

**Before the
Federal Communications Commission
Washington, DC 20554**

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

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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February 8, 2011

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CTIA – The Wireless Association® (“CTIA”)¹ respectfully submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.² The comments filed in this proceeding confirm that the Commission should refrain from imposing unnecessary, burdensome, and unlawful mandates in this proceeding and should instead work with all stakeholders, including the wireless industry, to educate consumers about the myriad account management tools available. As discussed below, the Commission also should reject intrusive new proposals suggested by some commenters. To the extent it adopts any new requirements, the Commission should preempt all state regulation of mobile wireless billing and ensure that wireless carriers retain maximum implementation flexibility.

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*, Notice of Proposed Rulemaking, 25 FCC Rcd 14625 (2010) (“NPRM”).

I. INTRODUCTION AND SUMMARY

The comments submitted in this proceeding confirm that no new mandates are needed to address wireless billing issues. Wireless carriers currently offer a wide range of innovative services, account management tools, and usage plans (including prepaid and unlimited options) to address billing concerns and other customer service issues, in addition to the many free and low-cost applications offered by third parties that allow consumers to manage their usage and prevent overages. Wireless carriers also consistently enhance these service offerings, account features, and billing practices to ensure that they do not fall behind their competitors or alienate customers because of billing issues. The comments and objective data also reveal that these diverse efforts have been extraordinarily successful and that most consumers are satisfied with their wireless service. In fact, the only analysis in the record that examined actual, recent customer bills to capture an accurate snapshot of carrier billing practices indicates that consumers rarely experience severe overages and, when they do, wireless carriers often provide substantial credits.

The Commission's proposals reflect not only a misconception of the scope of the overage charge issue, but also severely underestimate the cost, time, and effort that would be required for implementation. Commenters recognize that wireless carriers would have to spend millions of dollars to modify their networks, alter their billing and customer service systems and certain legacy accounts, and develop new industry-wide procedures for reporting roaming usage. Moreover, the proposed alerts could create new consumer confusion and frustration, potentially benefitting only a small minority of consumers who experience unexpected charges on their bills to the detriment of the millions of consumers who take advantage of the numerous account management tools, applications, and other features already available. Therefore, the Commission should heed Administration policy and abstain from imposing unnecessary – and,

as CTIA and others have noted, unlawful – prescriptive regulations in this proceeding. Instead, the Commission should work with carriers and other stakeholders, including consumer organizations and the media, to educate consumers about the variety of innovative plans, tools, and features that are available to manage their wireless services to reduce the likelihood and severity of unexpected charges.

A few commenters in this proceeding have proposed a series of intrusive new prescriptive mandates that they urge the Commission to embrace in addition to its own proposals. Many of the requests are outside the scope of this proceeding and, like the Commission’s own proposals, they are unnecessary, overly burdensome with little or no benefits to the overwhelming majority of customers, and extend beyond the Commission’s statutory authority. Accordingly, all of these proposals should be rejected. In addition, these new proposals, if adopted, would create implementation challenges and costs, trigger unintended consequences, and reduce carriers’ ability to innovate and provide new wireless services and pricing plans in response to consumer demand.

Although CTIA and other commenters have explained why the Commission’s proposed regulations are unwarranted, if the Commission nevertheless feels compelled to take some action in this area, it must ensure that any new mandates clearly establish a federal framework that limits state involvement in independently regulating or enforcing mobile billing practices. State-by-state regulation would threaten the Commission’s and the Administration’s national policy goals for wireless services and could create inconsistent overage and roaming disclosure and usage alert rules in 50 different jurisdictions. The proposed disclosure and alert mandates would constitute prohibited regulation of the “rates,” “rate elements,” and “rate structures” of wireless service (namely, roaming fees and overage charges and their inclusion in customer

bills). Moreover, the mobile nature and national scope of wireless services do not lend themselves to state-by-state regulation. Therefore, the Commission should reject requests for additional state-level involvement in this area and preempt all state regulation of mobile billing – including roaming fees and overage charges, related disclosures, alerts, and other billing-related requirements – for wireless services.

Finally, if the Commission does impose new mandates in this proceeding despite the strong record militating against such action, it should do no more than require wireless carriers to disclose the tools that they offer for subscribers to either limit usage or monitor their usage history. Moreover, if it imposes usage alerts, it should only adopt a broad framework for such alerts and provide wireless carriers with the flexibility to craft alerts that are the most appropriate for the particular service being provided and the particular customer being served.

II. THE WIRELESS INDUSTRY IS COMMITTED TO WORKING WITH THE COMMISSION AND CONSUMERS TO ADDRESS BILLING CONCERNS.

The comments highlight the diversity of innovative services, tools, and usage plans that wireless carriers currently offer to address billing concerns and other customer service issues. For example, carriers offer upfront disclosures of their billing practices to guide consumer expectations, unlimited and prepaid plans designed to ensure that airtime overages do not occur, and tools and applications that enable customers to monitor their usage. The comments reveal that these efforts have been successful. The best evidence indicates that the overwhelming majority of consumers do not experience unexpected overage charges and are satisfied with their wireless service.³ The Commission should therefore heed the spirit of President Obama’s January 18, 2011 Executive Order, which seeks to improve regulation and regulatory review by,

³ See Comments of The Nielsen Company, Customer Value Metrics: A Closer Look at Overages, CG Docket Nos. 09-158, 10-207 (Dec. 17, 2010) (“Nielsen Comments”).

inter alia, eliminating unnecessary regulations, and abstain from imposing unnecessary prescriptive regulations in this proceeding.⁴ Moreover, the intense competition among wireless carriers to attract and retain customers, and the costs incurred by carriers if their customers incur unexpected charges on their bills, assure that carriers will continue to anticipate and mitigate potential customer service issues before they arise.⁵

A. The Comments Reflect an Ongoing, Industry-Wide Effort to Address Customer Service Issues, Including Billing Concerns.

Wireless carriers are committed to preventing billing issues before they arise and to resolving those issues when they do occur. The comments reveal that wireless carriers employ a wide range of creative, ongoing strategies for addressing their customers' billing concerns, in addition to the many free or low-cost applications offered by third parties that allow consumers to manage their usage or prevent overages. Some customer service features that were novel just a few years ago have become nearly ubiquitous today. For example, most carriers now offer some form of online account management or shortcuts that consumers can dial or text to check their voice, text, or data usage.⁶ And consumers have embraced these easy-to-use account

⁴ See Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order> (last accessed Feb. 2, 2011). Although the Commission is not required to follow this Executive Order as an independent agency, trade press reports indicate that Chairman Genachowski has asked Commission staff to perform their responsibilities consistent with the principles contained therein. See, e.g., *Genachowski Endorses Obama Stance on Regulation*, *Communications Daily*, 1 (Feb. 7, 2011).

⁵ See, e.g., Comments of CTIA – The Wireless Association®, CG Docket Nos. 09-158, 10-207, at 6-8 (Jan. 10, 2011) (“CTIA Comments”); Comments of Mobile Future, CG Docket Nos. 09-158, 10-207, at 2-6 (Jan. 10, 2011) (“Mobile Future Comments”); Comments of AT&T Inc., CG Docket Nos. 09-158, 10-207, at 7-8 (Jan. 10, 2011) (noting the costs of unexpected charges and related customer service expenses) (“AT&T Comments”); Comments of Sprint Nextel Corporation, CG Docket Nos. 09-158, 10-207, at 3 (Jan. 10, 2011) (“In addition to upsetting customers, these billing overages increase operational expenses such as customer care call volumes and average call handle times.”) (“Sprint Nextel Comments”).

