

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF AT&T INC.

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INTRODUCTION AND EXECUTIVE SUMMARY

As the record confirms, wireless providers go to great lengths to help their customers avoid unexpected wireless charges. Billing surprises are bad for business. To succeed in the competitive wireless marketplace, providers must—and do—supply their customers with educational resources, usage-tracking tools, and automated alerts designed to prevent such surprises. Unhindered by regulatory mandates, providers today have the flexibility they need to tailor effective measures to the unique characteristics of their networks, the devices they offer, and the customers they serve. The absence of rigid rules also allows providers to respond quickly as consumer needs evolve.

Several commenters nonetheless contend that regulatory mandates are necessary to reduce the likelihood of unanticipated wireless charges. These commenters reflexively *assert*, without foundation, that wireless providers' existing efforts are deficient, never acknowledging that those providers already offer consumers many different ways of preventing unanticipated charges, including many of the tools that advocates urge the Commission to mandate. They also ignore recent empirical analysis confirming that existing tools have been very effective in preventing unanticipated wireless charges. Tellingly, not a single advocate of regulatory intervention *even mentions* the rigorous study recently conducted by the Nielsen Company, which flatly disproves claims of a widespread “bill shock” problem in the United States.¹

This is not to say that wireless bills never surprise consumers; they occasionally do, as shown here by anecdotes related by individual commenters. But these overages are usually caused by factors that the rules proposed here would not eliminate in the first place, such as

¹ See Letter from Judith L. Harris & Amy S. Mushahwar, ReedSmith LLP, Counsel to The Nielsen Company, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-207, 09-158, Attach. (filed Dec. 17, 2010) (“*Nielsen Study*”).

delays in the exchange of international roaming records, malfunctions in the software or hardware that providers use to prevent such overages, or customer carelessness, including inattention to usage or roaming alerts. Moreover, consumers incurring these overages usually receive large billing credits, which often enable them to avoid *any* financial responsibility for the charges. In short, the Commission has no basis for concluding that unrectified “bill shock” is more than an extreme rarity, and anecdotes about unexpected overages cannot support a finding of a market “problem,” let alone a problem warranting the type of regulatory intervention proposed in the *NPRM*.²

Not only do pro-regulation advocates grossly overstate the need for regulatory intervention, they also ignore the *costs* of such intervention to consumers. As the record makes clear, the financial costs of supplying new alerts would be considerable, and those costs inevitably would be passed on to consumers in the form of higher charges for wireless service and less investment in network upgrades and new products and services. Consumers would incur non-monetary costs as well, including confusion and annoyance upon receiving intrusive and unnecessary alerts that are ill-tailored to the devices and services they use. Worse yet, some of the measures proposed by regulation advocates—real-time voice usage alerts and roaming alerts with customer-specific pricing information—would be extremely difficult and inordinately expensive, if not impossible, to implement, and could threaten the quality and diversity of service provided to consumers. Yet the pro-regulation commenters do not even *discuss* these difficulties and costs, much less offer any factual basis for concluding that wireless providers are overstating them.

² Notice of Proposed Rulemaking, *Empowering Consumers to Avoid Bill Shock, Consumer Information and Disclosure*, CG Docket Nos. 10-207, 09-158, 25 FCC Rcd 14625 (2010) (“*NPRM*”).

While the pro-regulation commenters traffic in anecdotes, rather than facts, the Commission could not impose new regulations without confronting the record evidence and undertaking a more rigorous analysis. The Commission would have to identify an actual problem warranting regulatory intervention and balance any benefits of each proposed new regulation against its financial and non-monetary costs. And under that standard, the Commission cannot reasonably adopt the rules proposed in the *NPRM*. While the *goal* of those rules—an informed consumer—is certainly a worthy one, there is simply no good evidence that such rules are necessary to achieve that goal. To the contrary, the evidence demonstrates that the proposed rules would substantially burden providers while producing little, if any, benefit to consumers.³

If, despite the lack of any need for regulatory intervention, the Commission remains convinced that it must take action in this area, it should not charge blindly ahead with one-size-fits-all regulatory mandates. Instead, the Commission should establish a series of structured workshops in which wireless providers, public-interest groups, Commission staff, and consumers work collaboratively to develop flexible “best practices” designed to give consumers all the

³ In that respect, the proposed rules fly in the face of Chairman Genachowski’s embrace of an Executive Order recently issued by President Obama, which directs agencies to eliminate unnecessary regulations that increase costs to businesses and slow down the nation’s economic recovery. See Howard Buskirk et al., *Genachowski Endorses Obama Stance on Regulation*, Communications Daily, Feb. 7, 2011 (quoting Chairman Genachowski’s statement to FCC staff that “We will continue our work to promote innovation inside and outside government and to spur economic growth and job creation, *while ensuring that the benefits of our rules outweigh the costs and burdens*”) (emphasis added); see also Exec. Order 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (2011), <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>; President Barack Obama, *Toward a 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011, <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html> (“[W]e are also making it our mission to root out regulations ... that are not worth the cost As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs.”).

information and tools they need to prevent unanticipated wireless charges. At the very least, the Commission should carefully tailor any new regulatory mandates so that they are no broader than necessary and do not impose unintended harms on consumers or distort the marketplace for wireless services. In particular, the Commission should not require arbitrary “cut-off” or “notice and opt-in” mechanisms, which even some *pro*-regulation commenters agree would harm consumers more than the unexpected charges they would be designed to prevent. Nor should the Commission apply its rules to prepaid services or to business customers. The Commission could not reasonably conclude that “bill shock” is a problem for those services and customers, irrespective of the Commission’s conclusions with respect to postpaid services purchased by consumers. Finally, even if the Commission had a legal and empirical basis for imposing rules, which it does not, it would have to apply them on a competitively neutral basis to all providers of the covered services. The Commission could *not* reasonably conclude that customers of larger carriers require more protection than those of smaller carriers or that implementation costs would be disproportionately higher for smaller carriers. And exempting some carriers from burdensome requirements would distort competition, compounding the costs to consumers of these unnecessary proposals.

Finally, the proponents of new regulatory mandates have failed to offer *any* legal basis for such measures in their comments. This is not surprising. As AT&T and other commenters have explained, the Commission may not regulate wireless data or messaging services as Title II services, and Title III does not supply any authority for the proposed rules either. Thus, the only route even arguably open to the Commission would be an exercise of Title I “ancillary” authority, but the Commission did not seek comment on any such jurisdictional theory in the *NPRM*, and it is doubtful that any such theory would be plausible. Certainly, the Commission

may not now invoke any such authority without first providing notice and the opportunity for comment on the ostensible basis for it.

DISCUSSION

I. THERE IS NO NEED FOR NEW REGULATORY MANDATES BECAUSE CONSUMERS ALREADY HAVE MANY EFFECTIVE MEANS OF AVOIDING UNEXPECTED WIRELESS CHARGES.

Although the pro-regulation commenters suggest that consumers are at the mercy of wireless providers and have no means of avoiding unanticipated charges, this simply is not the case. Consumers have ample means of preventing “bill shock,” as wireless providers already supply a variety of usage-management tools, including many of those that regulation advocates claim are needed. Moreover, unless the Commission stifles innovation by prescribing one-size-fits-all rules, the tools available to consumers will only improve as wireless providers strive to further enhance customer service and retain existing subscribers in a fiercely competitive and increasingly saturated wireless marketplace.

A. Consumers Already Have Many Different Ways to Prevent Unanticipated Wireless Charges.

The comments make clear that customers of all major wireless providers, and not just AT&T, have many different means of avoiding unanticipated wireless charges. Indeed, consumers have their pick of a wide range of educational resources and usage-tracking tools supplied not only by their wireless providers, but also by device manufacturers and third-party application developers.

As AT&T has explained in its comments, it employs measures at all stages of the customer relationship to ensure that its subscribers do not incur unanticipated charges for voice, messaging, or data services. Those measures include personalized point-of-sale disclosures; easy-to-understand bills that clearly identify charges, including any overages; online resources;

and user-friendly tools for monitoring usage. *See* AT&T Comments at 9-24.⁴ In addition, AT&T supplies a variety of free text and email alerts concerning usage, overages, and international roaming. *Id.*

AT&T is certainly not alone in this respect. All major wireless providers offer their customers a variety of educational resources and tools designed to prevent unanticipated charges. *See* CTIA Comments at 7, 9-14, 16-21 (summarizing existing measures). Sprint, for example, provides handset-based usage-monitoring tools, web-based usage-monitoring tools, automated usage and overage alerts, international roaming alerts, Facebook and iGoogle widgets, and various other applications to help consumers manage their consumption of wireless services. *Sprint Comments* at 10-12. Similarly, Verizon “proactively reaches out to customers who are trending to exceed their monthly domestic voice, messaging, or data allowances by sending them a free text alert to their devices. In addition, it sends messages to data card customers alerting them when they reach particular usage levels.”⁵ Even smaller providers offer robust educational resources, usage-monitoring tools, and alerts. U.S. Cellular, for example, sends its customers free text alerts when they approach or reach their voice or messaging limits.⁶ As the Rural Cellular Association explains, usage-management features are a key element of many smaller carriers’ service offerings, as customer service and satisfaction are one of the most important ways in which these carriers seek to distinguish themselves from larger providers. *See* Rural

⁴ Unless otherwise indicated, all references below to the “Comments” of a party refer to comments filed in CG Docket Nos. 10-207 and 09-158 in January 2011.

⁵ Verizon Comments at i; *see also id.* at 2-11 (describing additional usage-management tools and alerts offered by Verizon); Elizabeth Woyke, *Verizon Sends Subscribers Fact Sheets To Educate About Data Charges*, Forbes.com, Feb. 1, 2011, <http://blogs.forbes.com/elizabethwoyke/2011/02/01/verizon-sends-subscribers-fact-sheets-to-educate-about-data-charges/> (discussing Verizon’s customer-education efforts).

⁶ *See* CTIA Comments at 10; U.S. Cellular, Overage Protection, <http://www.uscellular.com/overage-protection/index.html>.

