**Before The**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of: | ) | |
| | ) | CC Docket No. 98-170 |
| Truth-in-Billing and Billing Format | ) | |
| | ) | CG Docket No. 04-208 |
| National Association of State Utility | ) | |
| Consumer Advocates' Petition for | ) | |
| Declaratory Ruling Regarding Truth-in- | ) | (FCC 05-55)Title |
| Billing: Further Notice of Proposed | ) | |
| Rulemaking. | ) | |

**COMMENTS OF**
**ATTORNEYS GENERAL**
**OF THE**
**UNDERSIGNED STATES**

Through the:

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 First Street, NW, Suite 1100
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June 24th, 2005

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## I. Introduction

The undersigned Attorneys General submit these comments in response to the Federal Communications Commission's, ("FCC" or "Commission") *Second Report and Order*, *Declaratory Ruling, and Second Further Notice of Proposed Rulemaking,* (*"TIB Order 2"*).[1]

The Attorneys General recommend first that, in moving to clarify its Truth-in-Billing regulations with respect to all telecommunications carriers, and including CMRS carriers,[2] the Commission do so in a manner that protects consumers and strengthens competition. In this regard, the Attorneys General urge that the Commission allow only two broad categories of charges on telecommunications bills – (1) price, and (2) taxes and regulatory fees. In these Comments, the term "price" refers to the recurring cost for telecommunications services including any applicable per unit cost, and "taxes and regulatory fees" refers to taxes and fees that federal, state, or local authorities require carriers to collect from consumers and remit to the appropriate governmental entities in association with the sale of telecommunications service.

The Attorneys General further urge the Commission to prohibit carriers from imposing a third type of charge on telecommunications bills referred to hereafter as "carrier add-on charges." This refers to charges which are determined by the carrier, and are not taxes or regulatory fees expressly mandated by federal, state or local authorities. The Attorneys General submit that the practice of adding line items to consumers' bills for carrier add-on charges is causing widespread confusion in the marketplace and frustrating the goal of fair competition since it is virtually impossible for consumers to compare prices among providers. Such prohibition will benefit consumers, who will better understand how their bills relate to disclosed prices, taxes and regulatory fees. This approach will enhance consumer welfare and encourage trust between consumers and their carriers by reducing confusion; making billing mistakes and fraud easier to detect; and giving more clarity to real price terms, thereby facilitating marketplace competition. There is no constitutional impediment to such an order.

Second, if the Commission elects to allow carrier add-on charges as line items that so many consumers have found confusing, it should require that those line items be clearly defined, accurately stated, and separated from taxes and regulatory fees on consumer bills. In this scenario, the Attorneys General alternatively recommend that the Commission allow three categories of charges on consumer bills: (1) price; (2) taxes and regulatory fees; and (3) carrier add-on charges. If these carrier add-on charges are allowed, the Attorneys General support the Commission's proposal that they be grouped together but separated from taxes and regulatory fees. The Attorneys General urge the Commission to require carriers to disclose that these charges are discretionary on the part of the carriers and prohibit carriers from using misleading words and phrases such as "regulatory assessment" to describe these line items.

Third, any point of sale disclosure requirements and related enforcement regime adopted by the Commission should complement, not displace, traditional state regulatory and police authority in these areas. The Attorneys General, as in other areas in which

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[1] *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 05-55, 2005 WL 645905 (rel. March 18, 2005).

[2] "CMRS" refers to Commercial Mobile Radio Service, as defined in 47 C.F.R. § 20.9(10) and generally describes what is known colloquially as wireless, mobile and cellular telephone service not connecting directly to the consumer through a wireline.

state authority to regulate industry and protect consumers overlaps with federal authority, encourage the development of cooperative enforcement action with the Commission in this area.

Fourth, and most importantly from the Attorneys' General perspective, the preemption of state regulatory and enforcement authority contemplated by the Commission is contrary to Congress' intent and beyond the Commission's jurisdiction. As telecommunications markets were opened to competition, Congress envisioned more, not less, state involvement in consumer protection. Federal preemption of state law falls into three categories (express, field, and conflict preemption) none of which apply in this situation. Further, the Commission's attempt to preempt state involvement in the area of billing disclosures departs from historic federal/state cooperation regarding consumer protection matters and undermines the States' ability to protect its own consumers and to foster fair competition. The Commission may establish additional standards that protect consumers, but it has been given neither a mandate to supplant the States' role, nor the resources to step into the ensuing breach.

## II. Background and Basis for the Concerns of the Attorneys General

In 1999, the FCC addressed growing consumer and marketplace confusion related to carrier abuses in billing for telecommunications services by releasing its *Truth-in-Billing Order*, ("*TIB Order 1*").[3] In that order, the Commission adopted "broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices." *Id. at ¶ 9.* In general, the principles require that telephone bills: (1) be clearly organized, identify the service provider, and highlight any new providers; (2) contain full and non-misleading descriptions of charges; and (3) contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about or contest charges on the bill. *Id.* at ¶ 2. The details of compliance with these requirements were left to the carriers. CMRS providers were partly exempt from the truth-in-billing regulations.[4]

This approach was intended in part to foster competition. What ensued, however, was a proliferation of deceptive practices in telecommunications billing, particularly in the wireless industry that, in turn, became the source of widespread dissatisfaction among its customers. Telecommunications services now have a regular place on the Federal Trade Commission's, ("FTC") top ten list of consumer fraud-related complaints, joining the ranks of work-at-home schemes, foreign money offers, sweepstakes and lotteries.[5]

Attorneys General serve as chief law enforcement officers of their respective states and generally receive and respond to consumer complaints of many industries, including a variety of industries that are also regulated by other state agencies and subject to federal law enforcement and regulation as well. Telecommunications remain a top consumer protection issue for state Attorneys General Offices. For the past five years, the National Association of Attorneys General's ("NAAG") survey of top consumer complaints received in state Attorney General offices shows that telecommunications-

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[3] *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 99-72, 14 FCC Rcd 7492 (rel. May 11, 1999).

[4] In later adjustments to the *Truth-in-Billing Order*, the FCC determined that: (1) bundled services offered by different carriers as a single package may be listed on a telephone bill as a single offering; and (2) carriers are prohibited from including administrative costs in a line item designed to recover the carrier's federal universal service contribution. *See TIB Order 2, supra* note 1, at ¶¶ 6 and 9.

[5] Federal Trade Commission, *FTC Releases Top 100 Consumer Complaint Categories for 2004* (Feb. 1, 2005), *at* http://www.ftc.gov/opa/2005/02/top102005.htm (June 16, 2005).

related complaints have been in the top four of all consumer complaints. The number of telecommunications complaints rank comparably with those complaints related to automobiles, home improvement scams, Internet goods and services, and telemarketing fraud.

Much of the volume of these complaints has been about wireless billing practices and inadequate disclosures to consumers. A sample of these problems and state concerns are described by the Commission in *TIB Order 2*, at ¶ 24 and n. 65-66. A further sampling of states reveals that the complaint numbers on these issues is substantial. For example, in California, the Public Utilities Commission received approximately 130,000 total telecommunications-related complaints between 2000 and 2004 (more than 30,000 such complaints were made in 2004 alone), with CMRS-related complaints growing to nearly a third of that number.[6] In Texas, the Attorney General received more than 2,000 complaints about CMRS providers in 2003 and 2004. In 2004, the Illinois Attorney General received approximately 848 wireless complaints and Oregon received approximately 300 complaints regarding the billing and disclosure practices of wireless carriers. The total number of reported complaints is a sign of much more consumer dissatisfaction since only a small percentage of consumers actually complain to any government agency. [7]

These consumer complaints allow state enforcement authorities to identify emerging patterns of abuse, such as, learning of misleading or even false disclosures to consumers regarding coverage areas. Consumer complaints to states authorities have also triggered enforcement action by Attorneys General and regulators for failures to disclose even estimates of line item surcharges, which often significantly increase the cost of a calling plan for consumers; failures to disclose the existence of line item surcharges altogether; and failures to disclose "automatic" changes in a consumer's calling plan, or to notify consumers that such changes have occurred.[8]

At the heart of much consumer confusion and related complaints is the carriers' practice of incorporating carrier add-on charges as line items to the bills of CMRS consumers to mask the true price of the services that they provide. Often, when the consumer is first introduced to a CMRS carrier's service, through representations in carrier promotion or at the point of sale, that carrier states a monthly price for service but fails to clearly state the additional carrier add-on charges, which the carrier knows it will include in the consumer's monthly bill, and fails to correctly represent those charges as part of the total price. These carrier add-on charges represent efforts by carriers to

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[6] Consumer Affairs Branch, PUC, *Consumer Complaint Statistics* (provided March 10, 2004).

[7] *See* Christopher A. Baker and Kellie K. Kim-Sung, *Understanding Consumer Concerns About the Quality of Wireless Telephone Service*, Policy and Research for Professionals in Aging ¶ 8 (July 2003), *at* http://www.aarp.org/research/utilities/phone/Articles/aresearch-iimport-187-DD89.html; *See also* Arthur Best, WHEN CONSUMERS COMPLAIN 118 (Columbia University Press 1981).

[8] *See* Assurances of Voluntary Compliance between Attys' General of 32 States and Verizon Wireless, Cingular Wireless and Sprint PCS; ¶¶ 24-25 at 9, *In the Matter of Sprint Spectrum, LP*, No. 04C16625, *In the Matter of Cingular Wireless, LLC*, No. 04C16626, *In the Matter of Cellco P'ship, dba Verizon Wireless*, No. 04C16627, Marion County Cir. Ct., Or. (July 21, 2004); Order for Penalties and Restitution in *Investigation on Comm'n's Own Motion into Operations, Practices, and Conduct of Pacific Bell Wireless LLC dba Cingular Wiresless*, Investigation 02-06-003 (Sept. 23, 2004); Stipulated Judgment in *Cal. v. Airtouch Cellular, a Cellco P'ship*, No. 308655, S.F. Superior Ct. (2002); Assurance of Voluntary Compliance and Amended Assurance of Voluntary Compliance *In the Matter of AT&T Corp.*, No. 03C11619, Marion County Cir. Ct., Or. (2004); and Assurance of Voluntary Compliance *In the Matter of Quest Corp.*, No. 02C11205, Marion County Cir. Ct., Or.

recover part of the cost of doing business even while offering consumers a lower "price" for their services.