⁶ See CTIA Comments at 9-10; AT&T Comments at 11-12; Sprint Nextel Comments at 10; Comments of T-Mobile USA, Inc., CG Docket Nos. 09-158, 10-207, at 4-5 (Jan. 10, 2011) (“T-Mobile Comments”);

management features, as AT&T indicated that millions of subscribers avail themselves of its account management features every month.⁷

Even customer service features that have become nearly ubiquitous in terms of availability still take many different forms and offer varying capabilities, depending on the carrier.⁸ For example, while several major carriers offer extensive parental controls that allow adults to monitor and manage their children's voice, text, and data usage, these features vary widely in terms of the other advanced capabilities they offer.⁹ The comments further reveal that many carriers offer extensive features that enable customers with disabilities to track their usage.¹⁰

Moreover, the comments reflect wireless carriers' diverse approaches to structuring their service plans to eliminate unexpected overages. Not only do many carriers provide extensive prepaid and unlimited options,¹¹ they also offer postpaid plan features designed to eliminate high overages by accommodating irregular or changed usage patterns. Through Sprint Nextel's Right

Comments of Verizon Wireless, CG Docket Nos. 09-158, 10-207, at 3-6 (Jan. 10, 2011) ("Verizon Comments").

⁷ AT&T Comments at 12 (stating that seven million customers used its *Services feature nearly 24 million times in November 2010 to view their usage information or account balance and that customers logged onto its online account management system nearly 34 million times in October 2010).

⁸ See Comments of MetroPCS Communications, Inc., CG Docket Nos. 09-158, 10-207, at 3-4 (Jan. 10, 2011) (describing the consumer benefits of product and service differentiation) ("MetroPCS Comments").

⁹ See CTIA Comments at 11 (describing various parental control offerings); Sprint Nextel Comments at 11; T-Mobile Comments at 5 (describing its Family Allowances Feature and Family Allowances Feature Alerts).

¹⁰ See CTIA Comments at 14; AT&T Comments at 21-25; T-Mobile Comments at 7-8.

¹¹ See AT&T Comments at 15 (discussing prepaid voice plans) and 20-21 (discussing unlimited data plans for non-smartphone users); MetroPCS Comments at 12-14; Sprint Nextel Comments at 8 (describing Sprint Nextel's "Simply Everything" plan, which offers unlimited voice, text, and data, as well as its "Everything Data," "Everything Messaging," and "Any Mobile Anytime" plans and its plethora of prepaid brands); T-Mobile Comments at 3 (describing unlimited plans for voice, messaging, and data services); Verizon Comments at 7-8. As CTIA has noted, prepaid plans prevent any possibility of an unexpectedly high bill. CTIA Comments at 15.

Plan Promise, for example, customers can switch rate plans at any time to accommodate changing usage, without paying any fees or extending or renewing their contracts.¹² Verizon and AT&T also allow customers to change their plans without extending their contracts – and permit those changes to be made retroactive in any given billing cycle.¹³ AT&T also offers free Rollover Minutes, which allow customers to avoid overage charges without changing their plans during periods of anomalous usage by applying unused Anytime Minutes from prior billing periods.¹⁴ Cricket offers a unique service plan called “PAYGo,” under which customers pay a daily rate that covers their usage for a single day and incur charges only for those days they use their phones.¹⁵

In addition, the comments reveal that many carriers have embraced new technologies and platforms to improve customer service and prevent unexpected charges. Several carriers offer account management applications that allow customers to track their voice, text, and data usage from their mobile devices.¹⁶ And still more free and low-cost monitoring applications are also available from third parties.¹⁷ Some wireless providers are even embracing social media, such as Facebook, and personalized Internet search pages, such as iGoogle, to integrate account access and usage information into their customers’ daily routines.¹⁸

¹² Sprint Nextel Comments at 9.

¹³ AT&T Comments at 24; Verizon Comments at 7-8.

¹⁴ AT&T Comments at 14-15.

¹⁵ Comments of Cricket Communications, Inc., CG Docket Nos. 09-158, 10-207, at 2-3 (Jan. 10, 2011) (“Cricket Comments”).

¹⁶ See AT&T Comments at 12 (describing AT&T’s MyWireless application, which customers used more than seven million times in October 2010); T-Mobile Comments at 4 (describing the My Account application, which has been pre-loaded on every T-Mobile phone launched in the past two years); Verizon Comments at 4-5 (describing the My Verizon app).

¹⁷ See CTIA Comments at 12-13; Mobile Future Comments at 4-6.

¹⁸ Sprint Nextel Comments at 11 (describing Sprint Nextel’s “My Sprint” “widgets” for Facebook and iGoogle).

B. The Data Confirms that New Mandates Are Unnecessary Because Consumers Are Satisfied with Their Wireless Services.

The data in the record indicates that prescriptive regulations are unnecessary. As numerous commenters point out, the Commission’s own “*Bill Shock*” Survey and the Government Accountability Office’s (“GAO”) consumer survey revealed that 92 percent and 84 percent of wireless consumers, respectively, are very or somewhat satisfied with their wireless service.¹⁹ In addition, the only analysis in the record that examined actual customer bills – which was performed by The Nielsen Company (“Nielsen”), a leading provider of information about the wireless marketplace – indicated that the vast majority of consumers rarely experience high overages and, when they do, wireless carriers often provide substantial credits.²⁰

The Nielsen analysis is by far the “best available” evidence on the billing overage issue. Unlike the Commission and GAO surveys, which relied on consumers’ potentially flawed recollections and suffered from numerous methodological problems with respect to measuring unexpected charges,²¹ the Nielsen data were based on a representative sample of actual bills, measured precisely both the overages incurred and the credits received by individual customers, and were based on recent billing periods, capturing an accurate snapshot of carriers’ current billing practices. The Nielsen analysis is the most factual assessment of whether an overage problem actually exists and, if so, its severity. The Nielsen analysis resoundingly concludes that severe overages are rare and that wireless carriers effectively address consumer billing issues when they do arise.

¹⁹ See CTIA Comments at 24-25; Mobile Future Comments at 7-8; Sprint Nextel Comments at 4; T-Mobile Comments at 11; Verizon Comments at 13-14.

²⁰ Nielsen Comments at 7-9, 14-15; see also CTIA Comments at 26-28; Mobile Future Comments at 8; T-Mobile Comments at 13-14.

²¹ See CTIA Comments at 27-30.

Commenters did not identify any reliable data indicating that “bill shock” is a problem that can be fixed by further regulatory mandates. Although certain consumer advocates claim that a *Consumer Reports* survey supports the Commission’s proposed rules, the methodology used for the survey is unknown and not publicly available, and the accuracy of its conclusions cannot be verified.²² What is apparent, however, is that unlike the Nielsen analysis, the *Consumer Reports* survey did not rely on actual billing data. It instead addressed the overage issue as part of the magazine’s annual report on cellular service.²³ As a result, respondents may have had flawed recollections regarding any overages they purportedly incurred. And, sharing the same defect as the Commission and GAO surveys, the *Consumer Reports* survey apparently did not probe respondents regarding their carriers’ response to their overage issue, thus making it impossible to determine whether consumers were satisfied with the resolution of their concerns.

The sparse information available regarding the *Consumer Reports* survey weakens its reliability. The respondents to the survey consisted of *Consumer Reports Online* subscribers,²⁴ a self-selecting sample that likely is not representative of the entire pool of wireless consumers. Indeed, *Consumer Reports* admits its online subscribers are not representative, describing them as “some of the most consumer-savvy people in the nation.”²⁵ The Nielsen analysis, in stark

²² See Comments of the Center for Media Justice *et al.*, CG Docket Nos. 09-158, 10-207, at 2 (Jan. 10, 2011) (“Public Interest Comments”).