Cellular Ass'n Comments at 10 & Exh. A (detailing the usage-monitoring tools and features offered by RCA's members) ("RCA Comments").⁷

Wireless providers are not the only source of tools designed to help consumers avoid unanticipated wireless charges. Many device manufacturers also offer such measures. Apple, for example, supplies a "Usage Tracker" tool on the iPhone that enables customers to monitor their voice and data usage directly from their wireless handsets. AT&T Comments at 23. Many other devices feature similar tools. *See* Mobile Future Comments at 5-6. And most current smartphones feature a data-roaming toggle that allows wireless customers to avoid all charges for international data roaming.⁸ *See, e.g.,* Verizon Comments at 10; AT&T Comments at 51. In addition to these device-based tools, customers also have access to a wide variety of third-party applications that allow them to track their voice, messaging, and data usage. Mobile Future discusses *twenty* such applications in its comments alone. *See* Mobile Future Comments at 4-6 & Attach.

⁷ A recent survey reveals that most wireless consumers are aware that their providers offer such tools. 77% of respondents answered affirmatively to the question, "Does your wireless carrier allow you to check your minutes and other usage from your cell phone?" *See* Reply Comments of the American Consumer Institute, *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*, GN Docket No. 10-207 & CG Docket No. 09-158, at 1, 5-6, 9 (filed Feb. 3, 2011).

⁸ As AT&T explained in its comments, this toggle is generally set to "OFF" by default, so that customers typically must take an active step before incurring international data-roaming charges. AT&T Comments at 51. *See also* Verizon Comments at 10 ("customers may proactively control their international data usage directly by shutting off data services through the settings menu on their handset when travelling internationally, thereby preventing inadvertent international data roaming. Indeed, the global data roaming setting on all new devices currently being sold by Verizon Wireless is set to off, requiring customers to proactively change their settings to obtain data services in foreign countries."). Most smartphone devices display a warning alongside the toggle about the potentially substantial costs of international data-roaming charges. On the iPhone, this warning reads: "Turn data roaming off while abroad to avoid substantial roaming charges when using email, web browsing, and other data services."

Regulation advocates ignore the widespread availability of these educational resources, usage-tracking tools, and automated alerts. Instead, they reflexively posit that consumers have inadequate means of protecting themselves against “bill shock” without identifying any specific inadequacies in existing measures. But the Commission cannot base new rules on such a shaky foundation. Before imposing any new regulatory mandates, it would have to thoroughly analyze the diverse means that wireless providers already offer to help consumers avoid unexpected wireless charges. And it would have to reasonably conclude that the ostensible benefits of ordering providers to offer still more or different tools would outweigh the substantial financial and non-monetary costs to consumers, including unintended harms that could result from the extensive network modifications that such rules would require. For the reasons discussed below, the record precludes any such conclusion.

B. Competition, and Not Innovation-Chilling Regulation, Is the Best Way to Ensure That Consumers Do Not Incur Unanticipated Wireless Charges.

Every commenter in this proceeding appears to agree on one thing: consumers do not like billing surprises. Wireless providers are well aware of this fact, and they also know that their customers have many different providers to choose from. Motivated by a desire to meet investor expectations⁹ and avoid the hundreds of dollars in expenses that result from *each* lost customer,¹⁰ as well as the additional expense of handling customer complaints, providers go to great lengths to ensure that their subscribers do not experience unanticipated overage charges. As CTIA explains, “wireless carriers recognize that they must do what they can to avoid those

⁹ CTIA explains that “[f]inancial markets and investors also drive this competition because they closely monitor wireless carriers’ customer acquisition and churn rates to assess their performance and investment potential.” CTIA Comments at 7.

¹⁰ “In 2009 alone, 66 million Americans changed their wireless carrier.” CTIA Comments at 7. As AT&T discussed in its opening comments, this churn is extraordinarily expensive for wireless providers. AT&T Comments at 8 n.9 (explaining that AT&T incurs costs of approximately \$652 million dollars per *month* to replace its lost customers).

surprises in order to retain and attract customers.” CTIA Comments at 7. They therefore “offer[] attractive service plans, disclos[e] fully the terms of service related to usage and billing, and provid[e] innovative account management tools and resources that enable customers to monitor their usage.” *Id.* Indeed, many wireless providers make their overage-prevention features a cornerstone of their marketing efforts. U.S. Cellular, for example, answers the question “Why Choose U.S. Cellular®?” by touting its “Belief Project,” which features “overage protection and forgiveness.”¹¹ Other providers, including Sprint and Cricket, feature the billing predictability of their unlimited plans as a key aspect of their marketing strategy. *See, e.g.*, Sprint Comments at 8; Cricket Comments at 2.

Competitive forces also drive continual innovation in usage-management tools. To reduce churn and enlarge their subscriber bases, wireless providers are constantly looking for ways to distinguish their tools from those of their competitors. *See* Verizon Comments at ii, 13. And when one provider succeeds in developing a helpful usage-management measure, other providers are quick to improve upon them. As CTIA explains, “[w]ireless carriers will continue innovating to retain their current customers and draw customers away from their competitors, and carriers that fail to provide adequate account management tools will quickly be left behind in the marketplace.” CTIA Comments at 7-8. Similarly, Verizon notes that “intense competition has led wireless carriers to provide consumers with detailed information about usage allowances but to do so in ways that competitively differentiate their products.” Verizon Comments at ii.

One-size-fits-all regulatory mandates would break this virtuous cycle of competition-driven innovation. Verizon Comments at 16. Such mandates would also limit wireless

¹¹ *See* U.S. Cellular, Home Page, <http://www.uscellular.com/uscellular/>; U.S. Cellular, The Belief Project, <http://www.uscellular.com/the-belief-project/index.html>; U.S. Cellular, Overage Protection, <http://www.uscellular.com/overage-protection/index.html>.

providers' ability to offer their customers distinctive tools that are specially designed for the unique characteristics of their networks, the devices they offer, and the types of customers they serve.¹² That outcome would deny consumers the benefits of customization and diversity. For example, the usage-management tools that are appropriate for a service offering targeted to elderly customers will be very different from those appropriate for an offering targeted to technology-savvy college students, data-hungry tethering customers, or cost-insensitive business customers. As wireless providers know well, certain consumers might prefer a text-message alert, some would do better with an email, and some prefer no alert at all. *See* Sprint Comments at 16. Likewise, the types of usage-management tools appropriate for simple devices used almost exclusively for voice calls will be different from those appropriate for smartphones used for voice, messaging, and data services. And the appropriate tools for data-centric devices such as iPads or laptops will be different too.

The Commission could not possibly issue rules that account for all relevant differences among networks, customers, and devices—nor should it try. As Mobile Future notes, a “one-size fits all mandate—no matter how well intended—will necessarily fall short of the dynamic, diverse solutions that the wireless ecosystem is already providing.” Mobile Future Comments at 6. Specific rules would likewise hinder providers from responding appropriately when consumer needs evolve. As T-Mobile explains, the “regulations raised by the NPRM could effectively lock carriers into providing specific types of alerts and notifications, regardless of future market developments, limiting their ability to create unique and compelling tools that may better serve consumers.” T-Mobile Comments at 10; *see also* Verizon Comments at 15.

¹² *See* Verizon Comments at 15-19; Mobile Future Comments at 6; WCAI Comments at 2-8; RCA Comments at 9; Blooston Comments at 4; Sprint Comments at 14; Cricket Comments at 3 n.8; MetroPCS Comments at 2; T-Mobile Comments at ii, 18.

C. Market-Based Measures Have Been Highly Effective in Preventing Unexpected Wireless Charges.

The only rigorous empirical analysis in the record—the *Nielsen Study*—confirms that overage charges are far less common than popularly believed, that *unexpected* overages are even rarer, and that there is no market “problem” here that regulation is needed to solve.¹³ Although that study was filed in this record on December 17, 2010, more than three weeks before opening comments were due, none of the pro-regulation commenters even mentions it, let alone tries to rebut it. That reticence speaks volumes about the flimsy evidentiary basis for regulatory intervention.

As discussed in our opening comments, the *Nielsen Study*’s analysis of over 65,000 actual customer bills reveals that only “[a]bout 1% of Americans experience significant overages in any given year.”¹⁴ The study also reveals that when voice or data overages do occur, they are rarely *unexpected*.¹⁵ The majority of customers who incur overages do so more than once a year, and the more often that a customer incurs overages, the higher they tend to be. *Nielsen Study* at

¹³ See Sprint Comments at 5-6 (“Nielsen’s analysis of these wireless bills provides several data points that dispel the existence of a systemic ‘bill shock’ problem.”); Mobile Future Comments at 8 (the *Nielsen Study* “data indicate that wireless users rarely experience a significant issue with unexpected charges involving overages and roaming”); CTIA Comments at 1 (the *Nielsen Study* “demonstrates that the scope of the problem is not remotely as large as presented”); *id.* at 24-30; T-Mobile Comments at 13-14.

¹⁴ *Nielsen Study* at 11; see also AT&T Comments at 2-3, 26-27 (discussing *Nielsen Study*).

¹⁵ See T-Mobile Comments at 14 (explaining that the *Nielsen Study* shows that “the majority of consumers who incur overages voluntarily do so with the knowledge that they exceeded their monthly allotment”); Sprint Comments at 6 (“Consumers who regularly or periodically go into overage are unlikely to be surprised by their overages regardless of the amount of overages. The distribution of overages is stable to increasing for both voice and data overages, indicating that these consumers make a conscious choice.”); CTIA Comments at 27 (“Nielsen concluded that [] consumers ‘are unlikely to be surprised by their overages regardless of the amount.’ ... It also concluded that the distribution of overages for both data and voice customers indicate that those who experience repeated overages, and consequently pay the highest overage amounts, often make ‘a conscious choice.’”).