In addition, the carriers' bills often use misleading terms to describe these carrier add-on charges. Phrases such as "regulatory assessment" imply to consumers that these line item charges are governmental fees which carriers are required to impose upon customers – akin to the line item charges for taxes which customers are accustomed to paying on many goods and services. These phrases are also misleading: a consumer examining a lengthy and fragmented bill is not clearly informed that it is the carrier who has elected to generate additional revenue with carrier add-on charges appearing as line items. The practice of adding on various and frequently variable carrier add-on charges is pervasive in the industry and the end result has been to frustrate the goal of fair competition, because consumers are unable to compare prices for service plans among CMRS providers. Frequently, despite their diligent efforts, it is only when consumers receive their bills that they discover the total price to be paid. The problem is exacerbated by the fact that most carriers require initial contract periods of one, and often, two years and those contracts often impose substantial penalties on consumers for early termination.

The record reflects that strong, specific, enforceable consumer protections are needed to prevent further abuse in the telecommunications industry. Reliance on competition alone as a deterrent against consumer abuse over billing practices is insufficient, as demonstrated by the decade of abuse that followed the deregulation of the long-distance telecommunications industry. Overreaching and abuse in telecommunications generally were so widespread as to spawn new vocabulary, such as "slamming," describing the transfer of one's long distance service to another carrier without one's knowledge or consent, and "cramming," using telecommunications bills to charge for unauthorized products and services. Now, deceptive billing has become another major reason for consumers' distrust of telecommunications carriers.

In response to the particular problem of the proliferation on bills of misleading line item carrier add-on charges, the National Association of State Utility Consumer Advocates, ("NASUCA") filed a petition with the Commission last year, requesting a declaratory ruling by the Commission to clarify that wireline and wireless carriers are prohibited from imposing line-item fees or surcharges on customers' bills unless those charges are expressly mandated or authorized by local, state or federal law. In *TIB Order 2*, the Commission helpfully eliminated its then-standing exemption for CMRS service from certain requirements set forth in *TIB Order 1.* Of grave concern to the States, however, the Commission further determined that "state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are preempted" by federal law.[9] The FCC also "tentatively concludes" in its proposal that it should reverse its prior holding recognizing that states may enact and enforce telecommunications carrier-specific truth-in-billing rules more protective of consumers than federal regulations that are not inconsistent with federal regulation. The Commission, however, noted that its proposed actions were not intended to limit states' ability to enforce their own generally applicable consumer protection laws.[10]

As the chief law enforcement officers for our respective states, with well established track records for acting in the public interest to protect consumers from deception in the telecommunications marketplace, the Attorneys General welcome the Commission's recognition of problems in billing issues, particularly among CMRS

[9] *TIB Order 2, supra* note 1, at ¶ 1.
[10] *TIB Order 2, supra* note 1, at ¶ 2.

carriers which the states have long endeavored to address via legislative action, rule-making proceedings, and court litigation depending on the individual state's legal and regulatory structure.[11] The states especially welcome the Commission's decision to bring wireless carriers within the fold of truth-in-billing regulations.

The Attorneys General, however, strongly urge the Commission to reconsider any approach that would preempt states' efforts to curb abuse in this area. Such a position rejects the historical state-federal partnership that has existed in addressing telecommunications consumer protection concerns and represents a significant departure from that previously taken by the Commission in the context of state preemption – a position that was grounded on sound legal reasoning.

As detailed below, the applicable federal statutes, historical context, legislative history and case law all demonstrate Congress neither intended such preemption, nor authorized the Commission to preempt the states. Instead, Congress made clear its intent to preempt the states only in the narrow area of regulation of rates and market entry of wireless carriers and warned that only if stated expressly was any preemption intended. State enforcement of prohibitions on unfair, deceptive or fraudulent billing practices, whether effected by general consumer protection, contract law, or by regulations or laws that specifically preclude identified practices, do not conflict with Congress' intent. Similarly, when Congress has delineated the lines of authority, as it has here, that delineation supersedes a dormant Commerce clause claim.

## III. While Extending Application of Its Truth-in-Billing Regulations to CMRS Carriers, the Commission Should Protect Consumers and Strengthen Competition

### A. Mis-characterization of Carrier Add-On Charges as Government Charges and Separate from Price Is Unfair and Deceptive to Consumers, Makes Fraud More Difficult to Detect and Prevent, and Ultimately Harms Competition

A primary reason for confusion and frustration among consumers regarding their bills for telecommunications services is easy to identify and should be fixed. Many telecommunications providers have made it a practice to tack carrier add-on charges as line items to their bills for telecommunications services. The carrier add-on charges frequently are made to sound deceptively like taxes or regulatory fees that are required to be collected for a government agency. This practice is inherently confusing and misleading.

It is the nature of business to strive to build into prices, along with some margin for profit, basic items such as fixed and variable costs, overhead, and ordinary and extraordinary expenses incurred in a particular business, including payment of taxes and regulatory fees for which the business and not the customer is directly responsible, and the costs that must be incurred to stay in compliance with whatever federal and state laws may be applicable. Except where there are additional goods or services purchased at the customer's option, additional line items are reasonably understood by customers to be taxes or regulatory fees required to be paid by the consumer through the seller to a

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[11] During the same time period, the "FCC's Truth-in-Billing rules have not been the basis for a single Notice of Apparent Liability" against any telecommunications carrier. *See TIB Order 2, supra* note 1 (Statement of Comm'r Adelstein Approving in Part, Dissenting in Part).

governmental agency. Other costs of doing business are typically not charged to consumers as an add-on to the represented price.

The Commission recognized how the problem in telephone billing – at that time it appeared centered around charges that were made to appear to be federally mandated – can vex consumers and harm competition, stating that:

> Consumers misled into believing that these charges are federally mandated, or that the amounts of the charges are established by law or government action, could decide that such shopping would be futile. . . . Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce. When a consumer purchases socks from the local department store, the consumer knows what item the bill refers to, whether it describes the product as socks, men's wear, hosiery, etc. . . . [A] consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill. If one carrier labels this charge, for example, as "Access Charge," and another uses the term "FCC-Mandated Charge," a consumer will be unable to discern that these labels refer to the same charges.[12]

Substitute for "FCC-Mandated Charge" the various terms that have been used in particular by wireless carriers in recent years as carrier add-on charges on bills. Mix in the myriad ways in which the bills are broken out to provide little clarity to the consumer as to which charges are the carriers' own and which are genuinely required to be collected from consumers and remitted to government. The result has been consumer confusion and a widespread perception that price-comparison is futile.

In *TIB Order 1* the Commission acknowledged the problem and recognized that clarity in billing is essential to the telecommunications marketplace:

> [A] common theme voiced in the consumer complaints we receive is that telephone bills contain insufficient information to enable consumers to determine the nature of the service for which they are being billed. In our view, clear billing descriptions of the services rendered will reduce these problems. Clear and easily understood service descriptions will enable consumers to verify the services they have ordered, thus facilitating the detection of slamming and cramming.[13]

Yet the value the Commission recognized in clear and accurate bills is diminished when carrier add-on charges proliferate on bills. This is so even when somehow an accurate description of the charges can be gleaned in lawyerly fashion from a careful review of the fine print, footnoted explanations, and cross-referenced information contained in the documents available to the consumer. This is particularly important in an industry without tariffs, where price is ultimately constrained and quality enhanced through presumed competition. Taxes in which the business functions as an agent for collecting and remitting money to the government are different, because consumers understand and expect to pay sales taxes and other government mandated regulatory fees, and the method for calculation and amount of these charges is in fact fixed by and can be verified with the agency that required it.

[12] *TIB Order 1, supra* note 3, at ¶ 57.
[13] *TIB Order 1, supra* note 3, at ¶ 39.

Material presented to the Commission, as described in *TIB Order 2*, ¶ 24 and as noted by both dissenters in part, is replete with examples of misleading bill charges that demonstrate a tendency among many telecommunications providers to present bills that fail to make clear what total price is being charged. Even in their own comments to the Commission, many of the carriers themselves describe various charges that are just arbitrarily defined components of their total prices, but that imply to consumers a special obligation or right of the carrier to pass on such additional charges to consumers separately from price, that businesses in ordinary markets would not attempt, or likely would not get away with. The Commission, as quoted earlier from *TIB Order 1*, analogized the carrier add-on charges to the market for socks. Automobile sellers have many industry-specific and government imposed costs that figure into their overhead or diminish their profit as well – such as environmental rules and impact fees, and minimum vehicle component and safety features. While consumers have no right to have any vehicle at a regulated price, they have reasonably come to expect that these ordinary costs will be included in the price they negotiate in a competitive market.

### B. The Commission Should Prohibit Carriers from Imposing Carrier Add-On Charges that Are Not Expressly Mandated or Authorized by Federal, State or Local Government

In order to staunch the dissatisfaction and allow providers and consumers to interact in a free and fair market with less loss to consumer welfare from misleading information, the Attorneys General urge that the Commission reconsider its recent decision and prohibit the breakout of carrier add-on charges in telecommunications bills, other than taxes and regulatory fees. Short of that straightforward prohibition, the Attorneys General support the Commission's proposal that it require that carriers disclose the "full rate" (total to be paid by the consumer) at the point of sale, *TIB Order 2* at ¶ 55, and that carriers clearly separate and accurately distinguish the portion of consumer bills that comprises carrier add-on charges from genuine taxes and regulatory fees. Recommendations for billing practice and point of sale requirements follow in these comments.

### C. Regulations Prohibiting or Requiring Information to Be Provided in a Standard Billing Label Is Constitutional

Telecommunications service providers do not have a First Amendment right to bill consumers in a manner that, however intended, has the effect of obfuscating the total price to be paid by the consumer to the carrier. Assuming that the statement of charges in a bill is a form of speech, it is commercial speech, which has been defined as "... expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). Thus, line items on bills have at most the First Amendment protection given to commercial speech. They remain commercial speech despite even a possible interpretation of some line item carrier add-on charges as a form of protest against the government. *See Bolger v. Youngs Drug Products. Corp.*, 463 U.S. 60, 67-68 (1983) (mailings were commercial speech though they contained discussions of "important public issues").

