and harmonize state and federal laws where possible to avoid preemption.[143]

a. The carriers fail to show that state billing laws actually conflict with either the Act or the Commission's truth-in-billing or other regulations.

As consumer advocates and state regulators correctly pointed out in their initial comments, absent reference to specific state statutes or regulations, it is virtually impossible to conduct any sort of analysis under the "impossibility of compliance" prong of conflict preemption.[144] The Commission did not cite to any particular state laws in the *Second FNPRM* but rather framed its request for

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[139] NASUCA Comments at 26 n. 77; *see also* NAAG Comments at 23.

[140] *Florida Lime Growers Ass'n*, 373 U.S. at 141-43.

[141] *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973).

[142] *Dublino*, 413 U.S. at 423 n. 29.

[143] *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 476 (1996); *California ARCO Distributors, Inc. v. Atlantic Richfield Co.*, 158 Cal. App.3d 349, 359 (1984).

[144] *See*, *e.g.*, NASUCA Comments at 24-28; NAAG Comments at 24.

comments in general, abstract terms.[145] With one exception, none of the carriers attempt to argue that specific state laws actually conflict with specific provisions of the Act or any specific Commission rules. The one exception is SBC.

SBC asserts that "state billing requirements can easily conflict with the Commission's rules, placing carriers in the position of having to violate one or the other."[146] SBC claims that a provision of California's state code requires it to "denote any charge imposed in response to a FCC rule, regulation or tariff, whether mandated by the FCC or not, as a charge 'imposed by action of the Federal Communications Commission,'" and that this law applies to federally tariffed charges that are neither mandated nor remitted to the government, such as the Subscriber Line Charge ("SLC").[147]

On its face, SBC's argument fails to demonstrate that it is impossible to comply with both the California law and federal law. For one thing, neither the Act nor the Commission's current rules provide that such charges cannot be identified on customer bills as being "imposed by action of the Commission." Perhaps SBC is thinking of the Commission's proposal to separate government-mandated charges from other charges on a bill and possibly limiting charges included in that section to those required by, and remitted to, government. However, if the Commission adopts those proposals, as NASUCA recommends, it clearly is not impossible for

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[145] *Second FNPRM* at 20 ¶ 35, 28 ¶ 50.

[146] SBC Comments at 14.

[147] *Id.*, *citing* Cal. Pub. Util. Code § 786. NASUCA previously described this section's requirements elsewhere in its reply comments. *See supra*.

SBC and other carriers in California to comply with both the Commission's rules and the state law.

Taking SBC's example of its SLC, the carrier would place the SLC line item outside the section labeled "Government Mandated Charges" and denote the charge as "imposed by action of the Federal Communications Commission." Most carriers already label their SLCs as "Federal Subscriber Line Charge," etc., even though the charge is not obligatory (but must be tariffed with the Commission).[148] As with other charges authorized by the Commission but not required, such as line items recovering carriers' universal service contributions, it is not even clear whether the charge would be subject to Section 786 of the California Code since carriers' USF charges are neither tariffed nor actually required by Commission rules. In any event, as NASUCA previously pointed out, SBC's compliance with Section 786 of the California law and the Commission's rules might, at worst, confuse some customers – but that is hardly the standard for impossibility of compliance under "conflict" preemption analysis.[149]

b. State laws governing carriers' billing and related practices do not stand as an obstacle to the accomplishment and execution of the full purposes of and objectives of Congress.

All the carriers urging the Commission to preempt state laws governing carriers' billing and related practices assert that preemption is warranted under the second prong of conflict preemption, *i.e.*, state laws stand as an obstacle to the

[148] *See* NASUCA Comments at 6-7, Attachments A & B (discussing VarTec and Sage Telecom's SLCs).