9, 14-15; *see also* CTIA Comments at 27. The clear implication is that when overages occur, it is because the affected customers have chosen to pay for limited, less-expensive buckets of usage with the expectation that they will pay for occasional overages. *See* T-Mobile Comments at 14. For most customers, this strategy results in lower overall bills than if they subscribed to larger, more expensive bucket plans: the *Nielsen Study* reveals that consumers who incur overages typically pay only an additional \$18 to \$21 for voice services and an additional \$2 to \$4 for data services. *See Nielsen Study* at 11. The *Nielsen Study* is methodologically rigorous and confirms that there is no systemic “bill shock” problem in the United States.¹⁶

Rather than confront the *Nielsen Study*, advocates of regulation yet again rely on the *FCC Bill Shock Survey* and the *GAO Report*.¹⁷ Neither can support regulatory intervention.

First, the methodology and conclusions of the *FCC Bill Shock Survey* are flawed for the reasons discussed by AT&T and other commenters. *See* AT&T Comments at 27-29. As an

¹⁶ *See, e.g.*, CTIA Comments at 27-28 (“The Nielsen data are compelling. Unlike the *Bill Shock Survey*, the data were collected from actual monthly bills, not from consumers’ potentially flawed recollections of past billing cycles. The data are comprehensive and precisely identify when overages occur, how frequently overages occur, the magnitude of any overages that occur and the amounts of credits given by providers. The data are also accurately representative of wireless consumers, as the sample was benchmarked against U.S. Census Bureau demographics, carrier market share, penetration of family plans, and the penetration of smartphones. In addition, the data are derived from a very recent statistical period—the second half of 2009 and the first half of 2010—and captures an accurate snapshot of the present state of overages experienced by wireless voice and data consumers, while excluding years-old consumer issues that have long since been addressed by wireless providers.”) (footnotes omitted); Sprint Comments at 5 (“The Nielsen analysis deserves careful consideration by the Commission. It is based on objective, real-world data as opposed to a subjective consumer survey.”); *see also* CTIA Comments at 26-27 & n.68 (noting that the Nielsen Company “is a global leader in mobile measurement and information analytics” and “a leading provider of data and insights into the mobile marketplace”).

¹⁷ *See, e.g.*, Center for Media Justice, Consumer Action, Consumer Federation of America, Consumers Union, Free Press, Media Access Project, National Consumers League, National Hispanic Media Coalition and New America Foundation Open Technology Initiative Comments at 1 (“Public Interest Groups’ Comments”); NJ Rate Counsel Comments at 4-5; National Consumer Law Center Comments at 2 (“NCLC Comments”); NECPUC Comments at 2; NARUC Comments at 5-6; AARP Comments at 2.

initial matter, the Commission’s survey asked only whether respondents ever incurred an overage of any type. The answers do not reveal whether, for given respondents, the overage charges were unexpected or not—and, of course, *expected* overages cannot possibly support regulations designed to address “bill shock.” On top of that, the survey also does not identify whether the respondents incurred their overages a month before or five years before; how often they incurred such charges; whether wireless providers offset the charges with billing credits; or whether the respondents were satisfied with how their providers handled any effort to contest the charges. *See, e.g.*, Verizon Comments at 21-23 & Exh. 4 (discussing and attaching a report by a leading expert on the design and conduct of consumer surveys who detailed the deficiencies in the FCC survey); CTIA Comments at 28-29; T-Mobile Comments at 12-13; Rural Telecommunications Group Comments at 2 (“RTG Comments”).

Nor can the Commission draw any relevant conclusions about “bill shock” from the *GAO Report*. As AT&T and other commenters have detailed, that survey addressed consumer concerns about “billing” in general.¹⁸ Such concerns encompass an enormous range of issues beyond the scope of this proceeding, including the “[c]omplexity of billing statements” (*GAO Report* at 9); “errors” in bills (*id.*); fraudulent charges by third parties, and the unexpected appearance of (or increases in) USF fees and taxes. *See* AT&T Comments at 29. Because the study does not address unexpected overages or roaming charges in particular, it cannot support any finding that such charges are a systemic problem. *See, e.g.*, AT&T Comments at 29; Verizon Comments 23-24 & Exh. 6; T-Mobile Comments at 12-13.

¹⁸ *See* Government Accountability Office, *Telecommunications – FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34, at 9 (Nov. 2009), <http://www.gao.gov/products/GAO-10-34> (“*GAO Report*”).

Similarly, the *Consumer Reports Survey* cited by some commenters¹⁹ also falls far short of identifying any systemic “bill shock” problem. That survey purports to find that “[o]ne in five survey respondents reported receiving an unexpectedly high bill in the previous year, *often* for exceeding the plan’s voice, text, or data limits.”²⁰ Again, however, “an unexpectedly high bill” can result from any number of factors, including unexpected taxes and USF charges, directory-assistance fees, or late-payment charges. Because Consumer Reports made no effort to quantify what “often” means, it is impossible to know to what extent these other charges, rather than the overage and roaming charges at issue in this proceeding, are responsible for the “unexpectedly high bills” claimed by 20% of Consumer Reports’ respondents. Similarly, an “unexpectedly high bill” also could also signify nothing more than that the consumer did not expect to have a *need* to incur overages in a given month. From the limited information provided by Consumer Reports, it is simply impossible to say. Indeed, the Consumer Reports article in which the survey results were published provides no details about the specific questions asked, the answers received, or the survey’s methodology, including how the respondent sample was determined.

Given the absence of any meaningful information about this survey, there is no basis for concluding that the survey is probative of any issue this proceeding. To the contrary, what little information is available suggests that, like the *FCC Bill Shock Survey* and *GAO Report*, the *Consumer Reports Survey* suffers from significant methodological flaws. For example, the survey respondents were all subscribers to Consumer Reports Online who agreed to answer the

¹⁹ See, e.g., Public Interest Groups’ Comments at 2.

²⁰ “*Bill shock*” is common, Consumer Reports (Jan. 2011), <http://www.consumerreports.org/cro/magazine-archive/2011/january/electronics/best-cell-plans-and-providers/cell-phone-bills/index.htm> (“*Consumer Reports Survey*”) (emphasis added).

survey questions,²¹ which is hardly a representative sample of wireless customers. In addition to this obvious sample bias, the *Consumer Reports Survey* may well suffer from the same flaws (among others) as the other two surveys upon which the pro-regulation commenters rely. It would be arbitrary and capricious for the Commission to rely on the findings of the *Consumer Reports Survey* for any purpose without, at a minimum, requiring full public disclosure of its methodology and underlying data and seeking further comment on the study's limitations and potential flaws. *See American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237, 240 (D.C. Cir. 2008) (explaining that “studies upon which an agency relies in promulgating a rule must be made [fully] available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment” and that the Commission may not just “provide notice and an opportunity to comment on only those parts of the studies that [it] likes best”). The need for such public disclosure is particularly pressing here, given that Consumer Reports is published by Consumers Union, an advocacy group with a strongly pro-regulation agenda. *See Consumer Reports Survey* (“In October, the Federal Communications Commission proposed that cell carriers be required to send customers alerts before they incur hefty overage fees We support that customer-friendly idea, a no-brainer that should be a snap for today’s sophisticated smart phones.”); *Consumer Reports Blog* (discussing why “Consumers Union, the publisher of *Consumer Reports*, supports the FCC proposal”).

Finally, although several commenters point to consumer complaints filed with the Commission and the Better Business Bureau,²² these complaints do not establish a factual

²¹ Jeff Blyskal, *CR Survey: One in five hit by cellular bill shock*, ConsumerReports.org Electronics Blog (Oct. 13, 2010), <http://blogs.consumerreports.org/electronics/2010/10/fcc-consumer-reports-survey-cell-phone-bill-shockexpensive-monthly-wireless-cost-overcharges-fees-overages-cellphone.html> (“*Consumer Reports Blog*”).

²² *See, e.g.*, AARP Comments at 3; NARUC Comments at 5-7.

predicate for sweeping, industry-wide regulation. As many commenters point out, the number of complaints submitted to the FCC represents a tiny fraction of the nearly 300 million wireless subscribers in the United States. *See* Verizon Comments at 24; CTIA Comments at 29 (noting that the consumers who complained to the FCC represent five ten-thousandths of one percent—*i.e.*, 0.0005 percent—of all wireless subscribers). The number of complaints submitted to the Better Business Bureau likewise pales in comparison to the total number of wireless subscribers. *See* Verizon Comments at 25. In 2009, the Better Business Bureau received only 36,086 complaints from U.S. wireless customers, which amounts to just 10.9 complaints per month for every *million* wireless customers—the lowest rate since 2003.²³ Further, complaints about unexpected overage and roaming charges—the narrow subject of this proceeding—likely constitute just a small fraction of those complaints, as the Better Business Bureau welcomes complaints on a wide variety of topics. *See* Verizon Comments at 24-25. Finally, these complaints are very often resolved to the satisfaction of the customers involved, many of whom end up paying nothing in overages.²⁴ For these reasons, complaints filed with the FCC and BBB simply cannot form the basis for the intrusive regulations proposed in the *NPRM*.

²³ *See* Better Business Bureau, US BBB 2009 Statistics Sorted by Complaint, at 1, http://www.bbb.org/us/storage/16/documents/stats%20pdf/us_complaint.pdf (“2009 Better Business Bureau Complaint Statistics”); Better Business Bureau, 2009 Complaint and Inquiry Statistics, <http://www.bbb.org/us/2009-complaint-and-inquiry-statistics/> (gateway for complaint statistics for 2009); Better Business Bureau, View National Complaint Statistics, <http://www.bbb.org/us/complaint-statistics/> (gateway for complaint statistics from 2002 to 2009).

²⁴ The Better Business Bureau data show that in 2009, wireless providers resolved 95.2 percent of customer complaints, an all-time high. 2009 Better Business Bureau Complaint Statistics at 1. This was one of the highest resolution rates for any industry, and far higher than the national average resolution rate of 73.8%. *Id.*

D. Isolated Instances of Large and Unexpected Overages Cannot Justify Burdensome Industry-Wide Regulation.

As AT&T explained in its opening comments, on those rare occasions when consumers incur large, unexpected overages, it is often because a provider's processes, software, or hardware has not functioned as intended; because the usage has been incurred in a single data session; or because there has been a delay in receiving roaming records from other wireless providers. *See* AT&T Comments at 29. Such overages can also be a product of customer negligence—such as ignoring usage or roaming alerts, inadequately supervising children's usage, or failing to report a lost or stolen phone. *Id.* at 29-30. But even when these overages result from consumer negligence or misuse of a wireless device, providers generally offer an affected customer a substantial billing credit that offsets or even eliminates the overage.