As stated in *Bolger*, the First Amendment provides "less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Id.*, at. 64-65. Commercial speech is given no First Amendment protection from regulation if it concerns either unlawful activity or is misleading. *Central Hudson*, 447 U.S. at 566. Even commercial speech that would otherwise be protected may be regulated if (1) the government interest is substantial; (2) the regulation directly advances the asserted interest; and (3) the regulation is reasonably tailored to achieve government's legitimate purpose. *Id*.

To the extent that the regulation is aimed at, and effectively achieves, clear delineation between the price charged and taxes or regulatory fees to be collected from customers, the regulation advocated here does nothing more than prohibit misrepresentation in commercial speech, which is not constitutionally protected. *Bolger*, at 65 (content-based restrictions on commercial speech permissible given greater potential for deception or confusion in the context of certain advertising messages).

Though some commercial speech that might not be deceptive would be regulated by clear and accurate labeling requirements, regulation of the presentation of these carrier add-on charges is well within the constitutional parameters described in *Central Hudson*, for the reasons stated by the Commission in *TIB Order 1*. ¶¶ 61-63. Simply put, the government has a substantial interest in "ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

Prohibition of deceptive carrier add-on charges and adoption of label requirements will directly advance these important government interests. By giving consumers a tool – a simple and accurate bill – the Commission will generally lessen confusion among consumers, foster competition by enabling price differentiation and engendering greater trust in the marketplace, and aid in the detection of mistake or fraud. In determining how to advance these important interests, the Commission is not bound to find the least restrictive means, so long as there is a reasonable "fit" between means and ends and the approach is "narrowly tailored." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). In this commercial context, the Supreme Court has found that, to the extent implicated, First Amendment rights are "adequately protected as long as disclosure requirements are reasonably related to the state's interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Following that principle, courts have had little trouble with regulations that require uniform labeling "because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *National Electrical Mfr. Assoc. v. Sorrell*, 272 F.3d 104, 113 (2nd Cir. 2001) (upholding state regulation that required labeling of products containing mercury).

In fact, the proposed billing reform is not only reasonably related, but is narrowly tailored to achieve its goals. Carriers would be constrained from deceptive line-item carrier add-on charges and required to separate out price items from taxes and regulatory fees that must be collected from consumers and remitted to government. They would, however, not be prevented from otherwise representing their views of the nature of and reasons for the charges with consumers by whatever non-deceptive means and manner they wish. This approach is narrowly tailored in a manner similar to that upheld by the Supreme Court in *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (rejecting First Amendment challenge to prohibition of practice of optometry under trade name, finding that law merely required "that commercial information about optometrical services appear in such form . . . necessary to prevent its being deceptive"). As the *Friedman* court recognized, standardizing the way participants in a market communicate to consumers may be necessary to ensure that they are not deceived by ambiguity, and does not violate the First Amendment. The proposed prohibition against deceptive line item carrier add-on charges and the adoption of contemplated labeling requirements in this context is less restrictive and no less reasonable than the approach upheld in *Friedman*.

Finally, as the Commission has noted, contemplated truth-in-billing requirements are analogous to Truth-in-Lending Act regulations, which have not been found to violate First Amendment rights. *TIB Order 1*, ¶ 63. The proposed reform is a necessary and constitutional part of any meaningful truth-in-billing system.

### D. If The Commission Allows Carriers to Present Bills to Consumers with Carrier Add-On Charges, Each Category Included on the Bill Should Be Clearly Defined, Accurately Stated, and Separately Listed

#### 1. Bills Should at Least Separate Non-Mandated Add-On Charges from Taxes and Regulatory Fees Required to Be Collected from Consumers

As detailed above, the States strongly oppose any formal adoption of standard carrier add-on charges as line items for carriers to bill various components of their operating costs. There is no more benefit to consumers from such a breakdown of total price than there would be for carriers to itemize bills with information about profit margins, employee health care costs, shareholder dividends or executive salaries. Such information, when accurate and not misleading, may perhaps be welcome to some and the carriers' right to impart in some other form to all, but detracts from the basic purpose of the bill from the consumers' perspective – providing straightforward information about how much the consumer owes, and the basis of the charges. The further proliferation of carrier add-on charges as line items will confuse most the consumers with the greatest need for clarity.

If, as it has tentatively concluded, the Commission determines to allow discretionary carrier add-on charges, we support the Commission's proposal that it require such line items to be grouped together, but separated from taxes and regulatory fees that are mandated to be collected from consumers and remitted to government, and should be labeled clearly and accurately. The uniform label categories and billing structure might include:

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| (1) Category 1 Charges: | Sales price for monthly services and/or per unit usage; |
| (2) Category 2 Charges: | [Carrier Name] carrier add-on charges; |
| (3) Pre-Tax Charges: | Pre-tax total of [Carrier Name] sales price and carrier add-on charges; |
| (4) Category 3 Charges: | Taxes and regulatory fees; and |
| (5) Total Cost to Consumer: | Total. |

#### 2. Carrier Add-On Charges Should Be Listed under a Heading Clearly Designating Them as the Carrier's Add-On Charges

All charges on consumer bills that are not required by government to be collected from consumers and remitted to a government or quasi-government agency, but are discretionary in nature should be included in Categories 1 or 2 under the labeled framework outlined above, and totaled as the carrier's "Pre-Tax Charges."

#### 3. Payments or Contributions that the Commission Requires Carriers to Make and Which Some Carriers Elect to Pass on to Consumers Should Be Clearly Represented on Bills as Carrier Add-On Charges

With regard to charges or contributions that the Commission determines must be made by carriers and recovered from consumers at the discretion of the carriers, those charges should be considered discretionary carrier add-on charges and not labeled as mandatory regulatory fees on consumer bills. Any descriptions of these carrier add-on charges in consumer bills that directly or indirectly misrepresent to customers that these charges are related to governmental or other third party charges, regulatory fees, or taxes should be prohibited. It is impossible to anticipate how future billing practices may obfuscate seller charges as those determined or imposed by another, but examples of such phrases may include words and phrases such as "cost recovery," "regulatory," "fee" if not defined as the carrier's and related to a service, "surcharge," "access," "portability," or "government." The Attorneys General further urge the Commission to require that the basis for charging and method for calculating any charges listed under "[Carrier Name] carrier add-on charges" be clearly stated, and, as applicable, separated into monthly and "per unit" line items.

#### 4. "Taxes and Regulatory Fees" Should Include Only Those Amounts Required to Be Collected from Consumers and Remitted to the Appropriate Government Entity

The category, "taxes and regulatory fees" should be limited to line items in which the service provider functions as an agent for collecting and remitting the tax or fee to the appropriate governmental entity authorizing collection of the charge from the consumer. If the service provider is not required to collect and remit the money to a governmental entity on behalf of consumers, the service provider should not be allowed to include the line item in this category. This category must be limited strictly to those taxes and regulatory fees, in order to prevent service providers from misleading consumers about the exact amount of money remitted directly to the government from each bill, and in order to allow consumers to compare the actual carrier charges on their bills with those represented at the time of purchase or to compare with competitors' service offerings.

As suggested by the Commission in TIB Order 2, ¶ 41, n. 123, charges required by government to be collected by carriers from consumers but remitted pursuant to law or regulation to a quasi-governmental agency should be included among the "Taxes and regulatory fees " category.

As detailed above, carrier administrative charges to recover the costs of collection and remittance of taxes and regulatory fees, if allowed to be recovered, should not be billed under this category.

If the Commission adopts the view against allowing carrier add-on charges as components of carrier charges, the proposed billing system discussed above could be greatly simplified to something similar to the following: (1) [Carrier Name] Price; (2) Taxes and regulatory fees (money required to be collected from consumers and remitted to government); and (3) Total.

### E. Point of Sale Disclosure Requirements and Any Enforcement Regime Should Complement, Not Displace, Traditional State Regulation and Consumer Protection

The Commission considers, *TIB Order 2*, ¶¶ 55-56, whether to adopt a rule requiring certain disclosures at point of sale, noting that the Attorneys General of 32 states have entered into settlement agreements with three major CMRS carriers requiring such disclosures. With respect to such disclosures, the Commission's articulated goals are "...to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications services" and to have "these obligations apply nationwide to all carriers." Toward these goals, the FCC tentatively concludes that "carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale," and that such disclosures must occur "before the customer signs any contract for the carrier's services." The FCC then asks for specific comments regarding a series of related concerns including (a) whether allowing carriers to provide a "wide range of potential surcharges" at the point of sale could be misleading; (b) whether the settlement agreements establish an appropriate framework for any point of sale disclosure rules that the FCC may adopt; and, if not, how the terms of such should be amended, or why the FCC should refrain from codifying those provisions in the first place; (c) whether the same standards should be applicable to small entities; and (d) what enforcement regime should be permitted regarding point of sale disclosures.

The Attorneys General agree with the Commission's tentative conclusion, *TIB Order 2,* ¶ 56, that it is critical for disclosures to be made regarding material terms of the contract before the consumer signs any contract. The Attorneys General further urge that in any point of sale disclosure requirements that the Commission might adopt, the measures incorporated in the negotiated settlements are worthy of consideration but contend that adopting a one-size-fits-all,-all-the-time,-everywhere approach to point of sale disclosures will, in the end, fall short of consumer protection goals. The settlements by their terms recognized this. For example, the settlements include a list of material terms which the carriers must clearly and conspicuously disclose to purchasers but make it clear that these are the minimum disclosures required and that carriers have an obligation to disclose all material terms and conditions of an offer, whatever those may be. Further, even for the states that participated, the settlements entered into by Attorneys General expressly provided that they would not preclude or trump further state-specific regulation.

