BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

INITIAL COMMENTS OF

AARP

ASIAN LAW CAUCUS

CONSUMERS UNION

DISABILITY RIGHTS ADVOCATES

NATIONAL ASSOCIATION OF STATE PIRGS

NATIONAL CONSUMER LAW CENTER

I. Introduction

On March 18, 2005, the Federal Communications Commission ("Commission") released its Second Further Notice of Proposed Rulemaking ("Second FNPRM") in the Truth-in-Billing ("TIB") proceeding. AARP, Asian Law Caucus, Consumers Union, Disability Rights Advocates, National Consumer Law Center, National Association of State PIRGs (collectively the "Consumer Groups"), respectfully submit these initial comments in this proceeding.

With over 182 million wireless subscribers today, the total number of wireless subscribers now actually *exceeds* the total number of wireline subscribers. The problems confronting consumers have increased exponentially; as the number of subscribers grows, so do the number of consumer complaints.

According to the Council of Better Business Bureaus, customers filed 28,000 complaints about cell phones in 2004 — more than for new car dealers, credit card companies, collection agencies or any other industry. Billing problems figured in nearly two of every three complaints registered with the Better Business Bureaus in 2003. Other common concerns about carriers: repeated failures to fix reported problems, inconsistent advice and miscommunication.

Just last month, USA Today reported that consumer frustration with wireless billing practices and customer services has reached record levels. "The chronic problems for cell phone customers are service and billing," says David Heim, deputy editor of *Consumer*

Reports, whose subscriber survey published in February found that just 45 percent of respondents were "completely" or "very" satisfied with their service. That ranked the cell phone industry below homeowners' insurance (77%), hotels (67%), supermarkets (67%) "and most other services we measure," the magazine said.

One of the major factors contributing to consumers' frustration with their cell phone service is the ubiquitous use of deceptive, misleading, or confusing line-item charges on monthly bills. As a result of these charges, many consumers do not discover the full cost of their cell phone service until they receive their monthly bills. Regrettably, they are likely to find that the actual cost of service far exceeds the advertised price of service. In this regard, TracFone Wireless found that an average wireless consumer spends $17.75 per month above the advertised price of the consumer's monthly plan and that most of this amount is attributable to line-item charges.[1]

Consumers who are dissatisfied with this practice generally have very few options. The current wireless carrier practice of committing most consumers to two-year contracts prevents a resolution to these billing practices in the marketplace: consumers simply have no practical option to switch from one carrier to another if they are confused or misled.

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[1] Reply Comments of TracFone Wireless, Inc., *In the Matter of National Association for State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing and Billing Format* (CG Docket No. 04-208), dated August 13, 2004 at p. 6.

The comments of the Consumer Groups jointly filing these remarks address some of the issues raised in the Further Notice with the objective of resolving the problems cell phone customers are experiencing with their carriers' billing practices.

I. Interest of the Commenting Parties

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. We have staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders. Founded in 1972, ALC is the nation's first organization dedicated to defending the civil rights of Asian Pacific Islander Americans. ALC serves over 1,000 low income clients per year throughout Northern California. ALC represents clients in housing, immigration, employment, hate crimes, and consumer matters. ALC has extensive experience in addressing and resolving telecom complaints of numerous individual clients.

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other

publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 4 million paid circulations, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Disability Rights Advocates is a non-profit law center dedicated to protecting the rights of people with disabilities and ensuring dignity, equality and opportunity for people with all types of disabilities in all key areas of life. DRA is committed to assisting people with disabilities in living independently. In order to achieve independence, people with disabilities, who are disproportionately low income, rely on telephone communications and are thus directly impacted by the availability of subsidy programs for this essential utility service.

National Association of State PIRGs is a network of state-based, nonprofit, nonpartisan public interest advocacy organizations working on consumer, environmental and good government issues, with over half a million citizen members across the country. The State PIRGs have documented consumer problems with the cell phone industry in its recent report, *Can you Hear Us Now?*, available at www.masspirg.org.

National Consumer Law Center is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts in 1971. Its purposes include representing the interest of low-income people and enhancing the rights of consumers. Throughout its history,

NCLC has worked to make utility services (telephone, gas, electricity, and water) more affordable and accessible to low-income households.

