Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Empowering Consumers to Avoid Bill Shock	)	CG Docket No. 10-207
Consumer Information and Disclosure	)	CG Docket No. 09-158

<u>COMMENTS OF METROPCS COMMUNICATIONS, INC.</u>

Carl W. Northrop
David Darwin
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, NW
Washington, DC 20005
Telephone: (202) 551-1700
Facsimile: (202) 551-1705

Mark A. Stachiw
Executive Vice President, General Counsel
& Secretary
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, TX 75082
Telephone: (214) 570-5800
Facsimile: (866) 685-9618

Its Attorneys

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Empowering Consumers to Avoid Bill Shock	)	CG Docket No. 10-207
Consumer Information and Disclosure	)	CG Docket No. 09-158

COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments in response to the *Notice of Proposed Rulemaking* (the "*NPRM*")[2] in the above-captioned proceeding. For the reasons set forth in greater detail below, MetroPCS opposes uniform Commission-imposed mandates on wireless carriers requiring usage alerts and cut-off mechanisms, especially for wireless carriers which provide pre-paid or unlimited pay-in advance services. In opposition, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

In the *NPRM*, the Commission proposes "rules that would require mobile services provider to provide usage alerts and information that will assist consumers in avoiding

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*; NOTICE OF PROPOSED RULEMAKING, in CG Docket Nos. 10-207, 09-158 (released October 14, 2010) ("*NPRM*").

unexpected charges on their bills,"[3] with the goal of "empower[ing] consumers to avoid incurring unexpected costly charges."[4] In so doing, the Commission proposes mandatory provision to consumers of "timely information about their usage, such as voice or text alerts when a subscriber is approaching or begins incurring overage or roaming charges, and clear disclosure of the available tools subscribers can use to limit usage and review their usage history."[5]

MetroPCS sympathizes with post-pay and measured service customers who are seeking to avoid unexpectedly large monthly bills, or "bill shock," especially in light of increased data messaging under data usage plans. In fact, MetroPCS has long been aware of and responsive to this consumer concern. The MetroPCS business model is designed in large measure to enable consumers to enjoy wireless fees that are predictable and constant, allowing them to effectively manage their budgets, without fear that they will end up with an unpayable bill at the end of the month. Accordingly, MetroPCS offers both voice and data customers fixed price, unlimited usage plans via a pay-in-advance billing system. MetroPCS even offers tax-inclusive and regulatory fee-inclusive plans to prevent even the small monthly charge changes that could result from passing through these variable costs each month. Additionally, MetroPCS has designed certain of its offerings, including its roaming plans to notify its mobile subscribers of any applicable charges that may be deducted from their prepaid roaming account before receiving a phone call while roaming in an off-network location where surcharges apply. Specifically, the roaming subscriber receives a real time audio message providing notice of the exact per minute charges that will be incurred if the phone call proceeds. MetroPCS also allows its customers to

---

[3] *NPRM* at ¶ 1.

[4] *Id.* at ¶ 5.

[5] *Id.* at ¶ 4.

add fixed sums to a separate stored value account they may draw against to cover charges for services not included in their plans. Such pre-funded mechanisms ensure that MetroPCS customers never pay more than they themselves have budgeted. And, in those instances where MetroPCS offers services on a metered usage basis, the plans are designed so that the consumer decides how much usage to buy in advance through pre-payments. These cost-saving advantages of pay-in-advance and prepaid offerings have made these plans a rapidly growing portion of the overall wireless service market.[6] Further, MetroPCS provides a convenient charge-free automated mechanism enabling subscribers of one of the LTE plans to easily check from their phone how much data usage they have had since their last bill cycle. To the knowledge of MetroPCS, other carriers provide similar mechanisms for their customers to monitor their usage.[7]

The fact that MetroPCS and many other carriers in the industry have voluntarily implemented many of the tools proposed in the *NPRM* indicates that competitive market forces are working. While the Commission cites with alarm its finding that "usage alerts vary widely between service providers and by the type of service covered,"[8] MetroPCS sees these variations as evidence that market forces are causing competitors to differentiate their products and services. Robust competition naturally will lead to variations in service offerings and consumers always have the ability to choose the carrier whose package of services and tools best fits the

[6] *See US Wireless 411*, UBS Securities LLC, March 12, 2010 (finding that "[p]repaid represented almost half of the industry's net adds in 4Q (unlimited making up 23%), driven by promotional pricing at MetroPCS, Leap, and StraightTalk. As a result, prepaid subscriber growth accelerated 30 bps sequentially to 17.1%. Prepaid subscribers now make up 19% of the US wireless base, up from 17% a year ago.").