This is confirmed by the comments filed by individual consumers in this proceeding. The outlier examples they detail were caused by one or more of the factors discussed above. And in nearly every case, the consumer involved was awarded a credit for the entire amount of the overage.

Although we defer to other carriers on the details of particular disputes with their subscribers, we do wish to address comments filed in this docket by Sean Murphy, an AT&T customer.²⁵ Mr. Murphy's experience, while regrettable, nevertheless demonstrates the lengths to which AT&T already goes to notify account holders of the charges for which they could potentially be liable, as well as the limits of current technology. And, importantly, it also shows that when consumers confront large, unexpected overages, providers do in fact offer them large billing credits to offset or eliminate the financial impact.

²⁵ *See* Sean R. Murphy Comments ("Murphy Comments").

Mr. Murphy primarily complains about a \$9,100 international data-roaming overage that his teenage son incurred while watching online videos in Guatemala. Murphy Comments at 3. Mr. Murphy states that his son was unaware that international data use could generate such charges because his son did not receive a notification from AT&T warning him of higher rates when he turned on his phone in Guatemala. *Id.* at 3. Mr. Murphy also claims that he never explicitly added international data-roaming capability to his son’s phone and was unaware that the phone had this capability. *Id.* at 4-8.

In fact, despite Mr. Murphy’s assertion to the contrary,²⁶ AT&T does *not* enable international data roaming by default on secondary family-plan lines. And it was not enabled by default here. Instead, before the events in question, Mr. Murphy—or someone with access to his account—took the affirmative step of adding international data roaming capability to his son’s line via AT&T’s online account management system. Further, as is AT&T’s policy, this online activation triggered an automated notification sent to Mr. Murphy’s email account, alerting him of the new international-roaming functionality on his son’s line. AT&T also sent a roaming-notification alert to Mr. Murphy’s wife while she was in Guatemala with their son, warning her that international rates applied to data usage there. Murphy Comments at 10. Most important, when, despite all of this, Mr. Murphy’s son incurred substantial data charges by streaming videos in Guatemala (including one that was 466,989 kilobytes in size), AT&T gave Mr. Murphy a billing credit for the *entire* overage. That is hardly evidence of a market failure. To the contrary, it is evidence of the lengths to which providers go to keep their customers satisfied.²⁷

²⁶ See, e.g., Murphy Comments at 8 (“The policy of defaulting features as ‘enabled’ increases sales, but also increases Bill Shock.”).

²⁷ Mr. Murphy also faults AT&T for failing to impose a cap on international data use. *Id.* at 1, 5, 9. In fact, AT&T does impose such a cap. As AT&T explained in its opening comments, its systems are designed to alert individual consumers when they have incurred \$250 worth of

More generally, AT&T and other wireless providers make every effort to eliminate the harm that their customers experience from unanticipated overages, regardless of their cause, and they strive to ensure that their customers do not incur unexpected overages in the first place. Due to these efforts, large, unanticipated overages are rare and, when they happen, are almost always resolved to the satisfaction of the customers involved. Such isolated instances of large, unexpected overages provide no basis for burdensome regulatory prescriptions.

II. THE COSTS TO CONSUMERS OF NEW REGULATORY MANDATES WOULD FAR OUTWEIGH ANY MARGINAL BENEFITS.

As AT&T discussed in its opening comments, when wireless providers do not supply the alerts proposed in the *NPRM*, it is for good reason. In some cases—such as with real-time alerts for voice usage incurred while roaming—implementation of the proposed measures would simply not be feasible given existing technology and industry processes. In others, the costs to consumers of implementing the proposed measures would grossly outweigh any putative benefits. *See* AT&T Comments at 4-6.

Pro-regulation commenters make no effort to conduct any cost-benefit analysis of the new rules they advocate. Instead, they consistently overstate the benefits of new regulatory mandates, failing to recognize, for example, that wireless providers or third parties already offer measures similar to the ones they propose, that most consumers have little or no need for their proposed measures, or that their proposed measures would cause many consumers more harm

international data usage, and to suspend their data-roaming service when they have incurred \$500 worth of international data usage. AT&T Comments at 23-24. However, information about data usage incurred during a single, ongoing data session enters AT&T's usage-tracking systems only after that session is terminated. *Id.* at 39-40. Here, because Mr. Murphy's son used a considerable amount of data in a single, unusually intensive data session, AT&T's systems were unable to trigger a service suspension before a significant overage had occurred. *See* Murphy Comments at 1, 10; AT&T Comments at 23. Nonetheless, as Mr. Murphy explains, AT&T did suspend the phone's data-roaming service after his son's data session ended and the usage was processed. *See* Murphy Comments at 2, 10.

than good. In addition, these commenters fail even to *mention* the costs of new regulatory mandates, despite the fact that those costs would be passed on to end users in the form of higher prices, reduced investment in service quality and new product offerings, or both.

The Commission, by contrast, has a duty of reasoned decisionmaking. And in order to discharge that obligation, the Commission must carefully assess the actual benefits of additional regulation and weigh those benefits against the true costs of the regulation to consumers.²⁸ The regulations proposed here cannot withstand any reasonable cost-benefit analysis.

A. Rules Mandating Real-Time Usage or Overage Alerts Would Fail Any Rational Cost-Benefit Analysis.

Although the pro-regulation commenters routinely overstate the benefits of new rules and ignore their costs, nowhere is that tendency more pronounced than in their advocacy for “real-time” usage and overage alerts.²⁹

First, although consumers might derive some benefit from access to real-time usage information, pro-regulation commenters vastly overstate the magnitude of that benefit. As discussed, AT&T and other providers already offer numerous mechanisms through which consumers can access information about their voice, messaging, and data usage, including dialing shortcodes, online account-management tools, and smartphone applications. *See* AT&T

²⁸ *See, e.g., California v. FCC*, 39 F.3d 919, 930 (9th Cir. 1994) (concluding that the order under review was “arbitrary and capricious under the APA” because “the FCC’s cost benefit analysis is flawed”); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (“[I]f data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding fault in agency’s cost-benefit analysis and holding that a rule is “arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency”).

²⁹ *See, e.g.,* Massachusetts AG Comments at 8; State PUC Comments at 3; Public Interest Groups’ Comments at 3-4; Disability Rights Advocates Comments at 6-8; NJ Rate Counsel Comments at 6, 10; AARP Comments at 4.

Comments at 11-12 (discussing AT&T's *Services tool, my Wireless website, and my Wireless smartphone App); CTIA Comments at 9-10, 12-14 (detailing similar tools offered by other wireless providers). And although there can be lengthy delays before certain *roaming* usage is reflected in these tools, information about the vast majority of voice, messaging, and data usage is available within just a few hours. *See* AT&T Comments at 13. This short delay is unlikely to be the cause of significant overages.³⁰ Rather, the service allotments that customers purchase are designed to be consumed over the course of a monthly billing cycle, and thus subscribers generally amass usage gradually over the course of days and weeks. Accordingly, a delay of a few hours in receiving on-network usage information is unlikely to result in significant unexpected overages. In any event, a number of providers offer free service features that enable customers to avoid paying any overage charges even when they exceed one of their prescribed monthly service allotments.³¹

Second, regulation advocates *entirely* ignore the costs of these proposed mandates for real-time alerts. Most simply assert that providers could easily supply such alerts without offering any factual basis for that assertion.³² AARP, for example, states: "We can only

³⁰ As AT&T has explained, overages do occasionally result from single-session data usage. *See* note 27, *supra*. But as discussed above, when such overages occur, AT&T often gives the affected customers substantial billing credits to reduce or eliminate the overage charges.

³¹ U.S. Cellular's "Belief Project," for example, features "Overage Protection & Forgiveness," which allows users to redeem their accumulated "points" for credit toward overage charges. U.S. Cellular, The Belief Project, <http://www.uscellular.com/the-belief-project/index.html>. Similarly, AT&T's Rollover Minutes® feature allows customers to keep unused Anytime voice minutes and carry them over from month to month for up to 12 billing periods. AT&T Comments at 14. With this feature, AT&T customers can avoid paying any overage charges for voice services if they do not significantly exceed their monthly limit for voice minutes. *Id.*

³² *See, e.g.,* Massachusetts AG Comments at 8; State PUC Comments at 3; Public Interest Groups' Comments at 3-4; Disability Rights Advocates Comments at 6-7; NJ Rate Counsel Comments at 6, 10.

conclude that the notification technology currently exists and is successfully utilized by some providers; and that notifications can and should be provided in ‘real time or near real-time,’ by the major carriers.” AARP Comments at 4. But as AT&T and other wireless providers explained in detail in their opening comments, it would be extremely difficult, and in some cases impossible, for providers to supply real-time usage and overage alerts.³³

To begin with, existing network architecture makes it impossible for wireless providers to supply immediate information even about usage incurred *on their own networks*; instead, internal processing results in an average delay of a few hours for on-network usage. *See* AT&T Comments at 32-33; CTIA Comments at 33; T-Mobile Comments at 20. Wireless providers could reduce this latency only by redesigning their networks, and the requisite network modifications “could negatively impact carriers’ networks, degrading call quality and the customer experience.” Verizon Comments at iii, 45. These modifications would also be exceptionally expensive—and, as discussed, these costs would ultimately be passed on to consumers. *See, e.g.,* Verizon Comments at 45 (discussing the “substantial additional costs” that generating real-time alerts would create); T-Mobile Comments at 20-21 (“reconfiguring T-Mobile’s postpaid billing processes ... would require a major overhaul of its systems and networks as well as millions of dollars and countless man hours”); AT&T Comments at 33; CTIA Comments at 31-33. While these costs would pose an extraordinary challenge for any wireless provider, some smaller providers claim that the expense is an *insurmountable* obstacle to providing real-time usage information. As the Rural Cellular Association notes, “real-time notifications ... would prove cost-prohibitive to rural and regional carriers,” necessitating

³³ *See, e.g.,* AT&T Comments at 32-43; Blooston Comments at 2; CTIA Comments at 31-33; National Telecommunications Cooperative Association Comments at 2 (“NTCA Comments”); RCA Comments at 6-8; Sprint Comments at 17-18; T-Mobile Comments at 20-21; Verizon Comments at 45.

network upgrades that would cost approximately \$100 per rural customer—an amount more than twice the cost of those customers’ typical monthly service. RCA Comments at 6-7; *see also* NTCA Comments at 2-3.