In formulating point of sale disclosure requirements, the Attorneys General urge the Commission to consider other federal laws and regulatory schemes that relate to consumer protection and which have incorporated the goal of national uniformity while allowing states to fashion remedies suited to local circumstances and problems. States have extensive practical experience with a dual system of regulation in many areas of consumer protection. In areas such as telemarketing,[14] fair credit billing,[15] equal credit opportunity,[16] privacy of financial information[17] and sub prime lending,[18] Congress has set national minimum standards while permitting states to adopt or utilize additional standards and seek remedies through enforcement approaches not inconsistent with federal law. The FCC should employ this same approach with respect to point of sale disclosures. This is particularly appropriate because these disclosures fall beneath the umbrella of traditional consumer protection matters with which the states have extensive experience in responding to public interest concerns by evaluating practices, rulemaking, conducting investigations and pursuing prosecutions.

The Attorneys General appreciate the Commission's statement that it does not seek to usurp the traditional consumer protection role of the States, but strongly caution that adopting an approach in which there is one set of mandated point of sale disclosures

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[14] Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (2005).

[15] Fair Credit Billing Act, 15 U.S.C. §§ 1601-1602, 1610, 1631-1632, 1637, 1666-1666j (2005).

[16] Equal Credit Opportunity Act, 15 U.S.C. §1691-1691(f) (2005).

[17] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, 15 U.S.C. § 6807(b) (2005).

[18] Home Ownership and Equity Protection Act, 15 U.S.C. §1640(e) (2005).

has the potential to do exactly that. Carriers taken to task by States acting pursuant to their respective consumer protection laws might argue that the federal rules create an absolute safe harbor or might urge a primary jurisdiction argument in the face of such an enforcement effort. Absent a clear indication from the Commission, carriers faced with enforcement actions filed pursuant to state consumer protection laws might seek to remove those cases to federal court arguing federal question jurisdiction. Leaving the door open for violators to make those types of arguments would serve to encourage expensive and protracted litigation which would deter enforcement efforts.

Assuming, as it appears that the Commission has tentatively concluded, that carriers would be required prior to sale to disclose to consumers the full rate actually to be charged throughout any contract period, including any carrier add-on charges, the Attorneys General support the Commission's view on this issue. Government taxes and regulatory fees required to be collected from consumers and remitted to a governmental entity should be fairly disclosed to the consumer by a clear statement of what taxes and regulatory fees are in effect at the time of sale, on whose behalf they are collected, and how they are calculated and assessed. The seller should further disclose to the consumer at the point of sale that such government-mandated charges are subject to change by federal, state, and local government. Given the locale-specific nature of some of these charges to be directly remitted to government, the appropriate range of any estimate to provide to consumers can and should vary from one state to another depending on specific circumstances, and should be subject to consideration from state regulators.

In the event that the Commission is inclined to allow carriers to utilize an estimate for taxes and regulatory fees in these point of sale disclosures, the States urge the Commission to require that the actual charge to the consumer ultimately not be in excess of 10% greater than the estimated surcharge. For example, if the estimated taxes and regulatory fees disclosed are $5.00, the ultimate charge to the consumer for this line item should not exceed $5.50. The States further urge that the Commission require carriers to maintain documentation that will enable carriers to respond to inquiries from regulators regarding prices disclosed in the context of point of sale in comparison to actual billing practices.

Further, the States contend that any requirements regarding point of sale disclosures, which the FCC may adopt should apply to all carriers so that consumers can engage in meaningful comparison shopping among all sellers.

Finally, with respect to enforcement of any rules which the FCC may adopt regarding point of sale disclosures, the Attorneys General appreciate the Commission's implicit recognition of the importance of continuing to partner with states in order to protect consumers and promote fair competition in the telecommunications marketplace. The FCC has previously recognized the wisdom of this approach noting that "joint state-federal activities have been very effective in protecting consumers against various types of telecommunications fraud. It is imperative that the states and the FCC continue to cooperate and expand their interaction..."[19]

Accordingly, the Attorneys General would welcome the opportunity to be able to utilize FCC rules to pursue enforcement actions and urge the Commission to make clear that this enforcement avenue is in addition to all other enforcement remedies available to the States. The Attorneys General further urge that the Commission adopt an

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[19] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Corrected Version, First Order on Reconsideration, FCC 00-135, 15 FCC Rcd 8158 (rel. May 3, 2000).

enforcement model, which allows states necessary flexibility to implement enforcement mechanisms appropriate to individual state resources and structures.

As is the case with the Commission's slamming rules, the enforcement regime should allow states to "opt in" and become the primary forum for administering point of sale disclosure rules and resolving related complaints. With respect to penalties, the States must have authority, as they do with respect to slamming, to adopt their own penalty provisions, which are necessary to provide meaningful consequences for violators and to encourage compliance with adopted standards. Similarly, it is important that states be able to recover costs of investigation and prosecution, including reasonable attorney's fees. This is common among the states with respect to consumer protection laws and critical to their effectiveness.

## IV. Preemption of State Regulation of Carrier Billing Practices Is Contrary to Law and to the Public's Interest in Fostering Fair Competition and Protecting Consumers

### A. The Proposed Preemption of State Regulation Governing Telecommunications Carriers is Contrary to Congress' Intent and Beyond the Commission's Authority

The States are not preempted from regulation and enforcement of billing practices, including those discussed by the Commission in *TIB Order 2*. Federal preemption of state law comes in only three basic varieties: (1) express preemption by Congress; (2) field preemption, when federal law so pervasively regulates an area of law that it occupies the field; and (3) conflict preemption, when the state law at issue actually conflicts with federal law.[20] None are present in this context, and Congress did not give the Commission authority to simply declare the States preempted from regulation and enforcement related to carrier billing practices.

#### 1. The Presumption Weighs Against Preemption, Which Requires a Clear Manifestation of Congressional Intent

The issue that determines whether federal law preempts state law under any variety is the intent of Congress.[21] The preemption doctrine emanates from the constitutional command that federal law is the "supreme law of the land."[22] The Supremacy Clause is so implicated, however, only when Congress intends that result; the intent of Congress "is the ultimate touchstone."[23] "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing states."[24]

The burden in claiming preemption is high; the presumption is against it.[25] Stated another way, the "starting presumption" is that Congress has *not* intended to preempt state law.[26]

[20] *Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev.* Comm'n, 461 U.S. 190, 204 (1983); *See Ting v. AT&T,* 319 F.3d 1126, 1135 (9th Cir. 2003).

[21] *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

[22] U.S. Const. art. VI, cl. 2.; *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

[23] *See id.*; *See also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

[24] *Bethlehem Steel Co. v. N.Y. State Labor Relations Board,* 330 U.S. 767, 780-781 (1947) (Frankfurter, J., opinion).

[25] *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *N.Y. Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

[26] *N.Y. State Conference of Blue Cross & Blue Shield Plans*, *supra* note 25.

The Supreme Court has repeatedly stated that analysis of any preemption claim starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[27] Further, "the regulation of utilities is one of the most important functions traditionally associated with the police power of the states."[28] Similarly, consumer protection is plainly "an area traditionally regulated by the States."[29] Thus, where the states' police powers are challenged, as they are in this proceeding, congressional intent to preempt state law must be "clear and manifest."[30]

The FCC itself cannot preempt state law absent authority from Congress to the Commission to wield that power. In rejecting the Commission's effort to preempt state telecommunications regulation in another context, the Supreme Court plainly declared, "[An] agency may not confer jurisdiction on itself."[31] Courts have held that the best way to determine if Congress intended the regulations of the administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.[32]

In the present context, there is no legal basis for express preemption by Congress, and no basis from which congressional intent to preempt the states from regulating carrier billing practices could be gleaned.

#### 2. Congress and the FCC Envisioned Not Less but More State Involvement in Consumer Protection as Telecommunications Markets Were Opened to Competition

When Congress enacted the Communications Act of 1934, 47 U.S.C.A. § 151 *et seq.*, as amended, ("1934 Act") AT&T held a monopoly in the interstate telephone service market. The 1934 Act came about in an effort to address problems related to the lack of competition by requiring the filing of tariffs to ensure rates offered were just and reasonable and non-discriminatory.[33] Courts recognized that states were not preempted from protecting consumers, so long as they did not attempt to specify rates.[34] To ensure tariff compliance, however, courts developed the filed-rate doctrine. State claims that a person should not be charged the filed rate, for example, because the carrier had misrepresented that a different, lower rate would apply, were often held preempted. The filed rate doctrine came to be seen as unjust to consumers who had been promised rates other than those in the filed rate.[35] In the 1980's and as late as 1994, however, the courts rejected the FCC's attempts to detariff non-dominant carriers, finding it impermissible under the 1934 Act.[36]

The federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), ("1996 Act") adopted the FCC's detariffing goal. The FCC immediately issued a proposed rulemaking and issued a mandatory detariffing order by October 1996. The FCC explained numerous times that one of the major goals of the 1996 Act was to

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[27] *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996).

[28] *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

[29] *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963); *Accord Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990).

[30] *N.Y. State Conference of Blue Cross & Blue Shield Plans*, *supra* note 25, at 655.

[31] *La. Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 374 (1986).

[32] *Id.*

[33] *Ting, supra* note 20, at 1130-1131.

[34] *See, e.g.*, *Kellerman v. MCI Telecomms.Corp.*, 493 N.E.2d 1045 (Ill. 1986).

[35] *Ting*, *supra* note 20, at 1131.

[36] *Ting*, *supra* note 20, at 1131-32.

eliminate the filed rate doctrine and its harmful effects on consumers.[37] The FCC also explained that while the Commission continued to govern the determination of whether rates of interstate service were just and reasonable or unjustly or unreasonably discriminatory, the 1996 Act did not govern other issues that arise in a detariffed environment. It explained, "[C]onsumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime."[38] As the Ninth Circuit explained,

> [W]hen Congress authorized the FCC to eliminate the filing requirement, it chose to replace the rate filing mechanism with a market-based mechanism. Unlike rate filing, this market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace.[39]

Carriers portray the 1996 Act as intended to eliminate regulation. Courts have noted, however, that the 1996 Act "was 'deregulatory' in the intended sense of departing from traditional 'regulatory' ways that coddled monopolies,"[40] and that were "associated with the protective measures taken by the states to perpetuate the incumbent carriers' monopoly over telephone service."[41]

The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Sec. 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332 (c) ("1993 Act") addressed a similar concern. As to wireless telecommunications, until 1993, the 1934 Act had drawn a sharp line preventing the FCC from any involvement in intrastate regulation of wireless carriers. In 1993, Congress gave the Commission jurisdiction over, and precluded states from regulating the narrow area of wireless carriers' rates or market entry, even in intrastate markets.