II. Billing of Government Mandated and Non-Mandated Charges

In the Second FNPRMM, the Commission tentatively concludes that where carriers choose to list charges in separate line items, government mandated charges must be placed in a separate section of the bill.[2] Consumer Groups agree that government mandated charges should be listed in a separate section of the bill, itemized and clearly labeled. A strict definition of government mandated charges, combined with the separation of those charges on consumers' telecommunications bills, will help prevent carriers from presenting non-government mandated charges in a manner which disguises the true nature of those charges.

As was made clear by the nearly 20,000 consumers who submitted comments in favor of the NASUCA petition, line items on telephone bills are often confusing and misleading. The labels attached to charges and fees often leave the impression they are taxes mandated by the government. Many consumers who contacted the FCC in Docket No. 04-208 complained that their telephone bills have increased with each new fee or surcharge, yet it is not clear whether the government or the carrier is to blame. An accurate distinction between government mandated charges and other charges appropriately places accountability for each squarely where it belongs.

[2] Second FNPRMM, ¶ 39.

a. Distinction between Mandated and Non-Mandated

The Commission is also seeking comment on how to define the distinction between mandated and non-mandated charges for TIB purposes: Should "mandated charges" be defined as those required to be collected and remitted to a federal, state or local government; or should the definition be broader to include discretionary charges (those authorized or permitted, but not required to be passed through to the consumer), thus including USF. The distinction between the two proposed definitions is that the latter would permit carriers to include fees and charges which, while remitted to the government, are not required by the government to be collected as a line item on consumer bills.

Consumer Groups support the first, more narrow and precise definition of government mandated charges as only those required to be collected and remitted to federal, state or local government. Unless government mandated charges are defined as such, the distinction between mandated and non-mandated charges will be meaningless. Defining "government mandated" charges as only those both required by and remitted to government is the most accurate description of the term. A charge such as the universal service fund charge is remitted to the government (although the majority of the fund makes its way back to the various carriers), but the government *permits,* rather than *requires*, carriers to collect the fee directly from consumers. A definition which gives carriers the ability to categorize such permissible charges as "government mandated" undermines the intent of TIB rules.

As the Commission has noted, defining government mandated charges as those both required by and remitted to government is also consistent with the "Assurance of Voluntary Compliance" ("AVC") entered into by the Attorneys General of 32 states and Cingular, Sprint and Verizon. The agreement requires:

> **F. Disclosures of Taxes and Surcharges on Consumer Bills**
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> 36. On Consumers' bills, Carrier will
> a. separate (i) taxes, fees, and other charges that Carrier is required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs, from (ii) monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges (including, but not limited to, Universal Service Fund fees), except when such taxes, fees, and other charges are bundled in a single rate with the monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges; and
> b. not represent, expressly or by implication, that discretionary cost recovery fees are taxes.

Defining government mandated charges consistent with the AVC stands in stark contrast to the definition offered by the wireless industry trade group, CTIA-The Wireless Association™ ("CTIA"), in its "Voluntary Consumer Code." CTIA's voluntary standards would permit USF and other non-mandated taxes, fees and charges to be included in a separate section of the bill along with those taxes, fees and charges that are both required to be collected directly from consumers and remitted to government.

In fact, although the wireless carriers may prefer a weaker definition, the three largest national carriers, representing approximately 75 percent of the market, have agreed to abide by a stronger definition of mandated charges when doing business in the majority of states.

For the reasons outlined by Consumer Groups, the Commission should adopt a rule that limits charges that are included in a "government mandated charges" section of a telephone bill to only those charges that are required by, and remitted to, federal, state or local governments.

b. Separate Section for Government Mandated Charges

Consumer Groups support the Commission's tentative conclusion that a separate section for government mandated charges facilitates competition and provides clear and accurate information for consumers, provided that the definition of "government mandated charges" is limited to only those charges both required to be collected by, and remitted to, government, as described above. Should the Commission adopt a weaker definition which permits non-mandatory charges to be labeled as government charges, the proposed separate section will only serve to undermine the TIB rules.

c. Other Considerations

The Commission also seeks comment on standardized labeling of categories of charges, and specifically, whether the First Amendment presents an impediment to requiring standardized labels.[3] Consumer Groups agree standard labels facilitate consumer understanding of charges and prevent fraudulent and misleading descriptions by carriers. Standard labels do not run afoul of First Amendment commercial free speech, as described by NASUCA in the TIB petition. The case law is clear that there is a difference between

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[3] Second FNPRMM, ¶ 45

regulating content and conduct. Therefore, labeling in the interest of clarity is not an impermissible restraint on free speech.