Moreover, even if carriers could eliminate the latency on their own networks, they would be unable to provide real-time information about usage incurred by their customers on other wireless providers’ networks.³⁴ As Sprint explains, “off-network” usage is often subject to delay and latency, and there is “much variance in the amount of time it takes to receive[] off-network information.” Sprint Comments at 17-18; *see also* CTIA Comments at 33. Indeed, delays in obtaining information about roaming usage can stretch to days or even weeks.³⁵ Wireless providers cannot reduce this latency unilaterally; instead, real-time alerts would be possible only if *all* wireless providers were to adopt a new industry-wide system for exchanging roaming records. *See* AT&T Comments at 35; *see also* CTIA Comments at 33 (“Roaming billing records are transmitted by the visited carrier, not the home carrier, and are not within the home carrier’s control.”). Although the Commission conceivably could mandate such a regime for domestic wireless providers, it would be extraordinarily expensive. And in any event, it would not remedy

³⁴ Although AT&T relies on the exchange of roaming records only for voice usage and for data usage near the Canadian and Mexican borders (*see* AT&T Comments at 36-37, 41), many carriers do not have the ability to “see” off-network messaging or data usage on their own networks. Thus, these providers must rely on roaming records for information about *all* of their customers’ off-network usage. *Cf.* T-Mobile Comments at 21 (explaining that T-Mobile “implemented various system and network changes in the second quarter of 2009 so that it could process roaming SMS records directly” and “made additional changes in the fourth quarter of 2010 so it also could process roaming data records directly”).

³⁵ *See* AT&T Comments at 35-37; T-Mobile Comments at 20 (“T-Mobile estimates that it receives roughly 95 percent of the [] files for its roaming customers within three days, with the remaining files typically received within three to four weeks.”); CTIA Comments at 33 (“International roaming usage information is subject to an even longer delay—so long in fact that roaming usage may not show up on a subscriber’s bill within the same billing cycle as the usage.”); RCA Comments at 8 (noting that “roaming records can take more than 30 days to reach the system, making real-time notifications on usage impossible”).

usage-alert delays resulting from international roaming, as the Commission cannot require foreign providers to adopt a new record-sharing regime. *See* AT&T Comments at 33.

In sum, the massive costs of implementing real-time usage alerts—even if required only for on-network or domestic usage—vastly outweigh the *de minimis* benefits that consumers would derive from them.

B. Pro-Regulation Commenters Fail to Explain How the Benefits of Additional Usage and Overage Alerts Exceed Their Significant Costs to Consumers.

While proposals that the Commission mandate “real time” usage alerts are completely divorced from technical and practical realities and are thus grossly unrealistic, regulation proponents fare little better when proposing other types of usage-alert requirements. These commenters seem to reason that, because an informed consumer is a good thing, so too is any regulatory requirement that mandates any form of disclosure. That logic is fundamentally irrational because it ignores the monetary and nonmonetary costs to consumers that must be weighed against the supposed benefits of any additional disclosure requirement.

1. Consumers Would Derive Little Benefit from the Usage and Overage Alert Rules Proposed in the NPRM.

As an initial matter, proponents of usage and overage notifications greatly overstate the benefits of mandating the alerts proposed in the *NPRM*. Wireless providers *already* supply their customers with a variety of usage and overage notifications. There is no record basis for concluding that mandates in this area would offer any net consumer benefit.

Voice usage alerts. As AT&T has discussed, any mandate for voice usage alerts is simply unnecessary because customers already have access to a wide variety of calling plans, features, and usage-tracking tools that are highly effective in preventing unanticipated charges.

AT&T Comments at 43-46.³⁶ Customers of nearly all wireless providers can track their voice usage at any time through one or more of the following means: by dialing a unique shortcode, by logging on to their wireless provider's account-management system, by employing the usage-tracking tools available on their wireless devices, or by using a variety of carrier-provided and third-party usage-tracking applications.³⁷ These tools have been very effective in preventing unanticipated overages for voice service. Even so, some wireless providers have also begun to offer automated alerts for voice usage,³⁸ and competition will drive other providers to follow suit to the extent that consumers find such alerts more useful than annoying. Given all this, there is no need for the Commission to disrupt those market dynamics and mandate one-size-fits-all notifications for all carriers or all customer classes.

Messaging usage alerts. In the messaging context as well, wireless providers already supply every usage and overage alert that their customers need. AT&T subscribers, for example, receive an alert when their domestic messaging overage reaches \$20, the cost of an unlimited messaging plan. AT&T Comments at 46. And they receive additional alerts when they reach \$50, \$100, and \$200 in messaging overage charges. *Id.* Any customer, upon receiving an initial or subsequent overage alert, can avoid paying the overage by retroactively changing his or her messaging plan to one with higher or unlimited thresholds. *Id.* Other providers offer similar protections. *See, e.g.,* Verizon Comments at 2-3, 7-8 (discussing usage alerts and the ability of

³⁶ Every wireless provider offers many service features that make it easy for customers to efficiently manage their voice allotments. *See* CTIA Comments at 9-14. AT&T, for example, offers features such as free mobile-to-mobile minutes, free Nights & Weekends minutes, free A-List Calling, and Rollover Minutes. AT&T Comments at 14-15, 45. Other providers offer many similar calling features. *See, e.g.,* Verizon Comments at 7-8; Sprint Comments at 8.

³⁷ *See* AT&T Comments at 11-12; Sprint Comments at 10-11; Verizon Comments at i, 3-6 (discussing Verizon's #MIN and #DATA services, online usage-tracking tools, and available usage-tracking applications); CTIA Comments at 9-10, 16-19 (summarizing carrier practices).

³⁸ *See* Verizon Comments at i, 2-3; CTIA Comments at 10-11; T-Mobile Comments at 5.

customers to change their plans retroactively); RCA Comments, Exh. A (discussing providers that allow retroactive plan modifications). In addition, messaging customers also have access to a variety of non-alert mechanisms to help them avoid unanticipated charges. Like voice customers, they can track their usage at any time by using the shortcode and other usage-management tools discussed above. *See* AT&T Comments at 11-12; Sprint Comments at 10-11; Verizon Comments at i, 3-6. And nearly all providers offer unlimited messaging plans that make overages impossible for domestic usage. *See, e.g.*, AT&T Comments at 16; Sprint Comments at 8. These plans are highly popular, and thus the universe of customers who can actually incur messaging overages is quite small. *See* AT&T Comments at 16; *see id.* at 47 (noting that 94% of all postpaid domestic messaging by AT&T subscribers is generated by customers with unlimited plans). For all of these reasons, requiring providers to supply usage or overage alerts at thresholds different from those at which they already supply them would provide little, if any, benefit to consumers.

Data usage alerts. Wireless providers also supply data usage and overage alerts that make it very easy for their customers to avoid unanticipated charges. AT&T, for example, sends its smartphone customers free text alerts (and often email alerts) when these customers reach 65%, 90%, and 100% of their allotment for domestic data usage, as well as frequent, detailed notifications as they incur overage charges. AT&T Comments at 19. AT&T's laptop customers receive alerts at the same usage thresholds and, in addition, are protected against significant overages through temporary suspension of their service. *Id.* at 20. And for non-smartphone customers who do not subscribe to unlimited data plans (or who elect not to purchase a data plan), AT&T provides a free text notification when its systems record a domestic data overage of approximately \$15. *Id.* at 21. These customers receive additional alerts at intervals of

approximately \$50, \$100, and \$200 in overages. *Id.* Finally, individual consumers who use international data-roaming services receive an automated alert when they have incurred \$250 worth of such charges, and their data-roaming service is suspended when they have incurred \$500 worth of charges. Any customer, upon receiving a domestic or international alert, can avoid paying overage charges by retroactively subscribing to an appropriate data plan. *Id.* at 24-25.

Many other providers also offer robust data usage and overage alerts to their customers. Verizon, for example, sends a variety of alerts to customers that access its network through data cards and modems or netbooks. Verizon Comments at 8-9. Specifically, these customers receive an email and/or a text message when they reach 50%, 75%, 90%, and 100% of their monthly data allowance. *Id.*; *see also id.* at i, 2-3 (describing data-usage alerts for other customers). Similarly, Sprint “provides mobile broadband customers with email or text alerts when they reach 75% and 90% of their data caps.” Sprint Comments at 10. Many providers also offer their customers the option of unlimited data-usage plans, which make domestic overages impossible.³⁹ Accordingly, as with voice and messaging services, consumers would derive few benefits if the Commission were to impose the data usage and overage mandates proposed in the *NPRM*.

2. Adoption of the Usage and Overage Alert Rules Proposed in the *NPRM* Would Impose Significant Costs on Consumers.

At the same time, the costs of implementing the additional usage and overage alerts proposed in the *NPRM* would be significant. For example, to send automated alerts for voice usage, AT&T and other providers would need to redesign their existing systems so that

³⁹ See, e.g., Sprint Comments at 8; Cricket Comments at 2; CTIA Comments at 16 & n.42; T-Mobile Comments at 3; TracFone Comments at 4; WCAI Comments at 5.

notifications are triggered by attainment of certain usage thresholds. AT&T Comments at 45. This network re-design, coupled with (1) the substantial investment in hardware required to accommodate the increased volume of alerts and (2) the additional customer-service support required to address resulting confusion, concern, and annoyance, would cost the industry many millions of dollars. *Id.*; CTIA Comments at 31-32; NTCA Comments at 2; RCA Comments at 6-8.