[7] *See*, *e.g.*, Comments of AT&T, Inc., in CG Docket No. 09-158 (filed July 6, 2010) ("AT&T offers a number of free services to assist customers in keeping track of their usage and their billing. Many of these services are accessible from the wireless phone or device itself and let the customer know remaining minutes, data usage, account balance, upgrade eligibility and more 24 hours a day, seven days a week.")

[8] *NPRM* at ¶ 2.

consumer's needs. Rather than being concerned, the Commission should be pleased that competitive forces have caused carriers to differentiate their products which increases the prospect that consumers will get what they want. A government-mandated one-size-fits-all solution is neither necessary nor appropriate. An undifferentiated government-imposed solution will eliminate a useful competitive mechanism used by smaller carriers to attract customers and will allow the largest carriers to further enhance their dominant market positions.[9] Consequently, MetroPCS urges the Commission to refrain from implementing these unnecessary and potentially harmful regulations.

While the Commission's proposals may be well-intentioned, the harms from these regulations could significantly outweigh any benefits. These unnecessarily excessive regulations would drive up the costs of services, especially those provided by small and mid-sized carriers and by prepaid service providers, while providing little to no benefit to customers, as prepaid customers cannot possibly be subjected to "bill shock" at the end of each month. Furthermore, any concerns faced by customers, even post-paid customers, are currently being addressed through business decisions made in light of competitive market forces already in place. In a competitive marketplace such as this one, wireless consumers may select from a number of providers and "vote with their feet" to acquire just the sort of services they desire. Accordingly, many wireless providers already offer their customers tools to monitor and limit monthly wireless services usage.

If the Commission proceeds nonetheless to adopt mandatory notification requirements, MetroPCS urges the Commission to (i) exempt small and mid-tier carriers from the mandates or

[9] Once the government has mandated a uniform set of notifications and alerts, carriers will be loathe to offer additional tools for monitoring usage for fear of creating customer confusion or customer alert fatigue.

to accord them significant additional time to comply, and (ii) exempt prepaid and pay-in-advance carriers from those requirements. Significant infrastructure costs will be associated with the proposed mandatory notification procedures, and small and mid-tier carriers which have small customer bases against which to defray the costs will suffer with any near-term compliance date. Further, these requirements serve no significant purpose for prepaid and pay-in-advance carriers since the customer is always in control and will never face a bill larger than the amount already paid.

II. THE RETAIL WIRELESS INDUSTRY IS COMPETITIVE, CREATING SUFFICIENT INCENTIVES FOR CARRIERS TO CATER TO THE NEEDS OF CONSUMERS AND KEEP THEM INFORMED ABOUT SERVICE USAGE AND OVERAGE CHARGES

The *NPRM* proposes "rules that would require mobile service providers to provide usage alerts and information that will assist consumers in avoiding unexpected charges on their bills."[10] Specifically, the *NPRM* proposes "that mobile providers provide notification when a subscriber is approaching their plan's allotted limit for voice, text, or data usage;"[11] that they "supply a notification message to consumers once they reach their monthly allotment limit and begin incurring overage charges;"[12] and that they "supply a notification message to consumers when they are about to incur international or other roaming charges in excess of their normal rates."[13] As MetroPCS has previously argued,[14] the market for voice and text services is governed at the retail level by competitive market forces that currently protect consumers, and the market for

---

[10] *NPRM* at ¶ 1.

[11] *Id.* at ¶ 20.

[12] *Id.* at ¶ 21.

[13] *Id.* at ¶ 22.