As the Supreme Court has noted many times, commercial speech is entitled to less protection than non-commercial speech. *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 64-65 (1983) ("the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression"). Particularly where, as here, government is not seeking to completely ban a particular form or mode of speech [*see, e.g., Bolger, supra* (government may not ban unsolicited mailing of contraceptive advertisements); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (state may not bar all advertising by lawyers)], but rather requiring commercial enterprises to more fully disclose information, the First Amendment does not preclude governmental action. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979) (state may prohibit the practice of optometry under a trade name); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 772, n. 24 (1976) (government may require a commercial message to "appear in such a form, or include such additional information, warnings or disclaimers, as are necessary to prevent its being deceptive.")

The Commission also seeks comment on what role, if any, states should have regarding labels on descriptions.[4] The Consumer Groups direct the Commission to Section V of our comments concerning preemption. In our view, labeling is consistent with "other terms and conditions" in section 332(c)(3)(A). Consumer Groups are opposed to the suggestion

[4] Second FNPRMM, ¶ 45

that states cannot make or enforce their own rules regarding other terms and conditions that are at least as stringent as the TIB guidelines. We do not object to the Commission giving states the option to enforce federal rules, provided the States are not preempted from making and enforcing their own rules.

Finally, the Commission asks for comments regarding whether certain carrier billing practices are misleading.[5] The Commission lists property taxes, regulatory compliance costs and billing expenses as examples of charges that have been included in line items labeled "regulatory assessment fees," and asks whether it is misleading to include such charges as a "regulatory assessment fee" and whether carriers' labels for these charges are sufficiently clear and specific enough to comply with the TIB requirements.

Without question, the charges described should not be separately collected and the labels devised by the carriers are misleading. Clearly, terms such as "regulatory assessment fee" connote government sanction. Requiring a separate section of the bill for government mandated charges is insufficient if carriers are permitted to continue to confuse and mislead consumers by separately collecting and mislabeling ordinary costs of doing business. As NASUCA's petition argued, regulatory compliance costs, property taxes, etc., are customary costs of providing telecommunications services and therefore should be incorporated into the price of service. Consumer Groups assert that the charges described in ¶ 47 are misleading and therefore in violation of Sec. 64.2401(b) and should be prohibited.

[5] Second FNPRMM ¶ 47

IV. Combination of Federal Regulatory Charges in Line Items

The Commission seeks comment on whether it is unreasonable under section 201(b) of the Act for line items to combine federal regulatory charges.[6] Consumer Groups believe the combining of such charges is a violation of Section 201(b) of the Act and the pro-competitive goal of the Truth-in-Billing rules.

Section 201(b) prohibits unjust and unreasonable charges on phone bills, and gives the Commission rulemaking authority to carry out provisions of the chapter. Subsequently, in the TIB rules the Commission recognized that combined billing of regulatory charges would "facilitate carriers' ability to bury costs in lump figures." The abuse of lump sum regulatory charges was well documented by NASUCA in the TIB petition. Regulatory line items are vague and provide the opportunity for carriers to recover costs that should be included in the overall cost of service. Consumer Groups urge the Commission to prohibit combination of so-called federal regulatory charges in line items.

V. FCC'S PROPOSED PREEMPTION OF STATE REGULATION

The Commission seeks comment on several matters regarding the preemption of state regulation of billing matters based on its initial tentative conclusions. This proposed preemption is a radical departure from the Commission's Truth-in-Billing Order that declared "states will be free to enact and enforce additional regulations consistent with the general guidelines and principles set forth in this Order, including rules that are more

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[6] Second FNPRMM ¶ 48

specific than the general guidelines we adopt today."(*Truth-in-Billing Order*, 14 FCC rcd at 7507, ¶.26.) As an initial matter, the Consumer Groups strongly disagree with the Commission's findings and declaratory ruling that "state regulation requiring or prohibiting the use of line items – defined here to mean a discrete charge identified separately on an end user's bill – constitute rate regulation and, as such, are preempted under section 332(c)(3)(A)." (*Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, ¶ 30.). Furthermore, by responding to this *Second FNPRM,* we are not waiving our firm opposition to the Commission's declaratory ruling on preemption, nor are we conceding the merits of the overreaching tentative conclusions and the unsound underlying premises to preempt state regulatory authority over billing matters for wireless and wireline carriers. We also note that the very legality of this Order and Declaratory Ruling is being challenged in the 11th Circuit. (*NASUCA v. FCC*, No. 05-11682-DD(11th Cir.).)