In both 1993 and in 1996, however, Congress accompanied its grant of authority to the FCC with express savings provisions to ensure states' authority to protect consumers.

### 3. Congress Expressly Preempted Only State Laws Governing Rates or Market Entry; It Declared its Intent that States Protect Consumers

As noted above, in analyzing whether or not federal law expressly preempts state law, the courts "must construe [the federal law] provisions in light of the presumption against the preemption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the federal law provision]."[42] The 1934 Act (as amended by the 1993 Act) contains only a single narrow express preemption provision. Section 332(c)(3)(A) expressly preempts state regulation only of wireless carriers' rates or entry into the market:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile

[37] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, 11 FCC Rcd 20,730, at 55, (rel. Oct. 31, 1996); Order on Reconsideration, FCC 97-293, 12 FCC Rcd 15,014, at 12-13, 80 (rel. Aug. 20, 1997); and Second Order on Reconsideration, FCC 99-47, 14 FCC Rcd 6004, at 17 (rel. Mar. 31, 1999).

[38] Order on Reconsideration, *supra* note 37, at 77.

[39] *Ting*, *supra* note 20, at 1126.

[40] *Verizon Communications, Inc. v. Fed. Communications Comm'n*, 535 U.S. 467, 503 n.20 (2002).

[41] *S. New England Tel. Co. v. Dep't of Pub. Utils.*, 803 A.2d 879, 901 (Conn. 2003).

[42] *Cipollone*, *supra* note 22, at 518.

> service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[43]

The second clause of that provision expressly limits the effect of the first. Absent the first clause, states had full authority to protect consumers from deceptive or other unlawful conduct, including, to fully regulate intrastate wireless service, and the FCC was excluded from intrastate regulation.[44] Consequently, the second clause serves to make clear that states' authority over terms and conditions for wireless services is preserved, other than regulations regarding rates or entry.[45] Through the plain meaning of the words used, Congress made clear its understanding that terms and conditions were the broad terms, and rates and entry the narrow area preempted.

Other provisions in the 1934 Act confirm that the statute's preemptive effect should be narrowly construed and confirm the authority of states to safeguard consumers. Forty-seven U.S.C.A. § 253(a) provides that no state "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Carriers imply or suggest that regulations states might enact to prohibit various unfair or deceptive billing practices could reduce their revenues or increase their costs. But even if such regulations had the greater effect of prohibiting carriers from providing telecommunications services, states would not be preempted from acting to protect consumers because section 253(b) provides:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to . . . ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 601(c) of the 1996 Act makes it even clearer that, while Congress intended to facilitate competition, it intended to supersede state law only where it expressly said so: "This Act…shall not be construed to modify, impair, or supersede…State…law unless explicitly so provided."[46]

Further, the 1934 Act at 47 U.S.C.A. § 414 has long contained a savings clause:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

This language further establishes that congressional intent in adopting the 1934 Act was not to preempt existing law, but, rather, to provide telecommunications consumers with additional remedies.

While in 1996 it intended to facilitate competition, in order to eliminate the unjust and harsh preemptive effect of the filed rate doctrine, Congress also clearly

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[43] 47 U.S.C. § 332(c)(3)(A) (2005).
[44] *See* 47 U.S.C. § 152(b) (2005).
[45] *See supra* note 43.
[46] *See* Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996), *reprinted in* note to 47 U.S.C. § 152; *see also AT&T Communications of the Pac. N.W., Inc. v. City of Eugene*, 35 P.3d 1029, 1050 (Or. Ct. App. 2001) ("section 601(c)(1) of the Federal Telecommunications Act itself cautions against interpreting [section 332] to have implicit preemptive effect.").

intended that consumers would be protected by state laws. As detailed below, there is no actual conflict between federal law and any state regulation.[47]

### a. Billing Practice Regulations Do Not Fall under Section 332's Narrow Express Preemption Provision

The only express preemptive provision at issue is that in 47 U.S.C. § 332(c)(3)(A), set forth above. Importantly, that section applies only to wireless carriers.

Congress' choice of words confirms its intent to preempt state regulation in the narrow areas of rates and market entry. Section 332 of the 1934 Act only denies states' authority "to regulate" rates and entry. When Congress has intended broad preemption, it has used broader language, such as a prohibition on states' enacting or enforcing laws "relating to" rates, as is contained, for example, in the Airline Deregulation Action of 1978, 49 U.S.C. § 1305(a), or the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a).[48] As the Supreme Court has explained, statutes that are "designed to pre-empt state law in . . . a limited fashion" will forbid states "to '*regulate*' rates."[49]

### b. The Legislative History of Section 332 and Judicial Rulings on the Issue Confirm that State Regulation of CMRS is not Preempted

The legislative history, Commission actions and decisions, and judicial interpretations of the 1934 Act's preemptive effect have confirmed that states retain the right to pursue their important interests in exercising police powers over utilities and consumer protection matters, including protection of consumers in the area of billing practices, as well as in other areas that require the adoption or enforcement of state consumer protection regulations.

The legislative history of 47 U.S.C. § 332 supports the conclusion that Congress intended that the states continue to enact and enforce laws and regulations governing the wireless industry's billing practices, among other consumer protection matters:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these [commercial mobile and private land mobile] services. **By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a states *[sic]* lawful authority.** This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under terms and conditions.[50] (Emphasis added.)

Notably, Congress did not limit states to enforcement of consumer protection laws of general application. Congressional intent could not be clearer that states were to retain the authority to "regulate" billing practices, however they chose to do so.

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[47] *TIB Order 2* focuses on issues related to preemption of state rate regulation. The issue of preemption based on entry is not before the FCC in this matter. Even if it were, preemption based on barriers to market entry has been narrowly interpreted and would not form a basis to preempt matters addressed in *TIB Order 2*. *See, e.g., Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999); 47 U.S.C. § 253(b) (2005); and *Spielholz v. Superior Court of Los Angeles County,* 86 Cal. App. 4th 1366, 1380 (2001).

[48] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

[49] *Id.* at 385-386.

[50] H.R. REP. NO.103-111, at 253, 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

In an effort to bring billing matters within the scope of preempted rate regulation – despite Congress' intent to the contrary – carriers have argued that billing regulations have the effect of increasing carriers' costs, which, in turn, leads to higher rates as the carriers pass on those costs to consumers. This broad construction of rate regulation violates the principle that express preemptive provisions should be construed narrowly and, accordingly, the courts routinely have rejected this construction. Rather, the courts repeatedly have held that, to run afoul of section 332, state law or rules must *directly* regulate rates. Rate regulation does not occur when state consumer protection regulations merely produce an "increased obligation" on the wireless carrier that "could theoretically increase rates."[51] "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves."[52]

As the *Phillips* court said, "'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment."[53]

Courts have easily distinguished preempted rate regulation from regulation of billing matters, which is not preempted. In *Fedor v. Cingular Wireless Corp.*, the court held that the type of regulations at issue – of billing practices, specifically delays in billing – was not preempted by the Act. The Court in *Fedor* held that, "[b]ecause the complaint alleges that Fedor's calls were improperly billed, Cingular asserts that it challenges the rates. That overstates the scope of the preemption, and in fact is a position that has been repeatedly rejected by courts and the FCC." The court stated:

> Those [federal] decisions [discussed above] thus reject the argument that any claims related to the billing amounts are automatically preempted under § 332. Instead we must examine whether the claims require the state court to assess reasonableness of the rates charged or impact market entry. The claims in this case do not involve such an examination. Fedor asserts that Cingular agreed to provide him with a certain number of minutes of call-time each month, and that calls within that month that exceeded the allotted time would be subject to an additional fee. Fedor does not challenge the reasonableness of those charges, nor does he ask the court to determine whether the services provided were sufficient to justify the charges. Fedor merely argues that Cingular inappropriately attributed calls made in one month to the call-time for a different month, thus assessing charges that were different from the contract terms. A state court analyzing this claim would need to refer to the rates in assessing damages, but would never examine the reasonableness of those rates. . . . In other words, these claims do not address the rates themselves, but the conduct of Cingular in failing to adhere to those rates.[54]

As in *Fedor*, state regulations that prevent billing contrary to the terms offered govern terms and conditions, not rates, and, therefore, are not preempted. Similarly, courts

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[51] *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp.2d 421, 423 (D. Md. 2000).

[52] *Id.*; *see also Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, at *36 (S.D. Iowa 2004) ("'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business").

[53] *See id.*

[54] *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004).

have held that regulations governing late fees concern contract penalties, not rates, and so are not preempted.[55]

The Ninth Circuit similarly held that the 1934 Act (as amended by the 1996 Act) was designed to prevent explicit rate regulation while protecting states' ability to exercise the important state function of regulation of utilities, through protecting consumers against unfair business practices, compensating consumers for harm, and ensuring fair competition between carriers.[56]

> The [Telecommunications] Act [of 1996] was designed to prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate and protect consumers against unfair business practices such as slamming. *See* Joint Explanatory Statement of the Committee of Conference, Cong. Rec. H1078, H111 (Jan. 31, 1996). **As the Supreme Court has held, 'the regulation of utilities is one of the most important functions traditionally associated with the police power of the states.' . . . Among the important state interests at issue here are the protection of consumers from unfair business practices, the compensation of these consumers for harm, the need to ensure fair competition between . . . licensed carriers.**[57] (Emphasis added.)

Similarly, the court in *Spielholz* noted that allowing for state law remedies for false advertising "is consistent with the 1993 amendments' objective to achieve maximum benefits for consumers and providers through reliance on the competitive marketplace."[58] The carrier characterized the case, in which the plaintiff alleged that carriers falsely advertised a seamless calling area, as a challenge to the reasonableness of its rates.[59] The Court held that there was no express or implied preemption of the plaintiffs' claims by section 332 of the 1934 Act (as amended by the 1993 Act). The Court relied in part on a declaratory ruling issued by the FCC in which the FCC concluded that section 332(c)(3)(A) generally does not preempt an award of monetary relief by state courts based on state tort or contract claims, unless a court "purports to determine the reasonableness of a prior rate or it sets a prospective charge for services."[60] The court explained that the term "rates" generally means "direct price controls."[61] The court concluded that "[a] judicial act constitutes rate regulation only if its principle purpose and direct effect are to control rates."[62] State regulation of billing practices does not set direct price controls for wireless service and, therefore, would not be preempted under the 1934 Act.