[14] *See* Comments of MetroPCS Communications, Inc., in CG Docket No. 09-158, at 5 (filed July 6, 2010) ("MetroPCS Comments").

data services is still developing and does not warrant intervention by the Commission at this time.

The wireless telecommunications industry is competitive by the Commission's own judgment. In the *Fourteenth Mobile Wireless Competition Report*, the Commission noted that almost 74 percent of Americans are covered by five or more wireless service providers, more than 90 percent of Americans are covered by four or more, and 95.8 percent have the option of three or more.[15] In a competitive industry of this nature, the American consumer public will be best served, especially with respect to the well-developed voice and text markets, by a Commission regulatory approach that allows service providers to respond quickly to customer needs. With so many Americans being covered by multiple wireless providers, carriers must work hard to distinguish themselves from their competitors by offering consumers exactly what they want. If they don't, their competitors will be more than happy to fill the breach. Consumers may vote with their feet by changing carriers, and service providers know this and live (and die) by it. If a wireless provider wants to survive, much less thrive and move to the top of the pack, it will provide customers with the means to manage the costs of their services effectively.

In this instance, the jury is still out on what it is that consumers want. The *NPRM* repeatedly cites the Government Accountability Office ("GAO") report that found that 34 percent of wireless subscribers had experienced unexpected charges on their wireless bills.[16] The Commission also cites again and again a survey it conducted which purports to confirm that

[15] *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report*, at Table 4, in WT Docket No. 09-66 (May 20, 2010) ("*Fourteenth Mobile Wireless Competition Report*").

[16] *See NPRM* at ns. 16, 29-35, 51, 58 and accompanying text.

consumers experience mobile bill shock.[17] However, other information contained in the record and cited in the *NPRM* completely undermines the claim that intrusive regulatory action is necessary. The record reflects that "the wireless industry provides consumers with an array of tools to avoid bill shock. These include usage controls, online tools to monitor and set limits on usage, text messages, and dialing shortcuts from mobile devices to check usage history and account balances."[18] The evidence of record also demonstrates that some providers "also offer various usage alerts for certain services." The Commission denigrates these market driven solutions based on the tenuous claim that "consumers are often unaware of these tools." Notably, this finding does not come from the Commission's Bill Shock Survey, but rather is based on unsupported comments made by consumer groups.[19] If it is indeed true that consumers are unaware of available tools to avoid bill shock, the inescapable conclusion is that they don't care enough about the issue to find out. Moreover, if the problem is education, the only defensible first step – though this would still be unnecessary[20] – would be for the Commission to require that consumers be advised of all available mechanisms to monitor and cap their usage rather than jumping to the draconian step of mandating usage alerts.

Indeed, mandating usage alerts will be viewed by many carriers and customers as a terrible outcome. Comments recently filed by Alaska Communications Systems ("ACS") – a regional wireless provider serving consumer, business and enterprise customers in the State of Alaska and beyond – raise the serious concern that the mandatory billing and usage alerts

---

[17] *See NPRM* at ns. 2, 3, 17, 49, 56 and accompanying text.

[18] *NPRM* at ¶ 10.

[19] The Commission cites to comments by Consumers Union, Consumer Action and Montgomery County, but a review of those comments reveals no statistically valid survey or underlying data.

[20] A government-mandated consumer disclosure requirement may not be justified since, if consumers are unhappy, they can leave their current service and sign-up with a carrier that makes such information easier to receive.

proposed by the Commission "create an entirely new category of 'regulatory SPAM'."[21] MetroPCS agrees with ACS that the proposed rules will result in consumers being "inundated with a barrage of unwanted alerts, text messages and other forms of mandated communications."[22] The Commission should be in the business of protecting consumers from wireless SPAM, not creating new categories of it. At a minimum, the Commission should allow carriers to enable consumers to opt-in or opt-out of such notices.[23]