[149] *See* NASUCA Reply Comments, *supra*.

accomplishment and execution of Congress' purposes and objectives.[150] Without citing any particular statutory provision, the wireline carriers identify Congress' purposes and objectives as the preservation of a competitive interstate marketplace and contend that state laws regulating billing and other practices threatens this marketplace,[151] or merely assert that state billing laws undermine the Commission's uniform, federal billing regime.[152] The wireless carriers, at least, have Section 332(c)(3) to rely on, and they assert that Congress expressed its desire for a federal, "unregulatory" framework to govern all aspects of the market for commercial mobile radio services that the Commission has implemented through its adoption of rules governing CMRS technical standards and regulatory parity.[153] The carriers' assertions are all well off the mark.

i. State billing regulations do not impede Congress' purposes or objectives for wireline carriers.

Congress' purposes and objectives for wireline carriers, as reflected in the Act, were reviewed in detail by the Supreme Court just three years ago,[154] but a brief summary of the Court's review is appropriate for this proceeding. As the Court noted, companies providing telephone service have traditionally been

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[150] AT&T Comments at 14; BellSouth Comments at 7; CCTM Comments at 3-6; Cingular Comments at 6-12, 39-46; CTIA Comments at 39-41; Dobson Comments at 7; MCI Comments at 12; Nextel Comments at 20-30; SBC Comments at 12-14; Sprint Comments at 10; T-Mobile at 16-20; Verizon Comments at 18-20; Verizon Wireless Comments at 21-24.

[151] *See, e.g.*, AT&T Comments at 14; BellSouth Comments at 7.

[152] *See, e.g.*, CCTM Comments at 3-4.

[153] *See, e.g.*, Cingular Comments at 6-8; CTIA Comments at 41; Nextel Comments at 23-24.

[154] *See Verizon Communications v. FCC*, 535 U.S. 467, 475-97 (2002). Much of the Court's discussion focuses on those provisions of the Act, and particularly the 1996 amendments to the Act, designed to foster competition in the local exchange.

regulated as monopolistic public utilities and the focus of legislatures and regulators has been to set and regulate *rates* to ensure affordable, stable public access to a utility's goods or services.[155] Intrastate retail rates were regulated by states or local government, while rates for wholesale service were regulated by the federal government, since the transmission or transportation involved was characteristically interstate.[156] Rates were the primary focus of utility regulation, with states principally concerned with "just and reasonable rates" for the public and the national government chiefly concerned with preventing rate discrimination.[157]

Dissatisfaction with the various methods of setting rates was the enduring feature of telecommunications regulation prior to the 1996 amendments to the Act, which radically shifted the rate-making paradigm to achieve a new objective: uprooting the monopolies that traditional rate-based methods had perpetuated.[158] The regulatory movement, undertaken first by the Commission under its broad powers to prescribe rates, practices, etc. for interstate telecommunications markets in the interstate market, through the 1982 consent decree divesting AT&T of its local monopolies, through the 1996 amendments opening the local market up to competition, has – at its core – been focused on rates, not other terms and conditions of telephone service, and certainly not the terms and conditions of intrastate telecommunications service. Moreover, competition was not an end in

[155] *Id.* at 477 (emphasis added). As the Court noted, "nationalization, the historical policy choice for regulation of telephone service in many other countries, was rejected in the United States." *Id.* n. 2.

[156] *Id.* at 478.

[157] *Id.* at 479.

[158] *Id.* at 480-489.

itself but rather was a means to an end, namely benefiting consumers; as an ancillary effect, the law allowed, on the interstate level, the elimination of ratemaking efforts that ultimately favored monopolies.

The wireline carriers cannot, for good reason, cite to any particular provision of the Act that would support their assertion that state regulation of intrastate billing and related practices stand as an obstacle to the accomplishment and execution of Congress' full purposes and objectives. If state regulation of billing practices thwarted Congress' purposes in enacting the Act in 1934, then one would have expected preemption of such state regulations to have been addressed sometime in the last seventy years. Similarly, if the 1996 amendments had contained purposes and objectives that state billing regulations and laws impeded, again one would not have expected to wait ten years to see such laws preempted.