²³ *CR survey: One in five hit by cellular bill shock*, Consumer Reports (Oct. 13, 2010), <http://blogs.consumerreports.org/electronics/2010/10/fcc-consumer-reports-survey-cell-phone-bill-shock-expensive-monthly-wireless-cost-overcharges-fees-overages-cellphone.html> (last accessed Feb. 2, 2011).

²⁴ *Id.*

²⁵ *How we survey at Consumer Reports*, Consumer Reports (May 2010), <http://www.consumerreports.org/cro/consumer-reports-national-research-center/overview/index.htm> (last accessed Feb. 2, 2011).

contrast, was benchmarked against U.S. Census Bureau demographics, carrier market share, penetration of family plans, and the penetration of smartphones.²⁶

The *Consumer Reports* survey also has an enormous potential for bias. The survey was apparently conducted in September 2010, after *Consumer Reports* described to its subscribers – the same subscribers who later responded to its survey – its support for the Commission’s action in this proceeding using pejorative language to characterize overage issues.²⁷ Its blog declared that Americans were “stung” by overages, asked if readers had *ever* seen “outrageously high” charges on their bills or been “[s]nagged” for exceeding their minutes, and offered tips to protect them “from cell phone overage ‘gotchas.’”²⁸ The print edition, in turn, stated that consumers “got burned” by overages and outlined tips for consumers to “protect” themselves.²⁹ While CTIA supports consumer education, given the inflammatory characterization of the issue in both the *Consumer Reports* magazine and online service, the potential for bias is plain. The Commission should not rely on a survey that suffers from such flaws, as “each agency shall ensure the objectivity of any scientific and technological information and processes used to support its regulatory actions.”³⁰

In contrast to the *Consumer Reports* survey, the Commission’s public data on consumer complaints also demonstrate that the need for prescriptive regulations are not supported by the record. The Commission regularly releases a quarterly report on the top subject areas for

²⁶ See CTIA Comments at 28.

²⁷ See, e.g., *Buzzword: “Bill shock,” and what you can do about it*, Consumer Reports blog (June 1, 2010), <http://blogs.consumerreports.org/electronics/2010/06/buzzword-bill-shock-overage-charges-minutes-cell-phone-plan-fcc-investigation.html> (last accessed Feb. 2, 2011).

²⁸ *Id.*

²⁹ *5 ways to avoid cell-phone ‘bill shock,’* Consumer Reports magazine (September 2010), available at <http://www.consumerreports.org/cro/magazine-archive/2010/september/money/cell-phone-bills/overview/index.htm> (last accessed Feb. 2, 2011).

³⁰ Exec. Order No. 13,563, *supra* note 4.

inquiries and complaints processed by the Consumer & Governmental Affairs Bureau. The most recent of these quarterly reports covers consumer inquiries and informal complaints received during the First Quarter of 2010.³¹ One of the complaint categories for wireless telecommunications is “Billing and Rates,” a category that extends significantly beyond what the Commission has termed “bill shock.”³² In the First Quarter of 2010, the FCC received, on

³¹ *First Quarter 2010 Report on Informal Consumer Inquiries and Complaints Released*, FCC News Release, (rel. Aug. 13, 2010) available at http://hraunfoss.fcc.gov/edoc_public/attachmatch/DOC-300795A1.pdf.

³² *Id.* According to the Report, the Wireless Telecommunications “Billing and Rates” category includes the following subcategories:

Billing/Rates – Airtime Charges: Complaints/inquiries regarding charges to subscriber for actual time spent talking on a wireless phone

Billing/Rates – Credit/Refunds/Adjustments: Complaints/inquiries regarding credits, refunds, or bill adjustments

Billing/Rates – Line Items: Complaints/inquiries regarding surcharges and taxes appearing on a phone bill

- Access Charge: Complaints/inquiries regarding miscellaneous line items charges

- E-911: Complaints/inquiries regarding provision of automatic location information and automatic number identification via a wireless phone used to contact a 911 call center

- Taxes: Complaints/inquiries regarding taxes appearing on wireless bill

- Universal Service: Complaints/inquiries about the availability and affordability of phone service for low income consumers in geographic areas where the costs of providing telephone service is high

Billing/Rates – Recurring Charges: Complaints/inquiries over recurring monthly charges that appear on a customer’s bill

Billing/Rates – Roaming Rates: Complaints/inquiries about charges assessed to the subscriber for wireless calls made while roaming in another carrier’s territory

Billing/Rates – Rounding: Complaints/inquiries about the practice of rounding calls to a full minute

Billing/Rates – Service Plan Rate: Complaints/inquiries about the terms and conditions of service:

- Activation Fee: usually a one-time charge to initiate service

- Off-Peak: specified time where per-minute rate is lower

- Optional Services: including caller-id, voice mail, road-rescue, etc.

- Peak: specified time where per-minute rate is higher

- Prepaid Service: subscriber pays for service in advance

- Promo Plan: including minute allowances

- Security Deposit: usually a one-time charge that is held by the carrier for a specified timeframe in order for subscriber to acquire service.

average, 1,265 consumer complaints per month for the entire wireless telecommunications “Billing and Rates” category.³³ At year end 2009, CTIA’s annual data survey estimated there were 276,610,580 total wireless subscriber connections.³⁴ Simple division indicates that 1,265 complaints (covering all categories of wireless billing and rates complaints, not limited to so-called “bill shock” complaints) out of more than 276 million subscribers, yields approximately 4.58 complaints per million wireless subscribers, or put another way, that on average in each of the first three months of 2010, only .0005 percent of wireless subscribers complained to the FCC about billing and rates. Thus, the Commission’s own data suggests that “bill shock” is a *de minimis* problem.

The best evidence indicates that most consumers are satisfied with their wireless service and that only a small number experience unexpected overages. Accordingly, the Commission should abstain from implementing unnecessary regulations in this proceeding.

C. Carriers Are Committed to Providing Adequate Information to Consumers So That They Can Manage and Assume Responsibility for Their Wireless Usage.

Consumer demand and technological advancements are driving an explosion of the services, devices, and plans available from wireless providers, creating new and complicated billing issues for carriers and their customers.³⁵ The comments reveal that both wireless carriers and consumers experience natural learning curves as they adjust to these rapidly changing offerings. Carriers implementing new offerings and services must strive to satisfy their

³³ *Id.* The actual number of Billing and Rates complaints for wireless telecommunications received by the FCC was as follows: January, 2010: 1,242; February, 2010: 1,175; March, 2010: 1,376.

³⁴ CTIA – The Wireless Association Annualized U.S. Survey Results (June 1985 to June 2010), *available at* http://files.ctia.org/pdf/CTIA__Survey_Midyear_2010_Graphics.pdf.

³⁵ *See* MetroPCS Comments at 6 (noting that the market for data services is still developing); T-Mobile Comments at 8-9.

customers, compete with other providers, and meet their business objectives.³⁶ Customers, on the other hand, must learn the capabilities and limitations of the new technologies, tools, and services, as well as determine which offerings meet their needs and how much capacity they need to purchase. As a result, wireless carriers must consistently review their customer service interactions, features, tools, and billing practices to ensure that they do not fall behind their competitors or alienate – because of billing issues – the very customers they seek to attract with their new offerings. CTIA and its members recognize these challenges, and carriers will continue to work to enhance the transparency of their billing disclosures to wireless consumers.