The *NPRM* concludes that "[c]onsumers are *entitled to* baseline information that allows them to control the costs they incur for mobile services."[24] The Commission may fulfill this entitlement without resorting to the mandatory provision of voice and text alerts that are as likely to annoy consumers as much as they inform them. A more measured approach is particularly appropriate given the recent updates – which became effective on January 1, 2011 – in the voluntary "Consumer Code" adopted by CTIA to facilitate the provision of accurate information to wireless customers. Notably, the *NPRM* simply finds that "voluntary efforts have proven insufficient *thus far* to adequately protect consumers from bill shock."[25] Since, as the Commission correctly acknowledges, these efforts are relatively nascent, the Commission should let them have time to develop and watch to see whether or not further regulation is necessary. In

---

[21] *See* Comments of Alaska Communications Systems, in CG Docket No. 10-207, at 1 (filed Dec. 27, 2010).

[22] *Id*.

[23] As the Commission has allowed in other circumstances, a customer should be given the opportunity to opt into or out of regulatory requirements. *See, e.g.*, 47 C.F.R. §64.2007 (providing opt-in and opt-out mechanisms pertaining to the Commission's customary proprietary network information (CPNI) regulations). *See also* In the Matter of Preserving the Open Internet; Broadband Industry Practices, *Report and Order* (GN Docket No. 09-191), FCC 10-201 released December 23, 2010 at para. 89 (allowing broadband providers to honor customer requests regarding traffic an end user chooses not to receive.

[24] *NPRM* at ¶ 2 (emphasis added).

[25] *NPRM* at ¶ 17 (emphasis added).

light of the relatively recent vintage of the code, and the record evidence that further voluntary efforts are in process, the Commission should not jump the gun and impose costly "one-size-fits-all" mandatory usage alerts on all carriers.[26]

The need for inflexible usage alert requirements is further undermined by the dramatic growth of both pay-as-you-go and unlimited prepaid services. As MetroPCS has noted previously, wireless communications consumers are choosing more and more to purchase services on a prepaid basis. The Commission has acknowledged this in its own findings. Earlier in 2010, the Commission found that between the second quarter of 2007 and the second quarter of 2009, total prepaid and pay-in-advance subscribers increased by 37.6 percent, accompanying a decline in the amount of postpaid subscribers as a portion of the entire wireless market from 81.9 percent to 78.5 percent.[27] These prepaid and pay-in-advance plans allow customers to enjoy equally robust coverage as their post-paid counterparts while providing the extra assurance that a customer will never spend more than he or she intends. Prepaid and pay-in-advance customers are able to set their limits on the front end without fear that they – or, in many cases, their children – will inadvertently exceed the planned budget for telephone and data services. But the benefits do not stop wholly within the prepaid plans themselves; this growth in the prepaid wireless market puts powerful competitive pressure on post-paid wireless carriers to provide

[26] Interestingly, the telecommunications industry has long had usage based pricing systems. From the very beginning, long distance calls (and other toll calls) were based on usage. Indeed, wireless services generally started out being charged on a usage basis until innovative, consumer-oriented carriers such as MetroPCS began to offer unlimited services. Significantly, in the almost 100 years since the inception of the telephone industry, the Commission did not mandate similar usage notification. Yet, there have always been users who lost track of their amount of usage. Thus, it is not clear what has changed in the last several years to make notification requirements now necessary.

[27] *Id.* at ¶ 163. MetroPCS distinguishes prepaid carriers – which offer a fixed amount of usage for a flat fee (e.g., $30 of service at $.10 per minute) – from pay-in-advance carriers which allow unlimited use for a fixed amount of time ($30 for 1 month). Both services have similar characteristics in that they are not likely to give rise to bill shock.

their customers with tools to more effectively manage their wireless services expenditures and avoid unexpected charges. That pressure has allowed subscribers to impact the direction of the wireless market directly, without government regulation that might misinterpret what those subscribers want or how to most efficiently deliver it to them.