In fact, the Commission took the wind out of the wireline carriers' sails in 1999 when it made it clear, in adopting truth-in-billing rules, that wireline competition alone did not sufficiently protect consumers from unfair and unreasonable billing and related practices, that rules were needed to curb such practices, and that those rules were in addition to, rather than in lieu of, state billing laws.[159] Moreover, the state laws at issue have been on the books for years, if not decades. Since 1982, and before, the interstate wireline market has been open to competition, yet state billing laws were never cited as impediments to such competition. If subscribership and carrier entry during this period are any indicator, state billing laws failed miserably to impede interstate wireline

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[159] *1999 TIB Order*, at 4 ¶ 6, 6-7 ¶ 14.

competition. And given the glowing reports of the thriving market contained in carriers' merger filings with the Commission, state billing laws have not checked local wireline competition either.

ii. State billing regulations do not impede Congress' purposes or objectives for wireless carriers.

The wireless carriers at least have specific legislation enacted by Congress that accords them somewhat different treatment than the wireline carriers under the Act. Nevertheless, the wireless carriers misstate Congress' purposes and objectives in arguing that state billing regulations stand as an obstacle to the full achievement and execution of those objectives.

As already discussed, Congress made very clear what its purposes and objectives were when it amended Sections 2(b) and 332(c)(3) of the Act – states were preempted from regulating the entry of or the rates charged by any commercial or private mobile service but states were not prohibited from regulating the "other terms and conditions" of commercial mobile services.[160] Congress also made it clear that "other terms and conditions" remaining within states' jurisdiction were to be broadly construed.[161] Congress made it even clearer that the scope of preemption was limited to those matters that could be considered regulation of CMRS "entry" by including two provisions that envisioned states' retention or reassertion of regulatory authority over such carriers' rates in the section (*i.e.*, ensuring universal availability of telecommunications services at affordable rates, and authorizing

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[160] 47 U.S.C. § 332(c)(3)(A).

[161] H. Rep. 103-111, at 261.

states to petition the Commission to reassert authority to regulate CMRS providers rates).

Regulation of wireless carriers' "entry" was well understood to refer to the Commission's historic assertion of primacy over wireless technical standards (such as radio frequencies, height and power limitations, and equipment and facilities compatibility) and wireless' competitive market structure (such as spectrum allocation and licensing).[162] This was consistent with the Commission's longstanding authority to regulate radio transmissions, even within a state, pursuant to Section 301 of the Act.[163] Nothing cited in the wireless carriers' comments suggests that state regulation of CMRS providers' billing and related practices thwarts or impedes Congress' purposes and objectives in vesting the Commission with exclusive authority to regulate those matters falling under "entry" regulation.

One carrier, Nextel, claims that state regulation of wireless carriers' billing and related practices conflicts with Congress' intent that wireless carriers be regulated at the federal level, with regulation diminishing as competition develops.[164] There is, however, no such statement of Congressional intent anywhere in the Act or in the legislative history of the 1993 amendments. In fact, Nextel's

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[162] *See* Cellular Communications Systems, 86 F.C.C.2d 469, 503-505 ¶¶ 80-83 (1981); *see also id.* at 505-09 ¶¶ 84-95 (technical standards) *and* 509-11 ¶¶ 96-107 (regulatory structure).

[163] 47 U.S.C. § 301.

[164] Nextel Comments at 20-21, 23-24.

assertion is at odds with the Commission's own pronouncements on the matter.[165]

Some wireless carriers argue that state laws regulating wireless carriers' billing and related practices necessarily regulate the carriers' rates.[166] This assertion is obviously overbroad and is contrary to a number of decisions, both by federal courts and even by the Commission, that have ruled that state laws that indirectly impact wireless carriers' rates – by increasing their operating costs, etc. – are not invalid on the grounds they regulate the carriers' rates.[167] Any claim that a state law or regulation constitutes preempted "rate" regulation is necessarily a fact-specific question that must be decided on a case-by-case basis, in accordance with well-established principles of federal jurisprudence, rather than through outright preemption of all state laws based on broad brush, unsubstantiated claims.