Consumers are already extremely frustrated with their telecommunications bills and with this *Second FNPRM* they face the likelihood even more frustration and anger over the inability of their states to provide them with the range of traditional protections from unfair and deceptive billing practices. We urge the Commission to reevaluate the ramifications on consumers of its declaratory ruling regarding preemption and the further harm that will be caused by the extension of preemption attempted by this *Second FNPRM*. It is in the context of these grave concerns that the Consumer Groups submit these comments on preemption.

A. States Are Not Preempted From Regulating Customer Billing Information and Practices, Billing Disputes and Other Consumer Protection Matters

The Commission seeks comment on whether the FCC should preempt state regulation of wireless billing beyond the line item regulations in the Declaratory Ruling and to what degree conflict preemption can be applied to all carriers. (*Second FNPRM*, ¶. 50.) These questions presuppose that the Commission's initial presumption about its authority to preempt states' billing practices is legally sound. In fact, that is not the case. The Commission, in one sweep, attempts to disregard the principles of federalism in the Constitution, the statutory language and intent, and judicial precedent.

1. Congressional Intent For A Dual Federal-State Regulatory System

There is a common analysis that runs throughout our responses to the Commission's request for comments on preemption issues in ¶50 through 54. This analysis highlights the Congressional intent for a "dual federal-state regulatory system." *La. Pub. Serv. Comm. v. F.C.C.*, 476 U.S. 355, 368-69 (1986).

Our federal system is based on the concept of dual sovereignty of federal and state governments (this is the core concept of federalism). The statutory language and the Congressional history of the Communications Act are replete with Congress' intent to preserve the dual federal and state jurisdiction over interstate and intrastate telecommunications services and Congress' acknowledgement and expectation that the

States will use their traditional police powers to protect their telecommunications consumers in the marketplace.

For example, the language of 47 U.S.C. § 332(c)(3)(A) and the legislative history of this section governing the state's jurisdiction over wireless carriers show Congress' intent to have dual federal-state regulation over wireless carriers. This subsection of the Act expressly provides that States are preempted from the regulation of "the entry of or the rates charged by any commercial mobile service . . ." 47 U.S.C. § 332(c)(3)(A). However, the second half of the same sentence expressly provides that ". . . this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service." 47 U.S.C. §332(c)(3)(A). Thus the statutory language itself indicates Congress' intent to have states regulate the wireless industry in areas other than "the entry of or the rates charged."

In addition, the legislative history for §332(c)(3)(A) clearly states Congress's intent that states retain jurisdiction over the traditional areas of state regulation. For instance, 47 U.S.C. section 332(c)(3)(A) was enacted as part of the Budget Act of 1993. In the House Report discussing Section 332(c)(3)(A), the Committee provided an illustrative list of matters intended to be covered by "terms and conditions."

> 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;* facilities siting issues (e.g., zoning); transfers

> of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's 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*.' (H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 388, emphasis added)

This Committee report language makes clear that Congress intended for states to continue having the authority to regulate state billing practices laws through specific laws, not just laws of general application.

Another example of Congress' intent to preserve the duel federal-state jurisdiction over telecommunications carriers is in 47 U.S.C. §§151 and 152(b). In § 151 Congress provides broad authority for the Commission to regulate:

> [I]nterstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by

> centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . . . [and to] execute and enforce the provisions of this chapter.

At the same time, §152(b) provides that, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. . . ."

In *La. Pub. Serv. Comm. v. F.C.C.*, 476 U.S. 355, (1986), the U.S. Supreme Court held that while §151 gave the Commission broad authority, the existence and wording of §152 (b) precluded the Commission from barring state regulations that interfered with the Commission's ability to ensure efficient, nationwide phone service. The Court explained:

> We might be inclined to accept this broad reading of §151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again [section 152(b)] asserts that 'nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. . . .' *By its terms, this provision fences off from FCC reach or regulation intrastate matters –*

indeed, including matters 'in connection with' intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.

Sections 47 U.S.C. §§ 253(a) and (b) regarding the removal of barriers to entry also reflect Congress' intent that states retain jurisdiction over the traditional areas of state regulation.