Of course, the broadband wireless data market is not yet as developed as the markets for voice and text services, but it is by no means ripe for government intervention. The wireless broadband data market, still in its nascency, is evolving with the changing demands and needs of American data consumers. Carriers are changing their offerings and adjusting their business models to fit the expectations of their target audiences. This is the normal process of emerging industries. The Commission should not interfere with and potentially stifle the natural development of a rapidly growing industry by imposing heavy regulatory mandates – especially when there has been no demonstrated market failure. Rather, the industry should be shaped by the entrepreneurial creativity of technological innovators and business professionals, those in the best position to judge the capabilities of a market and even to communicate with consumers. The government should not interfere in the growth of the market or in the carrier/customer relationship. Otherwise it might unintentionally prevent the development of innovative solutions that regulators cannot now imagine.

If the Commission truly wishes to help effect beneficial developments for American wireless consumers, it should strive to increase competition in the mobile wireless data market, and it may do so in two important ways. First, the Commission should work to fulfill the pledge in the National Broadband Plan (the "Plan") to free up additional spectrum for new and existing wireless carriers.[28] Failing to do so would be detrimental for the wireless data market. As the

---

[28] CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 75.

Commission noted in the Plan, "the cost of not securing enough spectrum may be higher prices, poorer service, lost productivity, loss of competitive advantage and untapped innovation."[29] Making additional spectrum available for the build-out of new and existing wireless networks will increase the incentives for carriers to respond quickly and effectively to the billing concerns of their customers.

Second, the Commission should increase competition in the wireless data market by moving forward quickly and effectively in its data roaming proceedings. If the Commission mandates the availability of data roaming arrangements between carriers on just and reasonable, non-discriminatory terms, all carriers, especially small, rural and mid-tier carriers, will be able to offer their customers increased mobility and more attractive terms. And, as MetroPCS has pointed out in other proceedings, the Commission has more-than-adequate authority to mandate such agreements.[30]

Unfortunately, progress on the implementation of the all-important National Broadband Plan – including the subsidiary goals of allocating and assigning new spectrum and an enlightened data roaming policy – has fallen behind schedule due to proceedings that have distracted the Commission's attention. Recent industry trade press reports have pointed out that the Commission "has fallen months behind" in issuing follow up orders to the National

---

[29] *Id.* at 85.

[30] MetroPCS has made numerous filings in the data roaming docket (WT Docket No. 05-265) demonstrating the jurisdictional authority of the Commission to regulated data roaming. *See* Comments of MetroPCS Communications, Inc., WT Docket No. 05-265, 13-14 (filed Oct. 29, 2007) ("MetroPCS Data Roaming Comments"); Comments of MetroPCS Communications, Inc., WT Docket No. 05-265, 4-10 (filed Nov. 28, 2007) ("MetroPCS Data Roaming Reply Comments"); Comments of MetroPCS Communications, Inc., WT Docket No. 05-265, 17-35 (filed Jun. 14, 2010) ("MetroPCS Data Roaming Comments 2"); Reply Comments of MetroPCS Communications, Inc., WT Docket No. 05-265, 13-17 (filed July 6, 2010) ("MetroPCS Data Roaming Reply Comments 2").

Broadband Plan.[31] Some at the Commission attribute the slow progress to the Commission's months of focus on the net neutrality order when there was ample evidence that competitive market forces were sufficient to cause carriers to adopt reasonable openness and network management policies.[32] Now the Commission risks compounding the delay by diverting resources to intrusive Bill Shock regulations which once again appears to be a solution in search of a problem and represent the long repudiated command-and-control form of regulation. This is especially problematic given the competitive nature of the wireless industry at the retail level and the need to focus the Commission's efforts on other more important goals such as garnering additional spectrum, fostering data roaming, and reforming the USF and intercarrier compensation regimes.

III. THE CONSUMER-FRIENDLY OFFERINGS OF METROPCS CLEARLY SHOWS THAT COMPETITIVE MARKET FORCES ARE WORKING

Competition in the wireless industry has given rise to diverse wireless business models, some of which are designed specifically to make certain that customers do not exceed the monthly sums they have budgeted for their mobile communications.[33] As a case in point, MetroPCS offers a variety of service features specifically designed to ensure that its customers are able to control their expenses. For example, MetroPCS customers who want roaming services can sign up for a service that enables them to roam without additional charge throughout the MetroPCS network in the US and on the networks of roaming partners who have entered into

---

[31] *FCC Doesn't Meet 2010 Goals for National Broadband Plan*; COMMUNICATIONS DAILY, Vol. 31, No. 1, 1-2 (Jan. 3, 2011).