Other wireless carriers argue that the Commission's authority over interstate wireline, and all wireless services, extends to billing matters under Title II of the Act, and this authority extends to billing over intrastate services where such services cannot be readily distinguished and separated into interstate and intrastate aspects.[168] Here the carriers offer a flawed and truncated version of the

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[165] *See* NASUCA Comments at 27 n. 79-80, *citing In the Matter of Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling, Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19902-03, ¶¶ 9-10 (1999).

[166] Cingular Comments at 40-46; Verizon Wireless Comments at 18-20.

[167] *See, e.g., Fedor v. Cingular Wireless, LLC*, 355 F.3d 1069 (7th Cir. 2004); *In the Matter of Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19908, ¶ 3 (1999); *In the Matter of Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17035-17036, ¶ 27 (2000) ("In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service."); *In the Matter of Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd. 1735, 1745 ¶ 20.

[168] Cingular Comments at 9; CTIA Comments at 46-47.

Court's ruling in *Louisiana PSC* and other decisions to support their argument. For example, Cingular writes that the Commission's authority over interstate telecommunications services may extend to intrastate aspects of the service as well, where the service cannot be separated into interstate/intrastate components, thus warranting preemption "on the ground of inseparability."[169]

Aside from the fact that there is no "inseparability" doctrine of preemption, Cingular's argument is premised on several fatally flawed assumptions. For one thing, Cingular assumes that the Commission's truth-in-billing rules must preempt state laws in order to "protect a valid federal regulatory objective" or avoid "negating the Commission's exercise of its own lawful authority." The problem is that the asserted preemption runs headlong into Section 332(c)(3)'s reservation of state authority over CMRS providers' "other terms and conditions" of service, and the consequent denial of preemption authority to the Commission over such matters.

The Court in *Louisiana PSC* rejected a similar proposition, *i.e.*, that the Commission could preempt state depreciation schedules and rates because they differed from those adopted by the Commission for interstate service. The Court rejected the argument that Section 2(b) of the Act operates as a jurisdictional bar to preemption by the Commission only when the matter is purely local and when interstate communications are not affected by the challenged state regulation, noting:

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[169] Cingular Comments at 9, *citing Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986); *Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990).

> The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for preemption. While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of *Congress*, it is also true that a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . Section 152(b) constitutes . . . a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.[170]

Like Section 2(b), Section 332(c)(3)(A)'s reservation of authority to states over "other terms and conditions" of CMRS is a limitation on the Commission's assertion of authority over such matters. Regardless of whether the interstate and intrastate component are inextricably intertwined, there must still be a Congressional purpose or objective that is frustrated absent preemption – and Congress' purpose cannot be frustrated if the state laws it preserved are not preempted. While this proposition is axiomatic, it still has not deterred the wireless carriers from arguing against it.

There is a more practical flaw in the argument put forth by Cingular and others, namely the supposed inseparability of carriers' billing into interstate and intrastate components. Contrary to their claims, carrier billing is separable and many carriers actually distinguish between interstate and intrastate components on their bills. Long distance carriers, for example, provide call detail that distinguishes between intrastate calls and interstate calls, even if they do not break

[170] *Louisiana PSC*, 476 U.S. at 374-75 (emphasis original).

such calls out into a separate interstate and intrastate section. A customer need only look at his or her call detail to be able to determine which calls terminate within the state and which do not (whether by noting the state abbreviation or the area code associated with the called number).

Moreover, even if carriers no longer distinguish between interstate and intrastate services, in their billing statements, they continue to distinguish between them in other ways. Carriers – both wireline and wireless – track calls to determine whether they are interstate or intrastate for purposes of calculating applicable access charges. Likewise, carriers calculate customers' interstate and intrastate calling in order to determine their monthly contribution to the federal universal service fund, which is assessed only on interstate revenues.

F. The Commerce Clause Is Not A Legitimate Basis For Preemption Of State Billing Laws And Regulations.

Cingular asserts that the Commerce Clause of the Constitution provides another basis for the Commission's preemption of state laws and regulations governing carriers' regulation of carriers' billing and related practices.[171] NASUCA previously addressed in its initial comments why the Commerce Clause does not provide the Commission with authority to preempt the state laws in question.[172] Likewise, NAAG and NARUC addressed the same issue and NASUCA concurs in, and adopts herein, those parties' comments regarding the inapplicability of the

[171] *See*, *e.g.*, Cingular Comments at 35-39.