The intense competition among wireless providers, moreover, will continue to spur additional innovation in account management tools and customer service features. As evidenced by the comments in this proceeding, wireless carriers are constantly exploring new and creative approaches to providing consumers ready access to usage and billing information.³⁷ Carriers are not only exploring new service plans, pricing structures, account management tools and applications, they also are embracing non-wireless technologies to reach their customers. For example, Sprint Nextel’s Facebook and iGoogle widgets expand the platforms on which it communicates with its customers from their devices and its corporate website to their web browsing and social media activities. And only time will tell what other new and effective tools competition will drive wireless carriers to develop, and on what platforms carriers will offer those features if allowed to continue to innovate freely.

³⁶ See MetroPCS Comments at 10; T-Mobile Comments at 9.

³⁷ See Sprint Nextel Comments at 11 (asserting that Sprint Nextel “continues to seek means of differentiating itself in the market – provide end users more robust controls and extend alerts to voice and text messaging”); T-Mobile Comments at 9 (noting that “providers continue to refine data offerings and capabilities by offering different service packages, rates, handsets, and bundles, and develop new features to help customers monitor their use of those services”).

D. The Commission Should Work With Carriers to Educate Consumers About the Available Tools and Information Related to Billing Issues.

Instead of imposing new regulatory mandates, the Commission should work with carriers to educate consumers about the tools and information that carriers and other third parties provide to monitor usage and prevent overages. As the President instructed in his January 18, 2011 Executive Order, the Commission should seek to “identify and assess available alternatives to direct regulation” and should “use the best, most innovative, and least burdensome tools for achieving regulatory ends.”³⁸ The comments reveal that the best, most innovative, and least burdensome tools for achieving the Commission’s ends – reducing billing overages – are those being developed and implemented by wireless carriers themselves. The Commission could further stimulate this innovation not by regulation, but by providing additional information to consumers regarding websites or publications that describe and review the tools that carriers offer to their customers.³⁹ Indeed, the Executive Order expressly indicates that agencies should consider means of “providing information upon which choices can be made by the public” as an alternative to direct regulation.⁴⁰

Yet the Commission’s proposed rules risk stifling that innovation by capping the quality and variety of the plans, tools, applications, and other customer service innovations carriers offer to consumers.⁴¹ By chilling innovation, the Commission would run afoul of the Executive Order’s admonition that “[e]ach agency shall also seek to identify, as appropriate, means to

³⁸ Exec. Order No. 13,563, *supra* note 4.

³⁹ See CTIA Comments at 5 (listing examples of independent publications and websites that describe and review wireless carriers’ offerings); Mobile Future Comments at 9 (urging the Commission to “build on the successful efforts of the FCC Consumer Task Force . . . on international roaming . . . and expand the outreach to include tips and information on other usage monitoring and account management tools”).

⁴⁰ Exec. Order No. 13,563, *supra* note 4.

⁴¹ See T-Mobile Comments at 9 (“[P]rescriptive regulations could inadvertently limit competition, investment, and innovation by reducing a provider’s flexibility to respond quickly and proactively to evolving market conditions.”).

achieve regulatory goals that are designed to promote innovation.”⁴² The Commission should therefore abstain from direct regulation and instead work with carriers to educate consumers about the variety of innovative plans, tools, and features they offer, which will further stoke competition between carriers on customer service issues and reduce the likelihood and severity of unexpected overages.

III. COMMENTERS AGREE THAT THE COMMISSION’S PROPOSED RULES WOULD IMPOSE SUBSTANTIAL IMPLEMENTATION CHALLENGES AND COSTS AS WELL AS REDUCED INNOVATION AND SERVICE OPTIONS, CONTRARY TO THE PUBLIC INTEREST.

As CTIA detailed in its comments, the Commission’s far-reaching proposals raise many complex technical and economic issues and would create substantial implementation challenges across the wireless ecosystem.⁴³ Thus, the Commission’s proposals reflect not only a misconception of the scope of the overage charge issue, but also severely underestimate the cost, time, and effort that would be required for implementation. Commenters agree, and many discuss the extensive – and expensive – network modifications that would be required to comply with the Commission’s proposed rules. For these reasons, the Commission should not adopt its proposed requirements.

Several commenters have identified the substantial costs that the Commission’s proposals would impose on the industry. The comments reveal that wireless carriers would have to spend millions to modify their networks, alter their billing systems and certain legacy accounts, and develop new industry-wide procedures for real-time reporting of roaming usage. For example, the Rural Cellular Association estimates that it will cost its members approximately \$2 million

⁴² Exec. Order No. 13,563, *supra* note 4.

⁴³ CTIA Comments at 31-34.

each to install, test, and launch the Commission's proposed real-time notifications.⁴⁴ AT&T states that mandating automated text-message notifications would require it to redesign its existing systems, which are currently designed to provide usage updates via a consumer-initiated request, not based on the attainment of certain usage thresholds.⁴⁵ It also notes that it would have to make a significant investment in hardware to accommodate the increased volume and frequency of outgoing text messages that it would be required to send.⁴⁶ T-Mobile challenges the Commission's cost estimate for implementing its proposed rules and the perception that existing alert mechanisms could easily be adapted to provide the alerts contemplated by the Commission,⁴⁷ noting that it spent millions of dollars designing and implementing its Family Allowances feature alone (which involved only a subset of its products and services).⁴⁸ Implementing the Commission's proposed rules therefore would require T-Mobile to design multiple solutions catered to each of its varied service offerings and modify its advertising, customer collateral, promotional and legal materials, and training procedures for retail and customer care representatives.⁴⁹ And Sprint Nextel estimates that new alert regulations would require it to write new code for more than 10,000 legacy pricing plans.⁵⁰

Other carriers also raise significant concerns about the burden the Commission's proposed regulations would impose,⁵¹ noting that complex and costly alert mechanisms would

⁴⁴ Comments of Rural Cellular Association, CG Docket Nos. 09-158, 10-207, at 7 (Jan. 10, 2011).

⁴⁵ See AT&T Comments at 45.

⁴⁶ *Id.* at 45, 47, 50.

⁴⁷ See T-Mobile Comments at 16-17.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.*

⁵⁰ See Sprint Nextel Comments at 15-16.

⁵¹ See Comments of Alaska Communications Systems, CG Docket Nos. 09-158, 10-207, 3 (Jan. 10, 2011) ("ACS Comments"); Cricket Comments at 3; MetroPCS Comments at 4.

drive up their costs while “providing little to no benefit to consumers.”⁵² In addition, Verizon points out that the cost and scope of network modifications would escalate substantially based on the specificity of any requirements imposed by the Commission.⁵³ Carriers thus encourage the Commission to allow the market to “create a lower cost solution if the customers have the demand,”⁵⁴ rather than impose new prescriptive regulations, and they underscore that a “government-mandated one-size-fits-all solution” would “eliminate a useful competitive mechanism” used to attract customers.⁵⁵

The comments also make clear that “real-time” alerts could pose particularly enormous, if not insurmountable, implementation problems. The usage-tracking tools currently offered by wireless carriers provide timely information, but cannot provide “real-time” information because all of the tools “are subject to unavoidable latency delays.”⁵⁶ Wireless carriers’ postpaid networks are designed such that call-usage information can be processed only after the call is terminated, and then only after the information about the call transits the carrier’s network and its postpaid billing system.⁵⁷ Thus, if the Commission adopted its proposed rules, wireless carriers would be required to spend millions of dollars and countless hours reconfiguring their networks from the ground up.⁵⁸ Resolving latency delays, even if technically feasible, would require a

⁵² See ACS Comments at 3; MetroPCS Comments at 4, 17-19.