[32] *See, e.g.*, Dissenting Statement of Commissioner Meredith Attwell Baker, *Preserving the Open Internet*, in GN Docket No. 09-191, *Broadband Industry Practices*, in WC Docket No. 07-52, at 14 (rel. Dec. 23, 2011).

[33] Prior to the arrival of MetroPCS and other "all-you-can-eat" service providers, wireless consumers knew that they would be charged usage fees since wireless at its inception was generally a metered post-pay service.

certain reciprocal roaming arrangements. There are, however, areas where roaming surcharges might apply. Customers can roam in these areas without "bill shock" by subscribing to a prepaid roaming service called TravelTalk. To use TravelTalk, customers place funds into a separate personal account from which any applicable roaming surcharges will be deducted. The customer then changes the setting on his or her phone from "Home or MetroPCS only" to "Roam or Automatic" which allows the phone to receive or place phone calls through a host network to which surcharges apply. However, the customer may only be charged to the extent of the funds placed into their account for such roaming purposes.[34]

MetroPCS also has implemented additional measures to ensure that customers are not caught by surprise by excessive roaming charges. If a customer is roaming outside of his or her home area and receives an incoming call, upon answering the call, the customer generally will hear a "whisper message," which explains that an incoming TravelTalk call is waiting. The customer may then accept the call or decline the call and the charges.[35] Furthermore, MetroPCS customers may check their balances at any time and add funds into their TravelTalk account to allow for whatever amount of roaming and other usage-based services (such as ringtones, game downloads, and the like) that they desire. But, again, they cannot receive a large unexpected bill because their charges are limited to the amount they have chosen to fund into the TravelTalk account. If they simply do not want to incur additional charges over their unlimited services they can either not use the usage based services or simply not place funds in their MetroCommand account. Further, unlike post-paid carriers, customers can discontinue their service at any time

[34] MetroPCS.com, TravelTalk, http://www.metropcs.com/products/traveltalk (last visited June 28, 2010).

[35] MetroPCS.com, TravelTalk FAQs, http://www.metropcs.com/products/traveltalk/faqpop.aspx (last visited June 28, 2010). MetroPCS' services are designed to provide this message – however, at times the roaming partner's system is not set up technically to provide the additional message.

or simply not renew. Unlike a post-paid service in which a customer will face early termination charges for failing to fulfill a long-term contract, MetroPCS customers are free to change service providers at any time. It should be little wonder to the Commission that MetroPCS, without government mandates, has adopted such consumer-friendly policies since every consumer must make a new purchase decision every month.

The growth of prepaid services, and the availability without government intervention of the specific safeguards MetroPCS has put in place to protect subscribers against unexpectedly large wireless bills, demonstrate that market forces are working to the benefit of consumers. This being the case, the Commission should refrain from imposing inflexible regulations upon the entire industry.[36] Furthermore, because many carriers offer free nationwide roaming, an across-the-board requirement that carriers send their customers notices when they are roaming might very well confuse customers and lead to a less-than-full use of the services for which they pay. Similarly, consumers who want to be able to use their phones anywhere all the time regardless of cost will not be served by intercept notifications that unnecessarily delay the communication. Accordingly, carriers should not be uniformly obligated to provide SMS messages regarding roaming or account balances.

In addition, as MetroPCS cautioned in an earlier "Bill Shock" proceeding,[37] the Commission should approach this matter carefully in order to avoid potential intellectual property claims that might arise with some of the messages it is considering mandating. For one, Freedom Wireless claims that any service in which an account balance is used in real-time to

---

[36] Now, the largest post-paid carriers also offer prepaid options for their customers. Accordingly, even a customer of the four largest carriers could continue to receive service on one of the four largest carrier's networks on a prepaid basis.

[37] MetroPCS Comments at 9.

determine when to provide service would infringe upon certain patents it holds.[38] Mandating a specific method for providing usage alerts to customers might lead to claims of intellectual property infringement. While this issue was ignored in the *NPRM*, MetroPCS urges the Commission to consider this if it chooses to move forward.