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[55] *See Brown, supra* note 51 ("While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment."); *Ball v. GTE Mobilnet of Cal.*, 81 Cal. App. 4th 529, 538-39 (2000) (late fees not analogous to the types of practices that courts have concluded are part of a carrier's "rate structure," such as charging for whole-minute increments, ("rounding up") or charging for incoming calls).

[56] *See Communications Telesystems Int'l., supra* note 47, at 1017 (some internal citations omitted) (emphasis added) (alleged violation of state specific regulations involving slamming); *Ark. Elec. Coop. Corp., supra* note 28, at 377.

[57] *Communications Telesystems Int'l, supra* note 47(quoting *Ark. Elec. Coop. Corp., supra* note 28).

[58] *Spielholz, supra* note 47, at 1376 (concerning allegations that defendants falsely advertised a seamless calling area, when in fact defendants' calling area contained gaps where plaintiffs were unable to connect calls).

[59] *See Spielholz, supra* note 47, at 1370.

[60] *In the Matter of Wireless Consumers Alliance, Inc.*, WT Docket No. 99-263, Memorandum Opinion and Order, FCC 00-292 at 38-39 (rel. Aug. 14, 2000).

[61] *See Spielholz, supra* note 47, at 1373.

[62] *Spielholz, supra* note 47, at 1374.

Finally, the courts in *Esquivel v. S.W. Bell Mobile Systems* and *State of Iowa v. U.S. Cellular Corp.* have also interpreted state regulations of cellular providers and found them not to be rates, but a term or condition, subject to state regulation.[63] These decisions did not turn on whether the case involved regulations that specifically prohibited particular conduct or consumer protection laws that applied to businesses in general. Thus, the proposal to define "other terms and conditions" as excluding regulations on billing practices and including only contract and consumer laws of general applicability, has no basis in the law.

Likewise, truth-in-billing type regulations do not regulate the amount carriers can charge. The states have ample grounds to impose billing requirements. These comments, examples detailed by NASUCA in its submissions in support of its petition, and the record detailed in *TIB Order 2* confirm the need for such requirements to protect consumers from abusive and improper practices engaged in by both wireline and wireless carriers.

#### c. In the Past, FCC Has Properly Interpreted Federal Statutes as Preserving States' Rights to Regulate Billing Practices and Other Consumer Protection Matters

The FCC has previously reiterated the broad scope of "terms and conditions" and the narrow scope of rate regulation in the context of telecommunications preemption. After the 1993 Act became effective, the California Public Utilities Commission, ("CPUC") petitioned the FCC for authority to continue to regulate wireless rates. The FCC denied this request, but in doing so, it acknowledged the CPUC's continuing jurisdiction over "other terms and conditions" of wireless service. The Commission stated that it expected the CPUC would continue to hear complaints and to monitor the structure, conduct, and performance of CMRS providers.[64]

In *In Re Wireless Consumers Alliance*, the Commission rejected CMRS carriers' arguments that non-disclosure and consumer fraud claims were disguised attacks on the reasonableness of the rate charged for service.[65] Carriers' reliance on this case to support a preemption argument is misplaced.[66] To the contrary, the Commission expressed strong support for states' rights to regulate all matters that do not constitute direct rate regulation or barriers to market entry:

> [W]e reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for service. A carrier may charge whatever price it wishes and provide the level of service it wishes, **as long as it does not misrepresent either the price or the quality of service**.[67] (Emphasis added.)

The Commission recognized that:

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[63] *Esquivel v. S.W. Bell Mobile Systems, Inc.*, 920 F.Supp. 713 (S.D. Tex. 1996); *State of Iowa v. U.S. Cellular Corp.*, 2000 WL 33915909 (S.D. Iowa Aug. 7, 2000); *see also Moriconi v. AT&T Wireless, PCS, LLC,* 280 F.Supp.2d 867, 874 (E.D. Ark. 2003).

[64] *TIB Order 2, supra* note 1, at 16 (denying CPUC's petition to continue to regulate CMRS rates, May 19, 1995).

[65] *In the Matter of Wireless Consumers Alliance Inc., supra* note 60, at 25.

[66] *See TIB Order 2*, *supra* note 1, Comments of Nextel Communications, Inc. and Nextel Partners, Inc., at 6, CG Docket No. 04-208 (July 14, 2004).

[67] *In the Matter of Wireless Consumers Alliance Inc., supra* note 60, at 27.

> [T]he legislative history of section 332 clarifies that billing information, practices and disputes all of which might be regulated by state contract or consumer fraud laws falls within "other terms and conditions" which states are allowed to regulate.[68]

These decisions and ruling by the Commission further confirm that preemption of State regulations relating to billing practices is improper. Similarly, in *Southwestern Bell*, the FCC held that state law claims stemming from state contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted under section 332.[69]

The FCC now suggests it may reinterpret section 332 to broaden the meaning of rate regulation and narrow the scope of "terms and conditions." The FCC may, however, only act as empowered by Congress. Congress' limited intent is clear; the Commission does not have the authority to reinterpret the statute itself.

#### 4. There Is No Field Preemption If the Federal Law Scheme Fails to Occupy the Entire Field; the Commission Cannot Declare it Occupies a Field of Law in Which Congress Expressly Preserved State Authority

State law may be preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."[70] Courts do not find field preemption "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[71] Congress will be considered to have preempted a field only when the regulatory scheme clearly and manifestly is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[72]

As the Supreme Court has explained, the comprehensiveness or detail of the federal regulatory scheme, however, does not demonstrate that Congress intended to occupy the field:

> We reject, to begin with, the contention that preemption is to be inferred merely from the comprehensive character of the federal [statutory scheme]. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.[73]

Moreover, the dominant federal interest justifying field preemption must be of a type that admits no reasonable degree of state involvement. In *Hillsborough Cy., Fla. v. Automated Med. Labs. Inc.*, for example, the Court rejected the notion that the federal

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[68] *In the Matter of Wireless Consumers Alliance Inc., supra* note 60, at 14 (internal citations omitted).

[69] *In the Matter of Southwestern Bell, Inc.*, Memorandum Opinion and Order at 6 and 23, FCC 99-356 (rel. Nov. 24, 1999) (states "can never regulate rates and entry requirements for CMRS providers; are free to regulate all other terms and conditions for CMRS providers"); *see also Fedor, supra* note 54, at 1073 (relying upon and referring to the Southwestern Bell decision).

[70] *English, supra* note 23,at 79.

[71] *Fla. Lime & Avocado Growers, Inc., supra* note 29, at 142.

[72] *Fidelity Fed.. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[73] *N.Y. Dep't of Soc. Servs. v. Dublino, supra* note 25, at 415.

interest in blood plasma was so dominant as to exclude state oversight. As the Court recognized,

> Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive.[74]

In addition, "[d]etailed regulation of a wide range of problems will not serve to preempt state law if the Court determines that the state law has its effect in an area outside the thrust of the federal enactment."[75]

The carriers have not argued that the FCC has occupied the field through implementation of comprehensive regulations. Rather, the carriers have asked the FCC to declare, and the Commission is considering declaring, that its truth-in-billing regulations occupy the field.[76] Such an express declaration of field preemption is inconsistent with the intent of Congress to preserve the states' historic and central role in protecting consumers, as discussed in detail above. It is also an improper usurpation of the courts' function to determine preemption, and would be unlikely to withstand a judicial challenge.

It is the courts' and not an agency's function to determine the legal issue of field preemption. Consequently, courts routinely reject the attempts of agencies to usurp their authority in this manner. In *Colorado PUC v. Harmon*,[77] for example, the court refused to defer to an agency's interpretation that the statute it administered preempts state law. In that case, the court held that a preemption determination involves an issue of law: "an area more within the expertise of the courts than within the expertise of the Secretary of Transportation…. Therefore…we independently review the legal issue of preemption."[78] Similarly, in *Davis v. Travelers Property and Casualty Co.*,[79] the court refused to defer to an agency's view that field and conflict preemption barred the plaintiff's state law claims under the statute it administered:

> First defendants have not pointed to any controlling authority that directs the Court to defer to an agency's view that the statute it administers implicitly preempts state law. Second, the Supreme Court has assumed, without deciding, that the question of whether a statute is preemptive 'must always be decided *de novo* by the courts.' The court follows that suggestion here and reviews the preemption issue *de novo*.[80]

The carriers suggest that congressional intent to preempt state law, or conversely to preserve state law from preemption, is virtually irrelevant, and that agencies are thus free to preempt state law as they see fit.[81] The cases on which the carriers rely do not support their argument. For example, in the *City of New York v. FCC,* where it was

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[74] 471 U.S. 707, 719 (1985).

[75] *Siegel v. Am. Sav. & Loan Ass'n*, 210 Cal. App.3d 953, 963 (1989).

[76] *TIB Order 2, supra* note 1, at ¶ 51.

[77] *Colorado PUC v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991).

[78] *Id.*

[79] *Davis v. Travelers Prop. & Cas. Co.*, 96 F.Supp.2d 995 (N.D. Cal. 2000).

[80] *Id.* at 1000 (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996). *See also Grunbeck v. Dime Sav. Bank of N.Y.*, 74 F.3d 331, 342 (1st Cir. 1996) (rejecting conclusions of Bank Board and OTS opinion letters concerning preemption).