⁵³ See Verizon Comments at 45 (“[D]epending on the requirement, 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.”).

⁵⁴ See ACS Comments at 3.

⁵⁵ See MetroPCS Comments at 4.

⁵⁶ AT&T Comments at 33-42; see also Sprint Nextel Comments at 17-18 (describing latency issue); T-Mobile Comments at 20-21; Verizon Comments at 45.

⁵⁷ AT&T Comments at 34-35; T-Mobile Comments at 20-21.

⁵⁸ T-Mobile Comments at 21.

“new industry-wide system for sharing” voice and data usage information among providers because wireless providers cannot unilaterally reduce latency in roaming situations.⁵⁹

Commenters also highlight the increased customer-service costs that the Commission’s proposed regulations would impose, which the Commission appears not to have considered in the *NPRM*. Specifically, the automatic usage alerts would increase the volume of customer service contacts, requiring carriers to hire additional personnel.⁶⁰ The comments clarify that the “network modifications and personnel additions” that would be required to comply with the Commission’s proposed rules would “cost millions of dollars.”⁶¹ And, as described below, requiring multiple alerts could create consumer confusion and frustration, leading to additional customer service contacts.

The Commission’s proposed rules would increase the cost of wireless service for consumers without providing the vast majority of consumers with any tangible benefit. Keeping with the spirit of the recent Executive Order, the Commission should consider the marginal benefits of its proposed rules and the enormous costs to carriers – and, in turn, the public who likely would have these regulatory costs passed on – of implementing them, and should “propose or adopt [these] regulation[s] only upon a reasoned determination that [their] benefits justify [their] costs.”⁶² These costs ultimately would be borne by *all* wireless consumers, who may have

⁵⁹ AT&T Comments at 42-43.

⁶⁰ See AT&T Comments at 45, 47, 50 (noting that it “would need to hire additional customer-service personnel to address customer confusion, concern, and annoyance caused by the new alerts”); Sprint Nextel Comments at 18 (indicating that a cut-off mechanism would cause an “astronomical” increase in “[t]he cost of fielding customer care calls”).

⁶¹ AT&T Comments at 45.

⁶² Exec. Order No. 13,563, *supra* note 4.

to pay higher prices for wireless service or lose the benefit of continued network investment.⁶³ Yet these alerts would benefit – if anyone – only the small minority of consumers who experience unexpected charges on their bills.⁶⁴ Indeed, the millions of consumers who take advantage of the account management tools, applications, and other features already offered by carriers or others to monitor their usage would be required to subsidize a massive alert system designed for those few who do not. In addition, the substantial costs of implementing the Commission’s proposed rules also may harm the public by rendering valuable services and products economically infeasible.⁶⁵ Thus, the limited benefits of the proposed mandates are substantially outweighed by the costs carriers – and the public – would incur in implementing them.

IV. THE ADDITIONAL PRESCRIPTIVE MANDATES PROPOSED BY A FEW COMMENTERS ALSO SHOULD BE REJECTED AS UNNECESSARY, ILLEGAL, AND OVERLY BURDENSOME.

Some commenters in this proceeding go far beyond addressing the merits of the Commission’s proposed disclosure and alert requirements by introducing a litany of intrusive

⁶³ AT&T Comments at 30 (“[T]he costs of making the necessary network modifications would far outweigh any potential benefit – and those costs ultimately would be borne by all wireless subscribers in the form of higher prices, reduced network investment, or both.”); T-Mobile Comments at 17 (“[T]he costs of system changes based on the [Commission’s] proposals . . . ultimately will be borne by consumers . . . from slowing down or re-directing resources away from other initiatives that would meet consumers’ fundamental needs for affordable, reliable, and high-speed mobile service.”); Verizon Comments at 45 (noting that the proposed rules would divert “substantial dollars away from infrastructure buildout or other beneficial uses” and that “customers will bear the costs of these new or upgraded systems”).

⁶⁴ See AT&T Comments at 32 (noting that the substantial costs of alerts “could increase the price of wireless service for *all* subscribers (or reduce network investment, or both), while potentially benefitting only a small subset of subscribers who incur overages despite the availability of numerous tools specifically designed to prevent them”).

⁶⁵ See Cricket Comments at 3 (stating that the cost of the upgrades “could undermine the viability of low-cost service models”); Comments of Nexus Communications, Inc., CG Docket Nos. 09-158, 10-207, at 4 (Jan. 10, 2011) (“Additional costs on price-sensitive prepaid customers would make wireless service unaffordable for some.”); Comments of OnStar LLC, CG Docket Nos. 09-158, 10-207, at 5 (Jan. 10, 2011) (stating that the cost of implementing the Commission’s proposed rules “could render its business model for Hands-Free Calling untenable, thus depriving consumers of a unique, innovative service”).

new prescriptive mandates that they urge the Commission to adopt *in addition* to its own proposals. These new proposals, if adopted, would micromanage wireless carriers' business decisions and dramatically reduce carriers' ability to innovate and provide new wireless services and pricing plans in response to consumer demand. They also would create additional implementation challenges and costs – and some may not even be technically feasible. Many of the requests are outside the scope of this proceeding and, like the Commission's own proposals, they all are unnecessary, illegal, overly burdensome, and should be rejected.

A few commenters propose that the Commission mandate numerous additional usage alerts, with some suggesting that they be customized for the individual consumer recipient.⁶⁶ Others encourage the Commission to require carriers to provide choices with respect to the delivery of alerts.⁶⁷ Moreover, the Public Interest Commenters request that the Commission require additional alerts (separate from the alerts proposed for when a consumer is nearing and at their usage limits, and when they are roaming) to let consumers know when they are *no longer* roaming and are thus *no longer* subject to any roaming fees.⁶⁸

Each of these proposed mandates would impose significant burdens on wireless carriers. As discussed above, implementing the Commission's proposals alone would entail substantial

⁶⁶ See Comments of NTCH, Inc., CG Docket Nos. 09-158, 10-207, at 2-4 (Jan. 4, 2011) (“NTCH Comments”); Comments of Sandvine, Inc., CG Docket Nos. 09-158, 10-207, at 2-5 (Dec. 21, 2010) (“Sandvine Comments”).

⁶⁷ Comments of the National Consumer Law Center and Advocates for Basic Legal Equality on Behalf of Their Low-Income Clients, CG Docket Nos. 09-158, 10-207, at 6 (Jan. 10, 2011) (“Consumer Law Center Comments”) (urging the Commission to require that the rules mandate multiple options for notice and allow the consumer to choose among them); Public Interest Comments at 3-4 (asking the Commission to require that notifications be made by both text message and e-mail, that a customizable voice alert option be available to all subscribers, and that the notifications be tailored for non-English speaking customers).

⁶⁸ Public Interest Comments at 4.

costs and challenges.⁶⁹ Mandating additional alerts, therefore, would magnify the cost burden on carriers. Moreover, requiring more types of alerts and greater customization would only exacerbate the already substantial implementation challenges discussed by CTIA and other commenters by requiring additional network capabilities for each carrier.⁷⁰ Mandating customized alerts also would impinge upon business decisions that should be left to carriers and limit further carriers' ability to innovate and provide new account management tools that are responsive to evolving consumer demand.

Some of the new proposals simply may not be technically feasible for all wireless carriers or devices. For example, the National Association of Regulatory Utility Commissioners ("NARUC") and the State Commissions ask the Commission to require screen notices and alert icons in addition to the Commission's proposed alert notifications.⁷¹ Like the proposals described above, these proposals would increase the cost and implementation challenges imposed on carriers and handset manufacturers. In addition, there is also a significant question as to whether all carriers would even be technologically capable of providing alerts in this manner without building entirely new billing and customer support systems and deploying network upgrades.⁷² Furthermore, existing consumer devices may not be capable of displaying the proposed screen notices and icons.