[172] NASUCA Comments at 31-33.

Commerce Clause as a basis for preemption.[173] There are, however, a couple of points raised in Cingular's arguments that bear comment.

First, Cingular cites the Commission's analysis underlying its decision to preempt all state regulation of Voice over Internet Protocol ("VoIP") services as being fully applicable to the question of whether state regulation of CMRS billing is preempted. Cingular claims that CMRS customers, like VoIP end users, are mobile and their use of such services are not limited to a fixed location.[174] Therefore, the reasoning goes, regulating wireless billing practices will potentially affect business activities that occur entirely outside a state's boundaries.

However, the Commission itself has undermined the "mobile service, Commerce Clause" analysis in the *Vonage Order* by subsequently requiring facilities-based VoIP providers to begin providing E911 service to end users within 120 days.[175] In its order, the Commission virtually abandoned its assertions about the "stateless" nature of VoIP services. Instead, the Commission concluded that the location of a VoIP end-user could be practicably and reasonably identified, that such facilities-based VoIP providers could connect end users to their local public safety answering point ("PSAP"), and that such providers could transmit automatic

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173 *See* NAAG Comments at 27-29; NARUC Comments at 8.

174 Cingular Comments at 37-38, *citing In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order 19 FCC Rcd. 22404 (2004) ("*Vonage Order*"). The *Vonage Order* is currently pending on appeal in the Eighth Circuit *See National Ass'n of State Utility Consumer Advocates v. FCC*, No. 05-71238 (8th Cir.).

175 *See In the Matter of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) ("*IP-Enabled E911 1st R&O*").

location identification information to the PSAP with the 911 call.[176]

Second, Cingular asserts that CMRS service and billing do not distinguish between interstate and intrastate services, meaning that state billing regulations would necessarily affect services rendered entirely outside the state, etc.[177] Some points need to be stressed here. First, the "service" at issue is the communication between carrier and customer regarding the customer's account balance, which necessarily occurs within a state. Second, the location where wireless customers receive their bill, or at least identify the address associated with their account, fixes the state whose billing laws apply. Third, Cingular overlooks the fact that, according to the Commission's data, the vast majority of wireless calls are intrastate.[178] Not only are most calls likely to occur within the state whose billing regulations apply, but the Commission's data demonstrates that wireless carriers have the ability to distinguish between interstate and intrastate calls.

Finally, Cingular claims that the burdens imposed on interstate commerce "far outweigh any local benefits resulting from state billing regulations."[179] Cingular's opinion on this issue certainly does not represent the views of state regulators, consumer advocates or consumers. As NASUCA and others made clear, state regulators receive hundreds of thousands, if not millions, of complaints

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[176] *Id.* at 7-8 ¶¶ 16-18.

[177] Cingular Comments at 38.

[178] *See Trends in Telephone Service*, Table 11.4 (June 2005). According to the Commission's report, 80% of wireless calls are intrastate, while 71% of wireless minutes of use are associated with intrastate calls.

[179] Cingular Comments at 39.

regarding wireless carriers' billing and related practices every year.[180] States surely have a substantial interest in adopting laws and regulations to protect their citizens from unreasonable billing and related practices. That interest is not outweighed by the burden imposed on carriers in providing those protections.

Moreover, NASUCA notes that many competitive, nationwide industries are subject to both federal and state regulation of their business practices. For example, national employers must comply with state employment and labor laws in addition to extensive federal labor laws.[181] Similarly, many competitive industries (*e.g.*, automobile manufacturers, oil and gas producers and refiners, and other manufacturers) must comply with state environmental protection laws and adjust their business operations accordingly.[182] The restaurant industry and other food services are also subject to scores of state, county or city food safety and public health statutes and regulations.[183] Insurers and lending institutions are also heavily competitive, and heavily regulated through disclosure laws, agent licensing, bond requirements and other state-specific requirements.[184]

The Commission itself recognized this fact when it considered the federal

[180] Consumer Groups' Comments at 2-3, 25; NAAG Comments at 2-4.