Similarly, overhauling providers' existing systems for sending alerts with respect to messaging and data usage would also be costly. For example, lowering the threshold for AT&T's alerts for messaging and data usage would require a significant investment in additional hardware to accommodate the increased number of alerts, as well as an ongoing, multi-million-dollar investment in new customer-service personnel. AT&T Comments at 47-52. Other providers would be forced to incur similar costs, at tremendous expense to the industry. *See* T-Mobile Comments at 16-17; RCA Comments at 7 (focusing on upgrades to networks and billing systems); CTIA Comments at 31-32 (explaining that "[c]ustomer support systems ... would need to be upgraded [as well] to address customer response to the new alerts"). As CTIA explains, "[s]ome billing systems are not equipped to handle outbound usage alerts and would need to be *overhauled or replaced entirely*." CTIA Comments at 31 (emphasis added); *see also* RCA Comments at 7 ("Many RCA carrier members' billing systems are not currently configured to institute usage alerts.").

As with real-time usage alerts, the financial costs of making these network modifications would be passed on to consumers in the form of higher prices or reduced investment in wireless

networks and services.⁴⁰ And consumers would suffer non-monetary costs as well, including confusion and annoyance upon receiving unnecessary alerts or alerts that are not appropriately tailored to the devices or services they use.⁴¹ These costs simply cannot be justified given the limited benefits that customers would derive from additional usage and overage alerts. This is especially clear when one considers that many of the voice, messaging, and data overages incurred by consumers are not only quite small, but also fully *expected* and *intended* by consumers. Indeed, these overages often occur because subscribers recognize that they will save money if, instead of signing up for an “unlimited” plan, they subscribe to a smaller (and less expensive) bucket of usage and pay for occasional overages. Failing to alert these customers of overages that they are intentionally incurring can hardly be characterized as “bill shock,” and it certainly cannot justify the intrusive and expensive regulatory mandates proposed in the *NPRM*.

3. Imposing the Additional Regulatory Burdens Advocated by Some Commenters Would Be Even More Unjustified Than Adopting the Usage and Overage Rules Proposed in the *NPRM*.

A number of commenters urge the Commission to adopt rules with respect to usage and overage alerts that go even further than those proposed in the *NPRM*. Although touted by proponents as essential, many of the proposed alerts would in fact be of little use to consumers, and, in most cases, would do more harm than good.

⁴⁰ As Verizon warns (at 45), “carriers may be required to replace entire billing systems or restructure their system architecture just to provide customers with the alerts that the Commission thinks they want, diverting substantial dollars away from infrastructure buildout or other beneficial uses. Ultimately, customers will bear the costs of these new or upgraded systems.” *See also* CTIA Comments at 31 (the Commission should avoid imposing mandates that “must ultimately be paid by consumers”).

⁴¹ Customers who incur usage near the Canadian or Mexican borders, for example, could receive alerts that classify as international usage that ultimately is re-rated as domestic. *See* AT&T Comments at 36-37, 41, 54-55 & n.83.

Specific Usage-Alert Thresholds and Content Requirements. The Commission’s proposed rules do not specify when wireless providers must send pre-coverage alerts, but instead require only that an alert be provided when “subscribers are approaching an allotted limit for voice, text, and data usage.” *NPRM* at Appx. A. The proposed rules also give wireless providers flexibility with respect to the content of their usage and coverage alerts. Some commenters argue that, accordingly, the proposed rules are too vague. They call on the Commission to (i) set one or more specific pre-coverage thresholds at which wireless providers must supply usage alerts and (ii) require wireless providers to supply specific rate information in their usage and coverage alerts.⁴² The Commission should not adopt either proposal.

First, as discussed in Section I.B above, wireless providers, and not the Commission, are in the best position to know what types of alerts are appropriate for the unique characteristics of their networks, the devices they offer, and the customer groups they serve. *See* pages 8-10, *supra*. If the Commission were to adopt excessively detailed rules mandating one-size-fits-all alerts, it would eliminate the ability of providers to appropriately tailor their alerts to specific customer classes and device types, making those alerts less useful to customers. Alerts mandated at specific thresholds could also result in an excessive number alerts being sent to consumers. *See, e.g.,* Verizon Comments at 45 (“[I]f the Commission mandates that carriers send alerts when consumers reach four different thresholds of their minute, message, and data allowances, consumers could be receiving as many as twelve alerts each month.”). In addition, the number

⁴² *See* Public Interest Groups’ Comments at 3-4 (advocating alerts at 80% and 100% and stating that “[a]llert messages should list the applicable rates at which further usage of the service in question will be charged”); NJ Rate Counsel at 11 (advocating that alerts be provided at 80% and 95% and that coverage alerts “clearly spell out the additional costs that will apply”); NTCH Comments at 2-3 (advocating a *first* text message when the user is within 200 minutes or 20 MB of triggering higher usage charges, then a *second* text message when the user is within 100 minutes or 10 MB of their plan limits, and then a *third* text message when the user reaches their plan limits).

of characters permitted in text-message alerts is limited, and if “carriers are required to provide certain information such as pricing information in these alerts, they could be required to either send an additional alert or exclude other information that customers may find more useful.” *Id.* at 46. Finally, even if the Commission *could* craft detailed rules that would perfectly serve the needs of consumers today, those rules would deprive wireless providers of the flexibility they need to respond appropriately as consumer needs evolve.

For these reasons, many wireless carriers, from large to small, “implore[] the Commission to provide ... maximum flexibility to implement ... alerts in a way that makes most sense for the carrier” if the Commission actually mandates alerts. Sprint Comments at 15-16. *See also* Verizon Comments at 44 (“If the Commission determines that carriers should be required to provide customers with domestic usage alerts, carriers should be allowed to determine the form, substance, and timing of the alerts, including whether to include specific cost information.”); RCA Comments at 12; T-Mobile Comments at 18 (the Commission should give providers flexibility to “tailor alerts based upon technological limitations and evolving market and consumer demand”).

Customizable Usage and Overage Thresholds. Other commenters call on the Commission to require providers to offer customizable usage alerts that subscribers can set themselves.⁴³ This approach would be even more unwise than rigid, Commission-imposed thresholds.

Requiring wireless providers to permit customers to set their own usage alert levels would impose enormous costs with no commensurate consumer benefits. Wireless providers would need to make significant changes to their networks in order to offer this feature. Although

⁴³ Public Interest Groups’ Comments at 4.

some providers offer tools that allow their customers to set usage limits for certain types of services—such as AT&T’s Smart Limits service and Verizon’s Usage Controls service—there are important limitations to these tools. *See* AT&T Comments at 60-61; Verizon Comments at 6-7. Among other things, Smart Limits does not enable subscribers to set monthly limits for voice usage; instead, it permits subscribers to block calls to and from designated numbers and restrict the times of day that the phone can be used for outbound calling. AT&T Comments at 60. Further, due to technical limitations, Smart Limits does not allow customers to set usage limits for MMS messaging, and does not permit limitations on web browsing and data usage for certain smartphones. *Id.* Enhancing Smart Limits and other similar tools to cover all forms of voice, messaging, and data services would require very costly network modifications—and, again, consumers ultimately would bear the costs of those modifications. Moreover, expanding the *scope* of these tools so that every customer can make use of them—and not just the limited number of customers that currently subscribe to them for an additional monthly charge—would require a significant investment in additional hardware.

These significant costs would not be counterbalanced by any meaningful benefit. Indeed, AT&T’s experience with its existing “Smart Limits” tool suggests that the vast majority of customers do not *want* the ability to set their own usage alerts. Even those subscribers who pay an additional monthly charge for AT&T’s Smart Limits tool generally do not make use of the ability to set specific usage levels for messaging and data services. Only 9.4% of Smart Limits subscribers set custom messaging limits. And although 20% of Smart Limits subscribers set specific data-usage levels, 71.5% of that subset use the service to *completely block* data services. That is, only 5.7% of Smart Limits subscribers set a customized, non-zero limit for data usage. The fact that customers pay extra for a service that allows them to set messaging and data limits

but then overwhelmingly do not make use of that functionality suggests that few wireless subscribers would take advantage of customizable usage alerts. Given this, and given the high costs to consumers of implementing such alerts, requiring wireless providers to supply this capability would fail any rational cost-benefit analysis.

Voice Alerts in Addition to Text and Email Alerts. Some commenters urge the Commission to require wireless providers to supply not just text-message and email alerts to their customers, but also *voice* alerts.⁴⁴ For example, the National Consumer Law Center argues that the Commission should “require multiple options for notice, via text and/or phone call or some other readily accessible means and allow the consumer to choose how they wish to be notified.” NCLC Comments at 6.

Any mandate to provide voice alerts would inflict even greater—indeed, much greater—financial and non-monetary costs on consumers than would the *NPRM*’s proposal to require additional text alerts. Providers’ existing systems are configured for text and email alerts, and making the necessary modifications to enable voice alerts would be very costly. And these costs would largely be wasted, as most consumers would view voice alerts as an unwelcome annoyance, akin to telemarketing calls, and therefore elect not to receive such alerts. *See, e.g.*, T-Mobile Comments at 19. For these reasons, the benefits of requiring wireless providers to supply voice alerts to their customers could not justify the associated costs.

⁴⁴ *See, e.g.*, Public Interest Groups’ Comments at 3; NJ Rate Counsel Comments at 10-11; AARP Comments at 5. For these purposes, we use the term “voice alerts” to describe alerts that are delivered by means of a phone call or voicemail (rather than text-message or email), no matter what type of service the alert relates to. The term should not be confused with “voice usage alerts,” which means alerts, however delivered, that relate to usage of voice services.

C. The Commission Should Not Deny Wireless Providers the Flexibility They Need to Tailor Roaming-Notification Mechanisms That Are Appropriate for the Unique Characteristics of Their Networks, Devices, and Customers.

A similar cost-benefit analysis is fatal to the advance roaming-notification alerts proposed in the *NPRM*.⁴⁵ Wireless providers already supply these alerts in many circumstances, and the costs to consumers of providing additional (or more specific) alerts would outweigh the marginal benefits that consumers would derive from them.