⁶⁹ See, e.g., *NPRM* ¶ 21; AT&T Comments at 44, 43-52 ("Even if additional usage or overage alerts might provide some incremental benefit to a small subset of wireless subscribers, that marginal benefit would be far outweighed by the costs of providing them."); CTIA Comments at 31-32.

⁷⁰ CTIA Comments at 31-32; see also *supra* Section III. Some text alerts would be subject to a maximum character limit. See Verizon Comments at 47-48.

⁷¹ Comments of the National Association of Regulatory Utility Commissioners, CG Docket Nos. 09-158, 10-207, at 3 (Jan. 10, 2011) ("NARUC Comments"); Comments of the California Public Utilities Commission, Nebraska Public Service Commission, Vermont Public Service Board, and Vermont Department of Public Service, CG Docket Nos. 09-158, 10-207, 5-6 (Jan. 10, 2011) ("State Commissions Comments").

⁷² See CTIA Comments at 31-34.

Requiring additional warnings, in addition to those already proposed by the Commission, also would increase the risk of consumer confusion and potentially spawn negative consumer reaction. Consumers, not surprisingly, seek to purchase the “right size” plan. That is, they seek to buy a wireless plan with enough minutes for their typical use, but not so many that they are paying for minutes that they do not need. If a consumer has the right plan, the consumer approaches the end of his or her minute allotment at the end of the billing cycle. Indeed, AT&T notes that some consumers elect to subscribe to metered messaging plans and pay small overages rather than pay for a more expensive unlimited plan that is not justified by their use.⁷³ Under the additional alert proposals, it would then be *expected* that every month a consumer with the “right size” plan would receive multiple alerts. A consumer would be required to receive (and review) multiple messages from his wireless provider before finally receiving the message that he or she has reached his limit. These frequent alerts risk becoming like spam: expected, ignored, and deleted. Even the commenters advocating for extra alerts recognize the potential for consumer confusion and frustration regarding multiple alerts. The Public Interest Commenters, for example, warn that “[t]oo many automatic notifications could run the risk of confusing or inuring consumers and potentially causing them to ignore important alerts.”⁷⁴ CTIA agrees and urges the Commission to reject these unnecessary, burdensome proposals.

Some of the new proposals fall far outside the scope of this proceeding and would have the unintended effect of dampening competition by mandating specific rate structures and business practices. For this reason alone, they should be rejected. NTCH asserts that the

⁷³ AT&T Comments at 47-48.

⁷⁴ Public Interest Comments at 4. Indeed, T-Mobile points out that a customer on a 500-minute plan receiving alerts at 80, 90, 95 and 100 percent thresholds would receive alerts in rapid succession after 400, 450, 475, and 500 minutes. *See* T-Mobile Comments at 19.

Commission should impose limits on the overage fees that a wireless carrier may charge;⁷⁵ AARP asks the Commission to require that all wireless contracts provide for a cancellation period of 20 days after receiving the first bill;⁷⁶ and the New Jersey Division of Rate Counsel seeks to have the Commission mandate that all wireless carriers offer a “rollover option” for unused minutes.⁷⁷ These prescriptive requests to regulate carriers’ rates are plainly outside the scope of this proceeding and go far beyond the Commission’s proposed rules.⁷⁸ None of these proposals would serve the Commission’s goal of providing information to consumers that would help them manage their wireless accounts. Instead, the proposals directly impact fees, contractual obligations between wireless carriers and consumers, and other business decisions that should be left up to individual carriers. And, if adopted, these proposals would have a dramatic effect on pricing and service options going forward. The Commission should reject them because they are outside the scope of this proceeding and are contrary to the public interest.

Finally, all of the new proposals suffer from the same legal flaws as the Commission’s original proposals. CTIA previously explained that Title III of the Communications Act does not authorize the Commission to mandate that wireless carriers provide usage alerts and other information disclosures to data and SMS subscribers, that the Commission also lacks authority under Title I and Title II to impose its proposed disclosure obligations, and that the Commission’s proposal runs afoul of wireless carriers’ First Amendment rights.⁷⁹ Comments

⁷⁵ NCTH Comments at 3-4.

⁷⁶ Comments of the AARP, CG Docket Nos. 09-158, 10-207, at 4 (Jan. 3, 2011).

⁷⁷ Comments of the New Jersey Division of Rate Counsel, CG Docket Nos. 09-158, 10-207, at 16 (Jan. 10, 2011).

⁷⁸ *NPRM* ¶ 14 (stating that the Commission’s goal “is to ensure that all consumers have access to baseline information to help them manage the costs associated with mobile service” to “avoid unexpected charges”).

⁷⁹ CTIA Comments at 34-43.

filed by AT&T and Verizon bolster CTIA’s analysis.⁸⁰ AT&T agrees that the *NPRM* identifies no authority under which the Commission could adopt its proposed regulations concerning broadband Internet access and SMS text messaging,⁸¹ while Verizon contends that the Commission lacks authority under the Communications Act to adopt its proposals and that the Commission’s proposals raise serious First Amendment concerns.⁸² Verizon additionally asserts that the Commission has not justified its proposals as required by the Administrative Procedure Act.⁸³ The new proposals raised in the comments would impose additional prescriptive mandates on wireless carriers and are subject to the same analysis, so the Commission lacks legal authority to adopt these proposals as well. For all of these reasons, the Commission should reject the additional prescriptive mandates proposed by a few commenters in this proceeding.

V. IF THE COMMISSION IMPOSES NEW MANDATES, IT MUST AFFIRM THAT IT IS REGULATING THE “RATES CHARGED” BY CARRIERS AND PREEMPT STATE-LEVEL REGULATION.

A. Section 332(c)(3)(A) Preempts State Regulation of Wireless Rates, Including Overage Charges.

The Commission’s proposed disclosure and alert mandates would regulate the “rates,” “rate elements,” and “rate structures” of wireless service (namely, charges included in customer bills), thereby preempting state-level regulation. Section 332(c)(3)(A) expressly denies the states “any authority to regulate . . . the rates charged” by wireless carriers for CMRS.⁸⁴ The Commission has interpreted Section 332(c)(3)(A) broadly, emphasizing that it bars state regulation of (and lawsuits regulating) not only “rate levels,” but all price terms in wireless

⁸⁰ See AT&T Comments at 66-69; Verizon Comments at 19-43.

⁸¹ AT&T Comments at 66-69.

⁸² Verizon Comments at 28-43.

⁸³ *Id.* at 20-27.

⁸⁴ 47 U.S.C. § 332(c)(3)(A) (emphasis added).

service contracts, including “rate elements” and “rate structures.”⁸⁵ Therefore, to qualify as a “rate,” a fee or payment need only “hav[e] relation to some other amount or basis of calculation.”⁸⁶

In the *NPRM*, the Commission states repeatedly that its proposed rules are intended to address “unexpected charges” on consumer bills and the “costs” that consumers incur for mobile services.⁸⁷ According to the Commission, these charges can result from, *inter alia*, “roaming fees” and exceeding the “monthly allotment of voice minutes, texts, or data consumption.”⁸⁸ At its core, this proceeding is about regulating the amount of money that consumers pay for wireless services.⁸⁹

Overage charges for CMRS are squarely within the scope of the “rates charged” by wireless carriers under Section 332(c)(3)(A). They are monetary fees that customers agree to pay for specific wireless services, and they are part of carriers’ overall business model for recovering the costs of providing wireless service. Wireless carriers offer service through a variety of rate plans that can involve numerous components and fees, such as activation (and reactivation) charges, pre-selected monthly usage plan amounts, fees for special features, late fees, and early termination fees, as well as roaming fees and overage charges.