[181] *See e.g., Cal. Lab. Code* §§ 510 *et seq.*; *Or. Rev. Stat.* §§ 652.010 - .990; *Minn. Stat.* §§ 177.21-177.35.

[182] *See, e.g.*, *Cal. Gov't Code* §§ 65800 *et seq.* (county and city zoning); *Cal. Health & Safety Code* §§ 39000 *et seq.* (clean air laws); *Minn. Stat.* § 116.07 (air pollution standards).

[183] *See, e.g.*, *Cal. Health & Safety Code* §§ 110425 *et seq.* (food safety); i*d.*, §§ 113700 *et seq.* (uniform retail food facilities law); *N.Y. Pub. Health Law* §§ 1350-1355 (Consol.) (food handling laws); 410 *Ill. Comp. Stat.* 650/0.01 -3.1 (sanitary food preparation); *Minn. Stat.* § 157.16 (food establishment licensure).

[184] *See*, *e.g.*, *Cal. Ins.Code* §§ 1631 *et seq.* (agent licensing requirement); i*d. at* §§ 12420 *et seq.* (mortgage insurance regulations); *Cal. Fin. Code* § 17000 *et seq.* (escrow agent regulations); *Ohio Rev. Code* §§ 3905.01 to .99 (insurance producers licensing).

Truth-In-Lending Act in adopting truth-in-billing regulations. As the Commission knows, states have adopted their own truth-in-lending laws that supplement the federal laws. Telecommunications carriers are not so different from other producers and sellers that operate on a nationwide basis, in competitive markets, that they cannot continue to function subject to the dual system of regulation that has been in place for decades.

G. There Is No Other Basis For Preemption.

1. The Commission's Ancillary Jurisdiction Does Not Authorize Preemption of State Laws Regulating Carriers' Billing and Related Practices.

Cingular notes that the Commission has "ancillary jurisdiction" to adopt rules where (1) its general grant of jurisdiction under Title I of the Act covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[185] The implicit suggestion is that the Commission's ancillary jurisdiction gives it authority to preempt state laws governing carriers' billing and related practices. This is simply wrong.

The Commission's ancillary jurisdiction provides the agency with a basis for adopting rules – not a basis for preempting states' laws that the Commission is otherwise not authorized to preempt. For one thing, courts follow a "very cautious approach" in deciding whether the Commission has validly invoked its ancillary

[185] Cingular Comments at 6, *citing American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

jurisdiction under the two part test outlined above.[186] Commission rules adopted pursuant to the Commission's ancillary jurisdiction are not a valid basis for preempting state laws and regulations over matters specifically reserved to the states. Where Congress has reserved power to the states to regulate aspects of intrastate telecommunications services, as it has in Sections 2(b) and 332(c)(3)(A), any rules adopted pursuant to the Commission's ancillary jurisdiction that purportedly supersede those reserved powers would clearly exceed the Commission's delegated authority.[187]

2. The Commission's *2nd CMRS R&O* Does Not Suggest the Commission Established Broad Authority to Preempt State Laws Regulating "Other Terms and Conditions" of Commercial Mobile Services.

Some carriers cite a footnote in the *CMRS 2nd R&O* as expressing the Commission's recognition that it has "broad" authority to preempt state laws regulating "other terms and conditions" of commercial mobile services, notwithstanding Section 332(c)(3)(A), if state regulations thwart or impede its policies.[188] On its face, the Commission's order does not support the carriers' assertion. CTIA glosses over the fact that the footnote in question actually defined limits on the Commission's authority to preempt state laws regulating "other terms

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[186] *American Library Ass'n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005) (citations omitted) ("[W]e think that the Supreme Court's cautionary approach in applying the second prong of the ancillary jurisdiction test suggests that we should be *at least* as cautious in this case").

[187] *Id.* at 701-02, *citing FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II* stands for the proposition that "if the basis for jurisdiction over cable is that the authority is ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast…").