Some wireless providers have elected to supply advance roaming-notification alerts to their customers whenever those customers' devices are registered on a foreign network. *See* Verizon Comments at 9-10; T-Mobile Comments at 6-7. But contrary to the suggestion of some commenters,⁴⁶ this is far from the only way to protect wireless customers from unexpected charges for international roaming services. To the contrary, AT&T and other wireless providers offer a diverse mix of measures—including, when appropriate, advance roaming notifications—that are highly effective in helping consumers avoid unexpected roaming charges. AT&T Comments at 15-18, 21-24, 52-56.⁴⁷ The Commission should not stifle this competition-driven

⁴⁵ *See NPRM* at Appx. A (“Mobile service providers shall provide notification alerts when ... subscribers will incur international or roaming charges that are not covered by their monthly plans, and notification if they will be charged at higher than normal rates.”).

⁴⁶ *See* Public Interest Groups' Comments at 4; NJ Rate Counsel at 12.

⁴⁷ For example, AT&T provides a wealth of resources to educate its customers on how to use their wireless devices in a cost-efficient manner while traveling internationally. *Id.* at 15-16, 53; Comments of AT&T, Inc., *Measures Designed to Assist US Wireless Consumers to Avoid Bill Shock*, CG Docket No. 09-158, at 8-9 (filed July 6, 2010). AT&T also provides many tools that allow customers to monitor and manage their wireless usage while abroad. AT&T Comments at 18, 22. Customers also can use tools or apps on their wireless handsets to track and manage their usage when traveling internationally. *See* Mobile Future Comments at 5 & Attach. (discussing available apps). As discussed in note 8, *supra*, all iPhones and most current smartphones feature a data-roaming toggle that is set to “OFF” by default, so that customers typically must take an active step before incurring international data roaming charges. AT&T Comments at 23. And iPhone users are able to monitor their usage through the Usage Tracker option provided for free on their handsets. *Id.* In addition to these mechanisms, AT&T also offers advance roaming-notification alerts in some circumstances. Because customers using

innovation, but should instead continue to allow wireless providers to tailor special mechanisms to the unique characteristics of their networks, the devices they support, and the customers they serve.

If the Commission were to mandate roaming-notification alerts for *all* customers, as the *NPRM* proposes, it would require wireless providers to incur design costs, purchase additional hardware, and hire and train additional customer-service personnel to handle additional call volume resulting from the alerts.⁴⁸ These costs are not “free” to consumers; they would ultimately be passed through in the form of higher wireless bills or reduced investment in network upgrades and new products and services.

In addition, the *NPRM*'s proposal would impose significant non-financial costs as well. As AT&T has explained, mandatory roaming-notification alerts would produce consumer confusion and annoyance by significantly over-alerting customers who live or travel near the borders with Canada and Mexico. AT&T Comments at 36-37, 54-55 & n.83. These customers would receive frequent roaming notifications due to “border bleedover” of wireless signals, which causes these customers to inadvertently roam on Canadian or Mexican wireless networks even though these customers remain within the United States.⁴⁹ AT&T Comments at 36-37, 54-

certain high-bandwidth-consuming devices—*i.e.*, iPhones and laptops—can more rapidly incur international data-roaming charges than customers using other devices, AT&T provides special advance notifications to those customers. *Id.* at 22-23. This alert is tailored to the device in question (for example, the alert sent to iPhone customers explains how to access the device's data-usage tracker), the visited country, *and* the customer's international plan (or lack of a plan), and it provides information about where to obtain additional guidance concerning international data roaming and the rates that might apply. *Id.* at 23, 53-54.

⁴⁸ See AT&T Comments at 45; Cricket Comments at 3; MetroPCS Comments at 5; Nexus Comments at 4; NTCA Comments at 2; RCA Comments at 6-8; RTG Comments at 2; Sprint Comments at 15-16; T-Mobile Comments at 25; Verizon Comments at 47.

⁴⁹ The number of affected customers is significant. In October 2010 alone, AT&T re-rated as domestic the voice usage of nearly 487,000 customers who roamed near the Canadian and Mexican borders. AT&T re-rates “bleedover” *data* usage as domestic too. If the Commission

55. Although AT&T re-rates the voice and data usage its customers incur from accidental roaming near the border, customers would receive international-roaming alerts whenever their devices registered on a Canadian or Mexican network. These alerts would be inaccurate, annoying, and potentially confusing.⁵⁰ There would be no consumer-friendly way to block these alerts given existing network architecture. *Id.* at 54-55.

Finally, requiring providers to supply roaming-notification alerts that “include the applicable rates and associated charges for international or roaming charges” (*NPRM* ¶ 22) would generate significantly more costs than benefits. AT&T alone would need to spend millions of dollars in design costs and system upgrades to send customers such highly personalized alerts. AT&T Comments at 55-56. Industry-wide, the costs would be far greater. *See, e.g.*, RTG Comments at 3; T-Mobile Comments at 25; Verizon Comments at 47. Further, the effectiveness of these alerts would be limited because it is not always possible for wireless providers to determine which country a subscriber is roaming in, as when two or more countries share a wireless network code. AT&T Comments at 55 & n.85. Indeed, customers might well rely to their detriment on alerts that provide the wrong rate for the country in which they are actually roaming. *Id.* at 55-56. Finally, requiring such precise information in roaming alerts could have the undesirable effect of homogenizing service plans and reducing consumer choice. Rather than incurring the costs of providing a multitude of customer-specific alerts, providers might choose instead to simplify and harmonize the plans that they offer in order to minimize the

were to impose mandatory advance alerts for international roaming, all of these customers would receive unnecessary and confusing notifications as soon as their devices were registered on a Canadian or Mexican wireless network.

⁵⁰ This problem would be even worse if the Commission were to adopt the Public Interest Groups’ proposal that users receive an alert not only when their devices are registered on a roaming network, but also when their devices have “reconnected to a non-roaming network.” Public Interest Groups’ Comments at 4.

divergence between customers and, thus, in the information that must be provided. AT&T Comments at 56. This, in turn, could lead to higher wireless rates for customers who would benefit from more narrowly tailored international plans.

For all of these reasons, the Commission should not require wireless providers to supply advance roaming-notification alerts that are more numerous or more specific than those that they already supply. Instead, as with usage and overage alerts, the Commission should preserve providers' flexibility to tailor effective mechanisms to their customers' needs.

III. IF THE COMMISSION ADOPTS NEW REGULATORY MANDATES, IT SHOULD CAREFULLY TAILOR ITS RULES TO PREVENT UNINTENDED HARM TO CONSUMERS AND DISTORTION OF THE WIRELESS MARKETPLACE.

If the Commission nonetheless concludes that existing measures are insufficient to prevent unanticipated wireless charges, it should not charge blindly ahead with the adoption of new regulatory mandates. Instead, the Commission should proceed cautiously in formulating new mechanisms and take deliberate steps to ensure that it does not inflict unintended harms on consumers or distort competition in the wireless marketplace.

As some commenters have noted, a collaborative approach is far more likely than top-down government regulation to produce workable, effective mechanisms to prevent "bill shock." *See, e.g.,* Sprint Comments at 15. If the Commission believes that some governmental role is necessary, it should therefore establish a series of structured workshops in which wireless providers, public-interest groups, Commission staff, and consumers can work together to develop flexible "best practices" for giving consumers the information and tools they need to prevent unanticipated wireless charges. These workshops would also inform the Commission's assessment of the costs of any new mechanisms and the benefits that consumers would derive from them. The data the Commission gathers through this process could then help shape any future deliberations about whether more direct market intervention is appropriate.

While such a collaborative approach is clearly preferable to top-down rules, if the Commission nonetheless proceeds with new rules, it should at the very least carefully tailor those rules to mitigate their costs, both monetary and non-monetary. The Commission should avoid the specific pitfalls discussed below as well as the other regulatory missteps identified above and in AT&T's opening comments.

A. “Cut-Off” or “Notice and Opt-In” Requirements Could Significantly Harm Consumers.

Some commenters urge the Commission to require wireless providers to discontinue service to their customers immediately after they reach their plan allotments for voice, messaging, or data services.⁵¹ This is not a consumer-friendly proposal. To the contrary, as even some of the *pro*-regulation commenters recognize, this proposed rule would be severely disruptive to customers and could leave them without access to critical emergency services.

The Commission acknowledged as much in the *NPRM*, noting that mandatory service cut-offs could obstruct access to emergency services. *NPRM* ¶ 21. Although a customer whose service has been suspended can still make a 9-1-1 call, emergency personnel cannot re-establish contact with that customer if the call is interrupted. *See* AT&T Comments at 59. In addition, a suspended customer could not make important or even “emergency” calls to numbers other than 9-1-1. Thus, urgent calls from a child to a parent, from a patient to his doctor, or from an employee to her supervisor would be blocked, with potentially grave consequences. And finally, customers whose service has been cut off are not likely to carry their phones, leaving them unable to make an initial 9-1-1 call in the event of an emergency. Even the *pro*-regulation state

⁵¹ *See* Mass. AG Comments at 8-9; Public Interest Groups’ Comments at 5; NCLC Comments at 6.

public utility commissions therefore agree that the Commission should not require such mechanisms. State PUC Comments at 4.

Quite apart from emergency situations, many customers will be, at a minimum, quite frustrated if their handsets are disabled as soon as they reach their allotment of wireless services. *See* AT&T Comments at 59; Verizon Comments at 43-44. Indeed, a customer whose service is cut off at an inopportune time—*e.g.*, when overseas or conducting a business transaction—will almost certainly prefer overage charges to a loss of service.

Although some commenters suggest that these problems could be remedied through an “opt-in” procedure,⁵² real-world experience suggests otherwise. Many customers would not notice (or would not respond to) alerts informing them that they have exceeded their allotment of service. *See* Verizon Comments at 44. Verizon explains, for example, that “customers often ignore such communications even after they have been contacted” by multiple means. *Id.* Further, even wireless customers who heed alerts will sometimes be “unable to contact the wireless company to ‘opt-in,’” or the opt-in procedure may not function properly. State PUC Comments at 4. In any event, requiring a customer to contact his provider before completing an urgent phone call would result in, at best, frustration, and, at worst, personal peril. *See* AT&T Comments at 59; Verizon Comments at 43-44.⁵³ The unintended effect of this proposal would undoubtedly be to induce more customers to sign up for unlimited service plans (or plans with higher cut-off limits) simply to avoid the inconvenience of having to take affirmative measures to avoid a service cut-off.