The fact that the Commission’s specific proposed mechanisms for regulating overage charges are disclosure and alert requirements (as opposed to establishing a rate ceiling for such

⁸⁵ See, e.g., Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19907 ¶ 20 (1999).

⁸⁶ *NASUCA v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006) (quotation marks omitted) (quoting Oxford English Dictionary (2d ed. 1989)).

⁸⁷ See, e.g., *NPRM* ¶¶ 1-2, 4, 5, 14, 15.

⁸⁸ See, e.g., *id.* ¶¶ 1-2, 14.

⁸⁹ As discussed above and in CTIA’s comments, however, the Commission does not have authority to impose its proposed requirements on SMS or data services.

services) does not alter the impact of the Section 332(c)(3)(A) preemption provision. Nor does the fact that the Commission is focused on regulating charges that “surprise” customers. And even though Section 332(c)(3)(A) preserves state authority to regulate the “other terms and conditions” of CMRS, the Commission expressly stated in the *NPRM* that this proceeding is not about those other terms and conditions: “We note that unexpected charges can also occur for [other reasons], such as confusion about the underlying terms and conditions of the service plan. Such forms of bill shock are beyond the scope of this proceeding.”⁹⁰

Although Section 332(c)(3)(A) does not apply to SMS and wireless data services, the Commission has expressly determined that wireless broadband Internet access services are interstate information services⁹¹ and that interstate information services are subject to the Commission’s exclusive jurisdiction.⁹² As CTIA previously has explained to the Commission, SMS services are also information services subject to the Commission’s jurisdiction.⁹³ Therefore, the Commission – not the states – has exclusive jurisdiction under the Communications Act to determine the policies and rules applicable to SMS and wireless data services.

As discussed above, the Commission’s proposals would impose substantial costs and implementation challenges on wireless carriers, directly affecting the underlying cost structure –

⁹⁰ See *NPRM* ¶ 1 n.4.

⁹¹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶¶ 18, 22-26, 28 (2007). In determining the regulatory classification of wireless broadband Internet access service, the Commission applied the same “end-user” analysis used for other broadband services and affirmed by the Supreme Court. See *id.* ¶¶ 20-21; *Nat’l. Cable & Telecomms. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967, 988-92 (2005).

⁹² *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 16 (2004) (“*Vonage Order*”); see also 47 U.S.C. § 152(a). To the extent any of these services has an intrastate component, the Commission should preempt state regulation over that component. See, e.g., *Vonage Order*.

⁹³ See, e.g., CTIA Comments at 40; Comments of CTIA – The Wireless Association®, WC Docket No. 08-7, at 32-40 (filed Mar. 14, 2008).

and thereby the rates – for mobile charges. Moreover, as discussed below, these costs and challenges would multiply if carriers were subject to additional state-by-state disclosure and alert regulations. Thus, to the extent it adopts new rules addressing unexpected mobile charges, the Commission should preempt all state-level regulation.

B. The Commission Should Preempt State-Level Regulation of Overage Billing.

The Commission has authority under the Communications Act and the Supremacy Clause of the U.S. Constitution to preempt conflicting state-level requirements.⁹⁴ Where, as with wireless broadband Internet services, it is impossible or impractical to separate the services into interstate and intrastate components, the Commission can preempt state regulation that “would thwart or impede the lawful exercise of federal authority” over the interstate communications.⁹⁵ It also can preempt state regulation that “negates a valid federal policy.”⁹⁶ Because the mobile nature and national scope of wireless services do not lend themselves to state-by-state regulation, the Commission should reject requests for additional state-level involvement in this area⁹⁷ and preempt all state regulation of mobile billing (including charges, related disclosures, alerts, and other rate billing-related requirements) for wireless services.

Wireless carriers often structure their service offerings and rate plans on a nationwide or regional basis independent of state borders, and they do so because of consumer demand. Today, subscribers take their phones with them when they travel, including for work (*e.g.*, truck

⁹⁴ See, *e.g.*, *Louisiana Pub. Serv. Comm’n*, 476 U.S. 355, 369 (1986) (citing *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).

⁹⁵ See *id.* (internal citations omitted).

⁹⁶ See, *e.g.*, *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 430-31 (D.C. Cir. 1989); see also *People of State of Cal. v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994).

⁹⁷ See NARUC Comments at 7; Comments of the National Association of State Utility Consumer Advocates, CG Docket Nos. 09-158, 10-207, at 6 (Jan. 10, 2011); State Commissions Comments at 6-7; Comments of the New England Conference of Public Utilities Commissioners, CG Docket Nos. 09-158, 10-207, at 12 (Jan. 10, 2011).

drivers).⁹⁸ Thus, a mobile phone purchased in one state might be used on a business trip in a second state and on a family vacation in a third state. Family plans further increase the likelihood of multi-state use, with family members keeping in touch after they leave home for school, work, or military service. Although consumers increasingly use their phones across state lines, they receive a unified, single bill that includes all charges, regardless of the call origins and destinations. Family plan or business customers receive one bill regardless of where the individual family members or employees are located, underscoring the utility of nationwide services.

If consumers are to continue reaping the benefits of the competitive wireless market, the Commission must ensure that any new mandates adopted in this proceeding clearly establish a federal framework that limits state involvement in independently regulating or enforcing mobile billing practices. Although the proposed rules are unnecessary, national rules would make it less onerous for a national carrier to maintain centralized billing for the entire country and to continue sending unified bills to consumers rather than a state-by-state framework, thereby increasing efficiency, scale and scope. Likewise, national rules also would help avoid consumer confusion over the available legal rights and remedies by providing a clear set of rules that apply no matter where consumers reside or use their wireless service.

Absent preemption, even a light-touch approach by the Commission could be “thwarted” or “impeded” by inconsistent mobile billing disclosure and usage alert rules in 50 different jurisdictions.⁹⁹ Notably, it would not make sense for the Commission to impose disclosure or usage alert mandates if states were then free to impose contradictory or more burdensome regulations. In addition, disparate requirements would increase significantly the implementation

⁹⁸ Subscribers also take their phones with them when they move to a new home.

⁹⁹ See, e.g., *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 369.

costs and challenges that carriers would encounter, even to such a point that some services may no longer be viable. To the extent states impose additional alert requirements, moreover, consumers could become increasingly “immune” to such alerts, reducing their effectiveness. A multitude of state-level requirements also would hamstring further carriers’ ability to provide new pricing plans, service options, and account management tools in response to evolving consumer demand. Moreover, state-level regulation could spark new legal and jurisdictional questions, such as which state’s rules would apply to a particular unexpected mobile charge. For example, given the prevalence of family plans and users’ mobility, a wireless contract sent to parents in one state may cover wireless use by a child in school in a different state, potentially causing duplicative state enforcement and jurisdictional disputes. Therefore, the Commission should preempt additional state-level involvement in mobile billing issues.

State-by-state regulation also would threaten the Commission’s and the Administration’s national policy goals for wireless services.¹⁰⁰ In his recent State of the Union address, President Obama announced a “National Wireless Initiative” to provide 98 percent of Americans with access to wireless broadband Internet services and “enable businesses to grow faster, students to learn more, and public safety officials to access state-of-the-art, secure, nationwide, and interoperable mobile communications.”¹⁰¹ In addition, the overarching goals of the National Broadband Plan include, for example, having the United States lead the world in mobile innovation and ensuring that every American has affordable access to robust broadband

¹⁰⁰ See, e.g., Connecting America: The National Broadband Plan (Mar. 16, 2010) (“NBP”).