Section 253(a) prohibits state or local laws that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Section 253(b) states that "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

Consumer Groups also note that the slamming verification procedures also reflect Congress' intent that States retain jurisdiction over the traditional areas of state regulation. Section 47 U.S.C. § 258(a) states, "Nothing in this section shall preclude any state commission from enforcing such [slamming verification] procedures with respect to intrastate services."

2. Presumption Against Preemption

The U.S. Supreme Court has held that when looking at the initial question of whether preemption exists or the scope of preemption, the analysis "start[s] 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." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947), quoted in *City of Columbus v. Ours Garage and Wrecker Service, Inc*., 536 U.S. 424, 432-33 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Leggett Group*, 505 U.S. 504, 581, 523 (1992). The U.S. Supreme Court has also held that "[t]he regulation of utilities is one of the most important functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983). In *Communications Telesystems International v. Cal. P.U.C.*, a case upholding the state utility commission's sanctions on a long-distance company for slamming, the 9th Circuit, in citing the *Arkansas Electric* holding, states: "Among the important state interests at issue here are the protection of consumers from unfair business practices, the compensation of those consumers for harm, and the need to ensure fair competition between, and the fitness to operate of, licensed carriers." (196 F.3d 1011, 1016 (1999).) The ability of States to protect their residential consumers from unfair and deceptive billing practices falls squarely within their historic police powers. Thus the Commission must prove that there is a clear and manifest intent to preempt the States on this matter. As discussed below, the Commission will have a very difficult, if not impossible case to make.

3. <u>The test for federal preemption of state law</u>

The U.S. Supreme Court's test for determining whether federal law preempts state law is set forth in *La. Pub. Serv. Comm. v. F.C.C.*:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." (476 U.S. 355, 368-69 (1986).) "The question of preemption is one of federal law arising under the supremacy clause of the United States Constitution. . . . Determining whether Congress has exercised its power to preempt state law is a question of legislative intent. . . .Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field . . . .Even when there is no express preemption, any proper application of the doctrine must give effect to the intent of Congress." (*cites omitted*, Bell Atlantic Mobile v. DPUC, 253 Conn 453 at 473 (2000).

In the *Second FNPRM,* the Commission requests comment on the degree to which conflict preemption can be applied to all carriers under the provisions of the Act. *Second FNPRM,*

at ¶ 50. This appears to suggest that the Commission may be basing its preemption decisions on implied preemption versus express preemption. Consumer Groups note that the Commission has not pointed to any statutory language that expressly preempts the States' ability to regulate billing practices. The Consumer Groups contend that there is no express preemption of state billing practices per the dual federal-state nature of the sections of the Act, the legislative history and the case law cited earlier in this section.

Conflict preemption occurs where a federal requirement and state requirement are contradictory. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). Conflict preemption is ordinarily not to be implied absent an "actual conflict." *English v. General Elec. Co*., 496 U.S. 72, 90 (1990). Merely contradictory language or requirements are generally not enough. Impossibility is a form of conflict preemption. Preemption will occur where state law conflicts with federal law in such a way that it becomes impossible to comply with both simultaneously. *California v. FERC*, 495 US 490 (1990); *see also* Schneidewind v. ANR Pipeline Co., 485 US 293 (1988). Consumer Groups note that if the carrier could comply with both sets of laws by merely refraining from doing what the covered act, or in the case of a more stringent law, complying with the more stringent requirements, compliance with both laws would not be impossible.

It appears that the Commission may be basing its preemption presumptions on a sub-category of conflict preemption, obstacle preemption. *Second FNPRM*, at ¶52 and the *Delaratory Ruling*, at ¶¶ 31, 35. Obstacle preemption occurs where a state law is preempted because the state law stands as an obstacle to the full realization of the purposes