Furthermore, mandating that wireless carriers transmit such alerts to customers would potentially violate both the First and Fifth Amendments. As explained above, the proposed rules would increase network costs, thereby limiting their customer pool to which they are able to transmit their content and other desired messages. What's more, the Commission would not only be interfering with carriers' communications with their customers, but it would be mandating its content as well. The Commission effectively would be mandating speech from the carriers to their customers, a violation of constitutional free speech.

Additionally, by mandating that all wireless carriers offer these alert services would possibly constitute an uncompensated regulatory taking in violation of the Fifth Amendment. The Supreme Court noted in *Lingle v. Chevron U.S.A. Inc.* that considerations in a regulatory takings analysis are "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[39] Here, the Commission proposed rules would increase costs for wireless providers, forcing them either to take a loss on those services or to increase the price for customers, which would potentially make wireless services too expensive for some and, thus, narrow the customer pool from which carriers may draw. Additionally, such rules would occupy already-scarce capacity on carriers' networks, which would certainly constitute an interference with "legitimate property interests."

---

[38] *See* Ben Charny, *Freedom Wireless collects prepaid patent*, CNET NEWS, May 23, 2001, *available at* http://news.cnet.com/Freedom-Wireless-collects-prepaid-patent/2100-1033_3-258175.html.

[39] 544 U.S. 528, 540 (2005).

IV. IN NO EVENT SHOULD THE COMMISSION IMPOSE REGULATIONS FOR "BILL SHOCK" ON PRE-PAID OR PAY-IN-ADVANCE OR UNLIMITED CARRIERS

In the *NPRM*, the Commission asks "whether prepaid mobile services should be exempt from any usage alert requirements that might evolve from this proceeding."[40] The answer is clearly "Yes!" Consumers of prepaid and pay-in-advance services stand to gain no benefit from the imposition of such requirements. As discussed above, many consumers already have switched from post-paid services to prepaid and pay-in-advance services, in part because such plans protect customers from unexpectedly large bills. Consumers already have voted with their feet and decided that pay-in-advance and unlimited service providers offer the budgetary security they seek. In the case of pay-in-advance services, customers decide each month what they are willing to pay and pay only that amount, effectively preventing unintended charges. Traditional prepaid customers do the same thing on a rolling basis. As the *NPRM* acknowledges, prepaid services "alleviate[] the need for a service provider to extend credit to its prepaid customers."[41]

The *NPRM* notes that "some consumer groups have commented that usage alerts would help traditional prepaid customers manage their usage and avoid the need to pay for additional minutes once they reach their prepaid limit."[42] However, this sole critique of prepaid services offered in the *NPRM* is wholly inapplicable to the fixed price pay-in-advance, unlimited service plans primarily offered by MetroPCS. Similarly, throughout the *NPRM*, the Commission sets out goals that are irrelevant to such pay-in-advance offerings of MetroPCS. It suggests notices when customers approach their "allotted limit for voice, text, or data usage,"[43] but such

---

[40] *NPRM* at ¶ 25.

[41] *Id.*

[42] *Id.*

[43] *Id.* at ¶ 20.

unlimited-plan customers do not have any such allotments. A customer cannot incur overage charges if their plan is unlimited or if service will merely discontinue, as opposed to accumulating additional fees, when they reach their limit, as is the case with all other traditional prepaid plans.

Additionally, many consumers have made the switch to prepaid and pay-in-advance services because those providers can offer their services more cheaply than can their post-paid competitors. A significant number of prepaid and pay-in-advance customers are in lower income brackets, and those services are their sole means of communications. Such increased regulation as those proposed in the *NPRM* would raise compliance costs for their providers, which would ultimately have to be passed down to those customers. The unintended consequences of mandating such measures could be the inability of those individuals to afford the now-more-expensive services, forcing them to reduce, or even eliminate, their means of connectivity. The disadvantages of regulating prepaid and pay-in-advance services here would heavily outweigh any advantages. Thus, the Commission should especially refrain from imposing usage alerts requirements on prepaid and pay-in-advance service providers.