[81] *Supra* note 66, at 12.

found that the FCC properly preempted local and state regulations of cable television technical standards, the Court held that the Cable Act had been enacted against a background of federal preemption on the issue for the prior 10 years.[82] In this matter, however, the legislative history and statute itself – as interpreted both by the courts and the FCC – make it clear that Congress specifically intended to allow states to regulate "other terms and conditions" and that it intended for that phrase to be construed broadly. Indeed, none of the cases the carriers offer to suggest the FCC could declare field preemption involved FCC actions after the enactment of the 1996 Act. The 1996 Act, as discussed above, contained several provisions expressly preserving the application of state law and severely limiting the Commission's ability to preempt. When Congress wanted to preempt the state regulations in the 1993 Act, it did so with clear language.[83] Moreover, Congress stated its intent that there is no preemption under the 1996 Act, unless expressly so stated.[84] When Congress intended to reserve issues for the states to regulate, such as other terms and conditions which were defined to include billing-related matters, the statute also made that clear. The FCC cannot promulgate a regulation that contravenes the express intent of Congress.

The Commission should decline the carriers' invitation to issue an order that improperly attempts to preempt state law enforcement agencies from continuing to adopt and to enforce consumer protection laws that protect their citizens.

#### 5. There Is No Basis for Conflict Preemption, Which Must Be Narrowly Construed and Should Not Be Inferred

The existence and extent of conflict preemption is narrowly construed to preserve state law where possible. State law is preempted to the extent that it actually conflicts with federal law.[85] Conflict preemption exists when it is impossible to comply with the requirements of both state and federal law, or when state law will "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[86] In determining whether a state law conflicts with federal statutes or regulations, the federal-state conflict must be actual and unavoidable, and not merely possible.[87] Also, the conflict must be "of substance and not merely trivial or insubstantial."[88] Even if there is a conflict, state law is preempted only to the extent of that conflict and no further.[89]

In determining whether state law has been preempted, "[s]tate and federal laws should be accommodated and harmonized where possible so that preemption can be avoided."[90]

#### 6. There Is No Conflict Between a Uniform Federal Scheme and State Regulation and Enforcement to Protect Consumers

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[82] *City of N.Y. v. Fed.. Communications Comm'n*, 486 U.S. 57, 66-68 (1988) (the court found that there was nothing in the Cable Act or legislative history which led the court to believe that the FCC decision to preempt local technical standards is not one that Congress would have sanctioned).

[83] The 1993 Act makes it clear that state rate regulation is preempted.

[84] *See* Telecommunications Act of 1996, *supra* note 46.

[85] *Fla. Lime & Avocado Growers, Inc., supra* note 29, at 142-143.

[86] *Id*. at 141.

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

[88] *N.Y. Dep't of Soc. Servs. v. Dublino, supra* note 25, at 423 n. 29.

[89] *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996).

[90] *Cal. ARCO Distribs., Inc. v. Atlantic Richfield Co.*, 158 Cal. App.3d 349, 359 (1984).

In the absence of specific statutes or regulations, conflict preemption analysis is virtually impossible.[91] Carriers do not seek a determination that particular state laws are preempted.[92] Rather, they argue that any state laws or regulations, of whatever nature, if related to billing practices, conflict with FCC regulations. Such an abstract argument is, at best, premature.

The carriers argue that Congress has expressed a preference for an unregulated competitive market that is inconsistent with state consumer protection regulation.[93] This is incorrect. Traditionally, utilities operated as monopolies and were subject to specific regulations. In the absence of utilities-style regulation, state consumer protection regulations have played an important role in fostering competition by ensuring fairness in the marketplace. The federal scheme thus contemplates a dual system of regulation. The 1934 Act maintained the dual regulatory framework in section 332(c), and reinforced the states' important role in protecting consumers and ensuring reasonable terms and conditions of all telecommunications services, including wireless.[94] In enacting the 1996 Act, Congress confirmed that the federal statutory provisions fostering competition "depend[ed] in part on state law for the protection of consumers in the deregulated and competitive marketplace" and that state "consumer protection laws . . . form part of the competitive framework to which the FCC defers."[95] As the Ninth Circuit has held, "we find no reason to imply a conflict between otherwise complimentary state and federal laws. In deregulated markets, compliance with state law is the norm rather than the exception. Congress recognized as much in authorizing forbearance authority and in emphasizing competition in the 1996 Act."[96] Moreover, in interpreting section 332(c)(3), the FCC expressed its understanding that market forces and state regulation can coexist.[97]

The pro-competitive federal scheme, therefore, is entirely consistent with – and indeed depends on – state consumer protection regulations that foster fairness in the

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[91] *Time Warner Entm't Co. v. Fed. Communications Comm'n,* 56 F.3d 151, 195 (D.C. Cir. 1995). ("[W]hether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract.") (citation omitted); *accord Ting , supra* note 20, at 1137.

[92] *TIB Order 2,* ¶ 54 mentions one or two state statutes, but does not suggest how they might conflict with any FCC rule. Far from being part of a welter of regulation currently sweeping the country, as the carriers suggest, the California statute aimed at preventing cramming of non-telecommunications products, for example, has been in effect for almost five years. CAL. PUB. UTIL. CODE § 2890 (West 2005), as amended. The rule promulgated to enforce the statute also has been in effect for more than four years. (*See Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Cal. PUC, Rulemaking 00-02-004 (filed Feb. 3, 2000). Neither has ever been challenged by carriers. Because the use of a telephone bill for billing for other purchases is analogous to the use of a credit card, the California rule tracks certain requirements under the federal Truth-in-Lending Act to prevent fraud. In effect, it prohibits conduct that would be unfair or deceptive. For example, it requires that carriers obtain authorization from customers before placing charges for non-telecommunications products on bills; it requires authorization for purchase of the non-telecommunications product; to ensure telephone numbers are not used by identity thieves, it requires carriers to provide some means of safe identification (such as a pin number) to authorize purchases to be placed on phone bills; and it establishes a method for resolving disputes about unauthorized charges.

[93] *See*, *e.g.,* Comments of Nextel Communications, Inc. and Nextel Partners, Inc., *supra* note 66, Brief at 16-17.

[94] *See generally* H.R. REP. NO. 103-111, at 260-61 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587-88 (discussing § 332(c)(3)(A)).

[95] *Ting*, *supra* note 20, at 1141, 1145.

[96] *Ting*, *supra* note 20, at 1142.

[97] *In the Matter of Petition of Ohio for Authority to Continue To Regulate Commercial Mobile Radio Servs.*, PR Docket No. 94-109, Report and Order, FCC 95-193, at 9, 44 (rel. May 19, 1995). Courts agree. *See GTE Mobilnet of Ohio v. Johnson,* 1997 FED App. 0137P 469, 480 (6th Cir.); *Cellular Telecom. Indus. Ass'n v. Fed. Communications Comm'n,* 168 F.3d 1332, 1335 (D.C. Cir. 1999).

marketplace. Because the federal scheme is in harmony with state laws, including those regulating billing practices, state law should not be nullified by the doctrine of conflict preemption.

#### 7. State Regulations Are Not Preempted under 47 U.S.C. §§ 201(b) or 202(a)

The FCC has also sought comment on whether state regulations of billing practices are preempted by 47 U.S.C. §§ 201(b) or 202(a) in response to an assertion made by one carrier that those sections expressly preempt state regulations of billing practices.[98] These sections decidedly do not preempt state regulations of billing practices. Sections 201(b) and 202(a) do not contain any preemptive statements, but, respectively, set forth the requirement that rates be just and reasonable, and that carriers not establish discriminatory rates or give preferences to any class of customers.

Because states' regulation of billing practices does not address the reasonableness of rates, or carrier discriminatory or preferential rate practices, and because the language of these sections in no way demonstrates any intent to expressly preempt state regulation, 47 U.S.C. §§ 201(b) and 202(a) have no preemptive effect. In fact, courts have specifically rejected arguments that sections 201 and 202 preempt state regulation over billing practices.

For example, the Ninth Circuit has rejected the argument that Congress intended section 201(b) to create national uniformity in the telecommunications industry and so intended to preempt states' consumer protection laws. In *Ting*,[99] the court labeled as "unpersuasive" the carrier's arguments that the "purpose of sections 201(b) and 202(a) is to ensure national uniformity of carrier rates, terms and conditions, that Congress' chosen method of effectuating this purpose is through unilateral policing by the FCC."[100] Courts have held that state consumer protection statutes, as well as state law contract provisions, did not conflict with Congressional intent in enacting sections 201(b) and 202(a) and so are not preempted:

> Because we do not believe that state contract and consumer protection laws obstruct Congress' 'chosen means' for effectuating the purposes of section 201(b) and 202(a) in a detariffed environment, we respectfully disagree with the *Boomer* court's conclusion. Examining 'the provisions of the whole law and . . . its objects and policy . . . we reject AT&T's argument as contrary to both the text and the structure of the 1934 Act and the clear intent of Congress in enacting the 1996 Act.[101]

The same is true here. Arguments that state regulations of billing practices are preempted rely upon the same flawed reading of these sections that was rejected in *Ting* and are offered without any basis or legal authority.

### B. Even if It Could, the Commission Proposal to Partially Immunize an Industry from States' Ordinary Exercise of Police Power Fails to Serve the Public Interest in Fostering Fair Competition and Protecting Consumers

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[98] *TIB Order 2, supra* note 1, Comments of Leap Wireless Int'l, Inc., at 50, CC Docket 98-170 (July 14, 2004).
[99] *Ting*, *supra* note 20, at 1126, 1138-1139.
[100] *Ting*, *supra* note 20, at 1135, 1137-8.
[101] *Ting*, *supra* note 20, at 1135 (internal citations omitted).

As detailed above, and in the record before the Commission in connection with the NASUCA petition, consumers of telecommunications goods and services are no less likely to need protection from unfairness and deception in the marketplace than consumers of any other goods and services. Telecommunications carriers are as likely as other sellers of goods and services to sometimes act in the marketplace in ways that warrant consumer protection enforcement, and state- and industry-specific regulation, particularly in markets without tariff requirements

States in the federal system are charged with a responsibility to respond to that need and exercise the powers ordinarily reserved to them as befits local circumstances. In doing so, states play a vital role in protecting consumers. The Commission should not be taking steps, even if it had the authority, to diminish the protection and help that states can and traditionally have given consumers. Carriers have long sought, and have largely received, freedom from pervasive regulation by the Commission. At the same time, carriers urge the Commission to provide them immunity from traditional state powers that govern other similarly situated industries. They are asking the Commission for federally-mandated protection as if they still filed rates, without the obligation to file them. Telecommunications carriers, therefore, have neither earned such a special immunity, nor do they need it to compete fairly and aggressively in the marketplace.