[188] *See* CTIA Comments at 43 n. 118, 47 n. 133.

and conditions" of CMRS under *Louisiana PSC*:

> As explained in note 515, supra, if we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes *our federal policy of creating regulatory symmetry*, we would have authority under Louisiana PSC to preempt such regulation.[189]

The Commission made it clear elsewhere in its order that the "regulatory symmetry" referred to were those rules that brought both commercial mobile services and private mobile services within the ambit of Section 332 with respect to Commission regulation of their rates and entry.[190] State billing regulations that do not thwart or impede such policies are not subject to preemption under *Louisiana PSC*.

3. The Suggestion that the Commission Can Preempt State Laws that are Consistent with Section 332(c)(3)(A) is Mistaken.

CTIA also asserts that the Commission's authority allows it to preempt state laws that are "otherwise *not* inconsistent with federal law,"[191] or as CTIA puts it, the Commission can preempt state regulation of "other terms and conditions" of wireless service even if they are consistent with Section 332(c)(3).[192] The decisions CTIA relies upon are inapposite, however.

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[189] *CMRS 2nd R&O*, 9 FCC Rcd at 1506 ¶ 257 n. 517 (emphasis added); *see also id.* ¶ 256 n. 515.

[190] *See, e.g., id.* at 1418 ¶ 13 (one of Congress' principal objectives in Section 332 was achieving regulatory symmetry, *i.e.*, ensuring that similar services would be subject to consistent regulatory classification); *id.* at 1424 ¶ 36 (including auxiliary services provided by mobile services licensees within the definition of mobile services); *id.* at 1429 ¶ 46 (regulating for-profit and non-profit carriers similarly); *id.* at 1434 ¶ 55 (defining interconnected services); *id.* at 1459 ¶ 114 (expressing intent to amending Commission rules to reconcile significantly disparate technical, operational and procedural regulations among mobile services providers).

[191] CTIA Comments at 43 n. 119, *citing City of New York*, 486 U.S. at 64 (emphasis added).

[192] CTIA Comments at 44 n. 120, *citing International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1414 (4th Cir. 1994).

For example, in *City of New York* the Court reviewed Commission regulations that preempted state technical standards governing the quality of cable television signals. The Court found preemption proper because "[w]hen Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue."[193] Congress' enactment of the Cable Act simply codified what the Commission had been doing for the preceding ten years.[194] Thus, the rules adopted by the Commission at issue were within the scope of an express delegation of authority by Congress.

The situation in *City of New York* is quite distinguishable from the preemption proposed by the Commission, and urged by the carriers, in this proceeding. Prior to 1993, states and the Commission had concurrent jurisdiction over wireless carriers' rates, entry and other terms and conditions of service (though the Commission had generally asserted primacy over entry matters). Section 332(c)(3) expressly reserved to states their traditional role in regulating other terms and conditions of commercial mobile services, eliminated – at least until further order – their role in regulating such carriers rates, and absolutely preempted them from regulating wireless entry.

The other cases cited by CTIA serve its cause no better. For example, in *Ouellette*, the Court upheld state common law nuisance actions involving pollutants discharged by a paper mill pursuant to its federal permit issued under the federal

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[193] 486 U.S. at 65-66.

[194] Section 624(e) of the Cable Act grants the FCC authority to establish technical standards for cable systems. *Id.* at 67; *see* 47 U.S.C. §§ 544(a)-(e).

Clean Water Act, though it concluded that such actions could not be brought under the law of any affected state but rather must be brought under the governing law of the state in which the mill's discharge was located.[195] Similarly, the appeals court in *Feikema* concluded that state common law claims were not precluded by the detailed scheme regulating solid and hazardous waste facilities and activities under the federal Resource Conservation and Recovery Act. The court in *Feikema* noted that, "[a] common law right, even absent a saving clause, is not to be abrogated unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."[196]

VI. POINT OF SALE DISCLOSURE RULES.

The carriers assert that there is no "clear cut need" for the Commission to adopt point of sale disclosure rules to ensure that customers understand the terms of service and, more particularly, the costs associated with their service.[197] This assertion clearly conflicts with the evidence in the record underlying the *Second FNPRM*. Many of the nearly 20,000 comments filed with the Commission in CG Docket No. 04-208 indicate that the individuals did not clearly understand what the

[195] 479 U.S. at 492-93. The Court expressly noted that, "[a]lthough Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress 'left no room' for state causes of action." *Id.* at 493.