V. SMALL AND MID-TIER CARRIERS SHOULD BE EXEMPTED

The *NPRM* asks whether there are concerns or issues the Commission should consider "with respect to smaller, regional and/or rural mobile providers."[44] In posing this question, the Commission specifically acknowledges that "mobile providers may need to revise their existing systems to comply with a mandatory usage alert requirement that may differ from their current practice."[45] The problem, of course, is that there are significant fixed costs associated with

---

[44] *NPRM* at ¶ 21.

[45] *Id*. at ¶ 22.

network upgrades, regardless of the number of customers served.[46] Large carriers have the luxury of spreading these fixed costs out over a larger customer base, thereby suffering very little financial impact on a per subscriber basis. Smaller carriers have fewer customers to absorb these relatively high fixed costs and thus stand to be competitively disadvantaged by a costly government mandate. The potential adverse impact is particularly severe for a carrier such as MetroPCS which is a low-cost provider of service that has succeeded in part by pricing its services below the level of charges imposed by its large competitors. Consequently, the proportionate effect of cost increases is particularly harsh for MetroPCS.

Based on the foregoing, the Commission must make accommodations for small and mid-tier carriers. If the Commission insists upon proceeding, it should impose the mandate only on the two most dominant carriers in the market (AT&T and Verizon). Since these carriers serve more than 60 percent of the units in service,[47] other carriers such as MetroPCS, and regional mid-tier, small and rural carriers will have powerful competitive incentives to offer similar – or better – consumer protection tools designed to guard against bill shock. In effect, the Commission will have fostered bill shock protections throughout the industry without having imposed costly inflexible requirements on other than the largest carriers.

In the alternative, the Commission should accord carriers such as MetroPCS and smaller carriers, ample time to comply with a government mandate. As the Commission is aware, MetroPCS recently has incurred substantial network upgrade costs in order to roll out 4G LTE

---

[46] Not only would billing systems and networks have to be redesigned, but also customer care and other features of the business would be impacted.

[47] *See* Mike Dano, *Grading the top 10 U.S. carriers in the third quarter of 2010*, FIERCEMOBILECONTENT, Nov. 9, 2010, *available at* http://www.fiercemobilecontent.com/special-reports/grading-top-10-us-carriers-third-quarter-2010 (showing Verizon Wireless and AT&T with more than a 63% market share of subscribers as compared to the rest of the top 12 U.S. carriers).

services throughout its footprint. The company needs to devote its immediate attention, and current upgrade budget, to completing this LTE roll-out plan and not to regulatory mandates that will impact a relatively small universe of all wireless customers.

VI. CONCLUSION

Wireless service providers are best suited to respond to the concerns of their customers, and competitive market forces ensure that they do. Government-mandated regulations run the risk of missing the mark and not allowing carriers to adjust their approach to better react to their customers' needs. On their own initiative, many carriers, MetroPCS included, have undertaken to provide usage alerts and other protective tools to help safeguard American consumers from unexpected high bills. The Commission should allow these companies to continue their efforts and allow the market to continue to work. Accordingly, MetroPCS urges the Commission to maintain a "hands-off" approach in this matter and refrain from imposing undue regulations – especially with respect to prepaid and pay-in-advance providers. Further, MetroPCS believes that the Commission has not made an adequate public interest showing to justify its incursion into wireless carrier's First and Fifth Amendment rights. In the alternative, special provisions must be made for mid-tier and smaller carriers in order to avoid unintended consequences.

Respectfully submitted,

MetroPCS Communications, Inc.

By:
Carl W. Northrop
David Darwin
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, NW
Washington, DC 20005
Telephone: (202) 551-1700
Facsimile: (202) 551-1705

Mark A. Stachiw
Executive Vice President, General Counsel and Secretary
MetroPCS Communications, Inc.
2250 Lakeside Blvd.
Richardson, Texas 75082
Telephone: (214) 570-5800
Facsimile: (866) 685-9618

Its Attorneys

January 10, 2011