Congress recognized the current regulatory framework and purposefully adopted a telecommunications policy-making and enforcement regime in which the states play no role in setting rates and guarding entry for carriers of interstate telecommunications, and CMRS, but which leaves the States with an important role to play in protecting telecommunications consumers.

That congressional policy, which need not interfere with the Commission's role, can tangibly benefit consumers.[102] The Commission can help with additional standards that protect consumers, but it has been given neither a mandate to supplant the States' role, nor the resources to step into the ensuing breach. State laws, regulations and enforcement should continue to help to see that consumers are served with adequate information and basic protections that enable consumers in a free marketplace to make informed choices that ultimately drive competition by rewarding real innovation and efficiency.

### C. The Commission Should Not Attempt to Eliminate, Modify, or Narrow What Constitutes Consistent Regulation under 47 CFR Section 64.2400(c)

To carry out its preemptive purpose, the Commission suggests the possibility of eliminating, modifying or narrowing 47 CFR section 64.2400(c). Section 64.2400(c) makes clear that the Truth-in-Billing Rules are not intended to preempt consistent truth-in-billing requirements that are adopted or enforced by the states. This section should remain intact and should not be modified. It is not for the Commission to attempt to preempt state regulations by simply narrowly defining what constitutes a "conflict," contrary to how that term has been interpreted by courts engaging in preemption analysis. Any such attempts would be disingenuous efforts to circumvent Congress' intent and states' Tenth Amendment rights. This action would improperly attempt to prohibit states from exercising their police powers to protect their citizens regarding matters that Congress has specifically left to the discretion of the states. States are

[102] *See, e.g.,* Cal. Assembly Bill 1068 (proposed legislation introduced on Feb. 22, 2005); *see also,* Interim Decision Issuing General Order 168, Rules Governing Telecommunications Consumer Protection, Cal. PUC Decision 04-05-057, D0405057 (adopted May 27, 2004) (although these rules have currently been stayed following the end of the terms of the Commissioners involved in initially adopting the rules, the rules provided important consumer protections and may be reinstated).

equipped to handle the ever increasing numbers of consumer problems with carriers and they should not be foreclosed from doing so. Any contrary order by the FCC would be improper and harmful to consumers.

## V. Truth-in-Billing Type Issues Are not Barred by the Commerce Clause

The federal Commerce Clause[103] presents no obstacle to the States' establishing guidelines for the carriers' billing practices. Where, as here, Congress has expressly permitted the States to perform certain functions, the "dormant" aspect of the Commerce Clause does not add an additional hurdle that must be cleared.[104] Furthermore, even if the Commerce Clause were applicable, it would not mandate interference with the dual system of federal and state regulation that defines "our federalism"[105] and that has for more than a century governed the oversight even of new communications technologies.

### A. Where Congress Has Expressly Permitted State Regulation, the Dormant Commerce Clause Presents No Obstacle

Because Congress has expressly provided that States may regulate carriers' practices other than market-entry and rates, the Commerce Clause poses no barrier to the States' efforts to assure accuracy and clarity in the carriers' billing procedures. In its "dormant" or "negative" aspect, the Commerce Clause denies the States, in some circumstances, the power to take "certain actions respecting interstate commerce even absent congressional action."[106] However, where Congress has expressly granted to the States the authority to regulate, the Commerce Clause inquiry is moot.

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce."[107] That is, Congress has the power under the Commerce Clause to allow States to regulate even if – contrary to the present situation – the states' ability to require truth-in-billing and related practices would otherwise violate the Commerce Clause. Here, Congress has not once but several times clearly stated that the states may proceed. Thus, "[h]ere the commerce power of Congress is not dormant, but has been exercised by that body. . . . When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[108]

As set forth above, Congress has expressly provided that states may regulate matters other than the "entry of or the rates charged by"[109] a carrier, including

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[103] U.S. CONST., art. I, § 8, cl. 3.

[104] "The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983).

[105] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

[106] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

[107] *White*, *supra* note 104, at 213; *see also S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945). *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("[W]e only engage in this review when Congress has not acted or purported to act . . . Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422 (1946).

[108] *N.E. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve*, 472 U.S. 159, 174 (1985).

[109] 47 U.S.C. § 332(c)(3)(A) (2005).

particularly to "safeguard the rights of consumers."[110] The record confirms that this grant of authority extends particularly to "customer billing information and practices."[111]

In sum, because Congress has approved the states' participation in regulating billing practice, there remain no grounds under the dormant Commerce Clause to challenge that participation.

### B. The Dormant Commerce Clause Poses No Bar to Shared Federal and State Regulation of Billing Practices

The record of governmental regulation of new communications technologies in this country reveals that a dual federal-state system has long been the norm. There is no cause here to disturb that well-established history.

The carriers have urged[112] that the necessity of a "seamless, national"[113] legal environment for nascent communications technology is somehow embodied in the Commerce Clause itself. Whatever the merits of such seamlessness as a practical matter, it is decidedly not required by the dormant Commerce Clause. To the contrary, the States have historically and consistently played a role in the regulation of emerging communications technologies whose purveyors resisted local regulation for their uniquely "national" products.[114]

There is nothing novel about the carriers' complaints concerning the states' supposed inability to regulate new technologies and the resulting loss of "efficiencies and economies of scale."[115] More than a century ago, litigants urged that communication by telegraph and (landline) telephone was beyond the power of states to regulate, much as the carriers here argue with respect to wireless communications. Although the telegraph and telephone companies' contentions met with some initial success,[116] ultimately the Supreme Court pointedly rejected the argument of exclusive federal control and determined that these businesses, like other industries, were properly subject to the dual federal-state system of regulation that informs the American system: "[I]s [the telegraph] of such a nature, so extensive and national in character, that it could only be dealt with by congress? We do not think [so]."[117] And so it is with wireless telephony as well.

The carriers' invocation of the Commerce Clause to bar dual regulation of wireless communications therefore reprises an argument that has been considered, and rejected, by American courts for over a century. With respect to landline communications, it is an argument that the carriers' own predecessors made, and lost,

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110 47 U.S.C. § 253(b) (2005).

111 PROVIDING FOR RECONCILIATION PURSUANT TO SECTION 7 OF THE CONCURRENT RESOLUTION ON BUDGET FOR FISCAL YEAR 1994, H.R. REP. NO. 103-111, at 253 (1993). *See N.E. Bancorp, supra* note 108, at 169-71 (examining legislative history); *BellSouth Telecomms., Inc. v. Mobile*, 171 F.Supp.2d 1261, 1279-80 (S.D.Ala. 2001) (telecommunications context).

112 *See* Comments of Nextel Communications, Inc. and T-Mobile, at 15, CC Docket 98-170 (Dec. 13, 2004); Comments of Verizon Wireless, at 4, CC Docket 98-170 (Jan. 25, 2005).

113 Comments of Nextel Communications, Inc. and T-Mobile, *supra* note 112, at 14.

114 *See* James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND L. REV. 1095, 1117 (1999).

115 Comments of Nextel Communications, Inc. and T-Mobile, *supra* note 112, at 3 ; *see also* Comments of Nextel Communications, Inc. and T-Mobile, *supra* note 112, at 14 ("economies of scale and scope").

116 *See, e.g., Tel. Co. v. Texas*, 105 U.S. 460, 464 (1881); *Western Union Tel. Co. v. Pendleton,* 122 U.S. 347, 356-57 (1887).

117 *Western Union Tel. Co. v. James*, 162 U.S. 650, 660 (1896); *see also Western Union Tel. Co. v. Commercial Milling Co.*, 218 U.S. 406, 421 (1910).

long ago; landline companies have long been subject, without apparent dire effect, to the regulatory regimes of multiple jurisdictions.[118] The same is true, of course, of telemarketing and mail order houses—despite the national, even international, scope of telephone and postal service.[119] And it is increasingly true even of businesses operating over the Internet.[120]

Accordingly, a violation of the dormant Commerce Clause—were that provision applicable here in the first place—would require in this instance no less than it does in any other circumstance: that the alleged burden on interstate commerce be "clearly excessive" compared to the putative local benefit—*i.e.,* the protection of telecommunications consumers.[121] Given that the carriers' challenge here to the States' ability to regulate is a global—*i.e.*, a facial—one, their argument can prevail only if they have established that *under no circumstances* could a state law or regulation relating to local billing practices provide a level of consumer protection that outweighed the burden it placed on interstate commerce.[122] This is a contention so extreme that even the carriers do not advance it.[123]

In sum, even if the Commerce Clause were applicable in this context, it would provide no barrier to the continuation of the long-established tradition of shared federal and state oversight of the telecommunications industry.

We thank you for the opportunity to provide our views concerning this matter. If you have questions about our comments, please do not hesitate to contact Margaret Reiter, California Supervising Deputy Attorney General, at (415) 703-5504 or D. Esther Chavez, Texas Assistant Attorney General, at (512) 475-4628.

Respectfully,

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[118] "It never could have been intended by the congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered...." (*City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 102 (1893) (quoting *Western Union Tel. Co. v. Commonwealth of Massachusetts*, 125 U.S. 530, 548 (1888).)

[119] *See State of Washington v. Heckel*, 24 P.3d 404, 412 n.17 (Wash. 2001); *see also CTS Corp. v. Dynamics Corp. of Am., supra* note 106, at 89 (corporate takeovers).

[120] *See, e.g., Ferguson v. Friendfinders, Inc.*, 94 Cal. App.4th 1255, 1268 (2002); *Heckel, supra* note 119, at 412.

[121] *See C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

[122] *See S.D. Myers, Inc. v. City and County of San Francisco,* 253 F.3d 461, 468-69 (9th Cir. 2001).

[123] *See, e.g.*, *Comments of Nextel Communications, Inc. and T-Mobile*, *supra* note 112, at 15 ("A sound argument can be advanced that the dormant Commerce Clause is violated by *some of the more extreme versions* of state regulation of wireless services." (emphasis added).