[196] *Feikema*, 16 F.3d at 1413 (citations omitted). The court cited provisions in the federal law that expressed an intent contrary to the proposition that the federal program occupied the field completely. *Id.* The court also concluded that private rights of action did not conflict with the federal act's provisions providing for enforcement by the Environmental Protection Agency. *Id.* at 1415. The court ultimately did find that the injunctive relief sought by the plaintiffs conflicted with the injunctive provisions of a consent decree reached between the federal agency and the defendant and was thus preempted, though claims for monetary damages were not. *Id.* at 1416-19.

[197] *See*, *e.g.*, Verizon Wireless Comments at 7-8, 34-36; Qwest Comments at 15.

true cost of their service would be until it was too late for them to cancel the service without incurring substantial penalties. Similarly, the volume of complaints regarding carriers' billing practices and the terms of their contracts received by the Commission,[198] as well as the high volume of complaints regarding such matters received by state commissions,[199] indicates that the Commission's tentative conclusion that point of sale disclosure rules are needed is a reasonable exercise of the authority delegated to it to establish reasonable practices, etc. for interstate carriers under Sections 201 and 205 of the Act.[200] Moreover, the carriers' suggestion that a strict standard, *i.e.*, a determination to adopt regulations must be based on a "clear cut" need, is squarely at odds with the deference given agencies in adopting regulations implementing their delegated authority and committed to their expertise.[201] Furthermore, that strict standard stands in stark contrast to the liberal standard the carriers advocate for upholding Commission decisions to preempt state laws, despite judicial pronouncements to the contrary.

Similarly, several carriers assert that point of sale disclosures provide no benefit to consumers and are outweighed by the burden those rules would impose on carriers.[202] NASUCA notes, however, that the association representing smaller

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[198] *See Second FNPRM* at ¶ 16.

[199] *See* NAAG Comments at 2-4; *see also* Consumer Groups Comments at 25 (survey found 43 percent of consumers responding .found it difficult to determine the actual cost of service when they were shopping for a wireless carrier).

[200] 47 U.S.C. §§ 152(a); 201, 205.

[201] *See, e.g., Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[202] BellSouth Comments at 5; MCI Comments at 11; SBC Comments at 10; Verizon Wireless Comments at 47; U.S. Cellular Comments at 8.

carriers, whose per-customer costs of compliance with the proposed point of sale rules are presumably higher than those of carriers with large, national customer bases, support the Commission's proposed rules. More significantly, these carriers assert that:

> *This proposal will impose minimal costs on the industry, but the consumer benefit is great*. The customer should be fully informed about the full rate he or she will pay, including any "non-mandated" line items and a reasonable estimate of government mandated surcharges. *The consumer benefit of this requirement outweighs the minimal cost to the carriers*.[203]

NASUCA agrees. As the Commission previously determined in adopting truth-in-billing rules, competition alone does not adequately protect consumers from unscrupulous competitors, nor does it ensure that they will be provided with basic information necessary to make informed choices in a competitive market.[204] Consumers should not have to wait until after they receive their first bill to discover the true cost of service, especially when the first bill is not received until after the service trial period has expired.

VII. CONCLUSION.

NASUCA urges the Commission to issue an order concluding this proceeding in accordance with NASUCA's arguments and recommendations.

Respectfully submitted,

/s/ Patrick W. Pearlman
Deputy Consumer Advocate

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[203] National Telecommunications Cooperative Association, *et al.* ("NTCA") Comments at 4 (emphasis added).

[204] *1999 TIB Order* at ¶¶ 1, 6, 14.

The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications
Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

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