⁵² *See* Public Interest Groups’ Comments at 5; Mass. AG Comments at 8-9.

⁵³ Consumer frustration could be reduced (though not eliminated) by giving customers the ability to opt out of service suspension when they sign up for service, as opposed to each time they exceed their monthly allotment of service. But this would not remedy the more important problem—namely, that customers who do not opt out of service suspension could be endangered if forced to contact their wireless provider before making an emergency call.

Finally, those few consumers who actually *want* their service to be suspended when they reach their monthly allotment of voice, messaging, or data service⁵⁴ already have this option: they can purchase a *prepaid* service from one of many providers. But it would be irrational to impose this choice on all wireless customers, as mandatory cut-off mechanisms would do. *See, e.g.,* Sprint Comments at 18.

B. Prepaid Wireless Services Should Be Exempt from Any Rules Adopted by the Commission.

While adopting any of the rules proposed in the *NPRM* would be unjustified, applying those rules to prepaid customers would be particularly unreasonable. As the name suggests, prepaid consumers pay for their service in advance and therefore can never experience an “overage,” let alone “bill shock.”⁵⁵ Nonetheless, some commenters ask the Commission to prescribe various alerts for prepaid customers on the theory that such alerts would help those customers better manage their minutes or budget.⁵⁶ The Public Interest Groups, for example, argue (at 6) that all prepaid subscribers should receive alerts when they have reached 80% of their current allotment of “minutes, text, or data” to ensure that users are not “surprised by the need ... to ‘top-up’ their available allotments.”

⁵⁴ As revealed by the discussion above concerning AT&T’s Smart Limits service, *see* pages 31-33, *supra*, the percentage of customers who would favor usage caps is likely to be very small. Indeed, even those customers who pay an extra monthly charge for a service that enables them to set usage caps rarely make use of that functionality. *Id.* at 32-33.

⁵⁵ *See* Alaska Communications Systems Comments at 3-4 (filed Dec. 27, 2010) (“ACS Comments”); AT&T Comments at 62-63; Cricket Comments at 1-4; MetroPCS Comments at 16-17; NTCH Comments at 4-5; Tracfone Comments at 4-7; Nexus Comments at 2-4; OnStar Comments at 5; Sprint Comments at 17; T-Mobile Comments at 26; James Tagg, CTO, Tru Comments at 3; WCAI Comments at 4-5.

⁵⁶ *See* AARP Comments at 4; Mass. AG Comments at 12; NECPUC Comments at 11; NJ Rate Counsel Comments at 15.

This argument ignores the fact that prepaid service providers already supply educational resources, usage-tracking tools, and accurate and prompt updates regarding their users' account balances.⁵⁷ And the exceptionally high level of churn in the prepaid marketplace, where customers never have service contracts, gives providers an unusually powerful incentive to keep customers satisfied with their service.⁵⁸ No commenter explains how existing tools are inadequate to keep prepaid customers informed about any need to purchase additional airtime. In short, instead of requiring costly new usage alerts that prepaid customers have no need for, the Commission should focus on maintaining the affordability of prepaid service for the millions of Americans who rely on it. *See Cricket Comments at 3* (“The attendant cost of the upgrades ... could undermine the viability of low-cost service models that have driven the popularity and wide adoption of prepaid services, particularly among consumers who could not otherwise afford service.”); *Nexus Comments at 4-5*; *NTCH Comments at 4*.

C. Any New Rules Should Exempt Business Customers.

As AT&T explained in its opening comments, the Commission has repeatedly recognized that business customers tend to be more sophisticated and knowledgeable about their service options and how to manage them. *See AT&T Comments at 61*. Consequently, these customers often find usage and roaming notifications more annoying than useful. *Id.* And they would be particularly upset if their service were suspended as a means of preventing small overage

⁵⁷ *See, e.g., AT&T Comments at 63; TracFone Comments at 6; Sprint Comments at 17; T-Mobile Comments at 26* (all discussing prepaid service usage monitoring tools).

⁵⁸ *See NJ Rate Counsel Comments at 9 n.23* (“Churn rates for pre-paid wireless service is significantly higher than churn rates for post-paid service”) (citing Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd 11407, 11416 (2010)).

charges. *Id.* at 62. Finally, tailoring alerts to each of the many different (and customized) service plans offered to business customers would be extraordinarily costly and complex. *Id.*

Sprint echoes these concerns and concludes that the proposed rules would only increase the cost and complexity of administering business accounts without any offsetting benefit. *See* Sprint Comments at 16. Since no commenter has offered any rationale for applying the Commission’s proposed rules to business customers, the Commission should ensure that, at a minimum, business or corporate-liable accounts are exempted from all “bill shock” regulations.

D. All Mobile Providers Should Be Required to Comply with Any Rules Adopted by the Commission.

Some smaller and regional providers argue that they should be exempt from any new rules designed to prevent unanticipated wireless charges.⁵⁹ But there is no valid policy rationale for exempting these providers, and the Commission would unreasonably distort competition in the wireless marketplace if it were to impose rules only on large wireless providers.

Several commenters point out that customers of small wireless providers have no less need for protection against unexpected wireless charges than those of large providers. *See, e.g.,* Public Interest Groups’ Comments at 7; NJ Rate Counsel Comments at 12. Indeed, as AT&T has noted, customers of some smaller providers might actually need such protections *more* because those providers often tailor their services to certain vulnerable demographic groups, such as the elderly. *See* AT&T Comments at 64. It would be particularly perverse to exempt from consumer-protection rules the very providers whose consumers most need protecting.

There is also no basis for the claim that some providers’ smaller customer bases would necessarily make it much more difficult for them than for larger providers to comply with any

⁵⁹ ACS Comments at 3; Blooston Comments at 2-4; MetroPCS Comments at 17-18; NTCA Comments at 2-5; RCA Comments at 13-16; USA Mobility Comments at 12-13.

new rules.⁶⁰ Among other considerations, these providers' smaller scale would enable them to avoid some of the costs that larger providers would incur. For example, the costs of network re-design are likely to be lower on smaller, less complicated networks than on sprawling networks that have been cobbled together through multiple acquisitions and that employ many different types of hardware. Similarly, because a smaller customer base means fewer calls from confused and frustrated customers, the costs of hiring additional customer-service personnel would also be much lower for smaller carriers.

In any event, exempting smaller wireless providers from the rules would violate the well established principle of competitive neutrality. *See* AT&T Comments at 63-64. The Commission should take care not to distort competition by imposing burdensome regulatory mandates on only some of the participants in the wireless marketplace. Instead, the Commission should apply any new rules evenhandedly to all mobile wireless providers.⁶¹

IV. NEITHER THE COMMISSION NOR ANY COMMENTER HAS OFFERED A SUFFICIENT LEGAL JUSTIFICATION FOR THE RULES PROPOSED IN THE *NPRM*.

The parties advocating new regulatory mandates have failed to offer *any* legal basis for those mandates in their comments. And the bases cited by the Commission are insufficient, as none of the statutory sections cited in the *NPRM* gives the Commission authority to adopt the proposed rules.

First, as AT&T and other commenters have explained, nothing in Title II of the Communications Act authorizes the Commission to adopt the proposed regulations for either wireless broadband Internet access or SMS text messaging. The Commission has found wireless

⁶⁰ *See* ACS Comments at 3; Blooston Comments at 2-4; MetroPCS Comments at 17-18; USA Mobility Comments at 12-13.

⁶¹ As AT&T argued in its opening comments, the Commission should also maintain a level playing field by imposing any rules on non-CMRS providers of mobile data services. *See id.* at 65.

broadband Internet access to be an “information service” rather than a “commercial mobile radio service,” and SMS text messaging falls into the same category. *See* AT&T Comments at 67; CTIA Comments at 40; Verizon Comments at 33-34. As such, wireless broadband Internet access and SMS fall clearly outside the scope of regulation under Title II.⁶² Moreover, although Title II does grant the Commission jurisdiction over wireless *voice* service, the record forecloses any threshold finding that wireless carriers’ disclosures or practices today are somehow “unjust and unreasonable” under Sections 201 or 202, and without such a finding, the Commission lacks any statutory basis to impose “bill shock” rules even for voice services. *See* Verizon Comments at 33, 35 (quoting 47 U.S.C. § 201(b)).

Title III likewise provides no basis for the proposed rules. Title III was designed explicitly *not* to contain a “substantive grant of authority for the Commission to regulate the business relationship between wireless carriers and subscribers.” Verizon Comments at 28. Instead, the Title III provisions cited in the *NPRM* grant the Commission general subject-matter jurisdiction over “radio communication” and “transmission of energy or communications or signals by radio” and provide for the “efficient and orderly use of spectrum” through a federal licensing regime. 47 U.S.C. § 301; Verizon Comments at 29; *see also* AT&T Comments at 67-68; Verizon Comments at 30-32; CTIA Comments at 38-39. General grants of subject-matter jurisdiction or licensing authority cannot themselves justify the adoption of specific regulations, and thus these Title III provisions do not authorize the Commission to adopt the rules proposed in the *NPRM*. *See* AT&T Comments at 68; CTIA Comments at 38.

Finally, the Commission has not even tried to articulate any Title I “ancillary jurisdiction” theory. No other commenter proposes such a theory either, and it seems unlikely

⁶² *See* AT&T Comments at 67; CTIA Comments at 40; Verizon Comments at 33-34.

that any such theory would survive scrutiny. *See* AT&T Comments at 68-69; CTIA Comments at 41. In any event, simply as a procedural matter, the Commission could not now try to devise such a theory without, at a minimum, seeking additional comment on the issue. AT&T Comments at 69 & n.104.

CONCLUSION

The Commission should not adopt the rules proposed in the *NPRM*.

Respectfully submitted,

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