¹⁰¹ See Fact Sheet, The State of the Union: President Obama’s Plan to Win the Future (Jan. 25, 2011), at <http://www.whitehouse.gov/the-press-office/2011/01/25/fact-sheet-state-union-president-obamas-plan-win-future> (last accessed Feb. 2, 2011).

service.¹⁰² Contrary to these goals, the additional costs imposed by new state mandates would drive up the price of wireless broadband and other wireless services, discouraging their deployment, adoption and use. Higher wireless service rates also could separate affluent from less affluent Americans. In addition, new mandates would divert carrier resources (including financial capital, and technical, legal, and customer service personnel) that could otherwise be used to support the development of innovative new technologies and services and to expand service to new areas, including additional rural areas. Thus, to avoid “negat[ing]” the Commission’s and the Administration’s national broadband policy goals,¹⁰³ the Commission should preempt all state regulation of mobile billing (including charges, related disclosures, alerts, and other rate billing-related requirements), for wireless services.

VI. IF THE COMMISSION IMPOSES NEW MANDATES, CARRIERS MUST HAVE THE FLEXIBILITY TO CRAFT THEIR OWN DISCLOSURES AND ALERTS.

A. Any Action Taken Should Be Measured and Should Not Extend Beyond A Flexible Disclosure Requirement.

Although CTIA and other commenters have explained why the Commission’s proposed regulations are unwarranted, if the Commission nevertheless feels compelled to take some action in this area, it should be careful to avoid regulations that will stifle innovation and result in higher prices for consumers, as discussed above. At most, then, the Commission should do no more than adopt its proposal to require “disclosure of any tools [mobile providers] offer which

¹⁰² NBP at 9-10, Goals 2 and 3. Similarly, the Commission recently stated a goal “for this country to lead the world in such mobile services by ensuring that consumers have access to competitive broadband data services over the fastest and most extensive competitive wireless broadband data networks.” *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4182 ¶ 1 (2010).

¹⁰³ See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d at 430-31; see also *People of State of Cal. v. FCC*, 39 F.3d at 931-33.

allow subscribers to either limit usage or monitor usage history.”¹⁰⁴ As Sprint Nextel noted, “such a measured and restrained approach is commensurate with an issue that affects such a small percentage of wireless consumers.”¹⁰⁵ Likewise, the Wireless Communications Association International, Inc. (“WCAI”) urged the Commission to “rely on transparency as its guiding principle” while avoiding a more heavy-handed approach that would impair providers’ ability to innovate and compete on service quality.¹⁰⁶

The Commission should not mandate any further level of granularity regarding the form or method of the required disclosure. As Sprint Nextel noted, it would be a mistake to mandate any one single approach, given that different customers will have different preferences, and that future modes of communication cannot be anticipated.¹⁰⁷

B. Providers Should Retain Maximum Flexibility to Structure Any Usage Alerts.

If the Commission proceeds with a requirement for usage alerts – despite the strong record in this proceeding militating against such action – it should adopt no more than a broad framework for such alerts, leaving providers with the flexibility to craft alerts that are the most appropriate for the particular service being provided and the particular customer being served. As commenters have explained in detail, a one-size-fits-all approach would not be practical or helpful given the wide variety of services, service plans (including legacy rate plans that in some cases may go back a decade or more), network capabilities, and consumer equipment in the marketplace. For example, requiring alerts at multiple specific percentage thresholds could be

¹⁰⁴ See *NPRM* ¶ 24.

¹⁰⁵ Sprint Nextel Comments at 13. See also CTIA Comments at 27-30 (explaining data showing that an exceedingly small number of consumers are “shocked” by their bills).

¹⁰⁶ Comments of The Wireless Communications Association International, Inc., CG Docket Nos. 09-159, 10-207, at 12 (Jan. 10, 2011).

¹⁰⁷ Sprint Nextel Comments at 14.

significantly more annoying to customers on low-minute plans, who could receive three alerts within one hour of use, compared to those with larger minute allowances.¹⁰⁸ Likewise, multiple alerts could be extremely annoying to customers for whom the potential overage cost is very low, such as for individual text messages.¹⁰⁹ As noted earlier, an inflexible alert rule also could create customer confusion if the alert threshold is triggered in the last day or two of a billing cycle,¹¹⁰ or if there are different categories of minutes in a plan (*e.g.*, daytime vs. nights and weekends). Requiring the delivery of alerts by a specific method, such as by text message, would not be helpful for customers who are unaccustomed to reviewing text messages, or who use devices that lack such capability.¹¹¹ Further, mandatory alerts to end-user devices on a multi-line account may not provide effective notice to the party responsible for the bill.¹¹²

The examples above represent just a few of the reasons why providers require maximum flexibility in developing the content and timing of any usage alerts. Flexibility would allow for innovative options, such as offering customers the ability to avoid overage charges by switching to an alternative service plan.¹¹³ Moreover, providers should be free to compete in the marketplace on the usefulness of all of their account management tools, including usage alert options, rather than relying on an inflexible Commission-mandated approach that would be unlikely to address all service scenarios and which could quickly become outdated. The business

¹⁰⁸ See T-Mobile Comments at 19 (noting that alerts at 80, 90, 95 and 100 percent on a 500-minute plan would result in the customer receiving alerts after 400, 450, 475, and 500 minutes).

¹⁰⁹ See Sprint Nextel Comments at 18.

¹¹⁰ *Id.* at 17.

¹¹¹ T-Mobile Comments at 23.

¹¹² *See id.*

¹¹³ Mobile providers should also have the flexibility – but should not be required – to establish an “opt-in” mechanism whereby the subscriber would need to affirmatively agree to the overage before allowing the subscriber to continue using the service. See *NPRM* ¶ 21 (seeking comment on such mechanisms).

imperative on carriers to reduce customer churn will provide ample incentive to create innovative notification tools that are responsive to consumer demand.

Finally, the Commission should avoid any specific mandated wording or content for usage alerts if it wishes to increase the chance that the regulation will pass Constitutional muster. CTIA explained in its initial comments why any compelled speech would violate providers' First Amendment rights in this context,¹¹⁴ and CTIA agrees with Verizon Wireless that “the more prescriptive and heavy-handed the regulation of carrier speech, the more problematic that regulation will be under the First Amendment.”¹¹⁵ The Commission itself has recognized that First Amendment concerns may be lessened by avoiding specific mandates on billing disclosures and allowing “each carrier [to] develop its own language.”¹¹⁶ The Commission should act similarly here and allow carriers to develop the content of any usage alerts that may be required.

VII. CONCLUSION

For the foregoing reasons, the Commission should refrain from imposing unnecessary, burdensome, and unlawful mandates in this proceeding. However, if it adopts new requirements,

¹¹⁴ See CTIA Comments at 41-43.

¹¹⁵ Verizon Comments at 36.

¹¹⁶ See *Truth-in-Billing and Billing Format*, First Report and Order, 14 FCC Rcd 7492 ¶ 60 (1999) (FCC rejected suggestions that a line item bill labeling regulation violated the First Amendment because “we have not mandated or limited specific language that carriers utilize to describe the nature and purpose of these charges; each carrier may develop its own language to describe these charges in detail”).

it should preempt all state regulation of mobile billing and ensure that wireless carriers retain maximum implementation flexibility.

Respectfully submitted,

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February 8, 2011