of Congress in enacting. *Hines v. Davidowit*, 312 U.S. 52, 67 (1941). As noted at the discussion beginning this preemption analysis, Congress has intended for states to continue to regulate consumer protections in sections throughout of the Communications Act. Congressional intent for states to continue to regulate consumer protections is reflected in many sections of the Communications Act. This intent belies any arguments that these very regulations are an obstacle to the full realization of the purposes of the Act. Furthermore, despite operating in states with differing billing practices regulations, wireless carriers have been thriving in this marketplace. In 1984 the wireless industry had around 92,000 subscribers and by June 30, 2004, there were approximately 170 million wireless subscribers.[7] We also note that the recent Industry Analysis and Technology Division report show that the vast majority of residential calls (80% to 85%) and minutes (71% to 81%) were intrastate.[8] The Consumer Groups strongly believe that state billing practices regulations play an essential role in the creation and maintenance of a fair and competitive marketplace. Indeed one District Court, in finding that the state consumer protection claims against a wireless carrier were not preempted, noted, "While there is a connection between the contracts which US Cellular may offer and the rates charged by the company, allowing a company to perpetrate frauds upon the consumer was not Congress' intent when it enacted the statute. Indeed, it appears to be just this concern that prompted Congress to include the exception clause to section 332," *State of Iowa v. US Cellular*

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[7] IATD, "Trends in Telephone Service" (June 2005) at 11-1.

[8] IATD, "Trends in Telephone Service" (June 2005) at Table 11-4, distribution of residential wireless calls and minutes from 2000 through 2003.

Corp., 2000 WL 33915909. We also direct the Commission to its *First Report and Order* in this proceeding that concluded:

> "The proper functioning of competitive markets, however, is predicated on consumers having access to accurate, meaningful information in a format that they can understand. Unless consumers are adequately informed about the service choices available to them and are able to differentiate among those choices, they are unlikely to be able fully to take advantage of the benefits of competitive forces." (*First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, May 11, 1999, ¶2)

The Commission also seeks comment on whether the other items of the CTIA Consumer Code are enough to occupy the field, to the extent the Commission occupies it. *Second FNPRM*, at *¶52.* The Consumer Groups argue that there is no basis for field preemption of state regulation of billing practices.

Field preemption is rarely found, but often in those circumstances the case involved a subject matter of particular federal interest (e.g. foreign affairs) or under federal control because of historical reasons (e.g., maritime law). The Supreme Court has provided a test for field preemption: when a federal statute or regulatory scheme is so extensive and detailed that it leaves no room for the States to act, that entire field of regulation and all state law regulating with it is said to be preempted, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). Outside of these particular areas, the finding of field preemption will turn on statutory complexity. However, the Courts are well aware that

Congress often passes statutes of great complexity without the intent to preempt state law. See *Pacific Gas & Elec. Co v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983)(despite the complexity of federal nuclear power regulations, States were not preempted from making economic decision about the need for new power plants). The CTIA's Consumer Code is a voluntary, industry drafted and implemented code of business rules that simply does not have the legal merit on par with the Congressionally enacted provisions of the Communication's Act. It would be outrageous for the CTIA's Consumer Code to preempt state billing practices laws. Furthermore, as discussed at the beginning of this section, the Communications Act, although complex, is replete with carve outs preserving the States' ability to regulate telecommunication carriers. This, too, is not indicative of intent by Congress to preempt the field of telecommunications law.

B. The Proper Boundaries For The State And Federal Jurisdictions Over Billing Practices Has Already Been Established By Congress And The Courts.

The Commission seeks comment on several issues relating to where to draw the proper boundaries between federal and state jurisdiction over billing matters. Second FNPRM, at ¶¶52,53,54. The Commission also seeks comment on whether states can enact more specific Truth-in-Billing rules. Second FNPRM, at ¶ 51. The Consumer Groups have the same reply to all of these questions. We understand and strongly support the proper delineation of federal and state jurisdiction that is set forth in the current statute, the legislative history and case law that are highlighted in these comments. This second FNPRM runs counter to the spirit and intent of Congress that explicitly preserved states' authority to protect their telecommunications consumers.

VI. Point of Sale Disclosures

The Commission 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 seeks comment on whether provisions of the settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS[9] ("AVC") establish an appropriate framework for point of sale disclosure rules; and, if not, how the terms of the settlement agreements should be amended.

Consumer groups are strong proponents of point of sale disclosures for wireless service. Consumers can be misled when carriers advertise low monthly rates and then include numerous add-on fees and surcharges in the first bill. Consumers should know the full amount their wireless phone service is going to cost them before signing up for service. This is especially important for lower-income and older persons who live on fixed incomes and must carefully budget monthly expenses. Our organizations frequently hear from consumers who are shocked to find the bottom line price on their first wireless bill to be as much as 50 percent higher than the advertised price of their chosen plan.

Adequate point of sale disclosures facilitate market competition by enabling consumers to realistically compare plans prior to entering into a long term contract with a hefty

[9] A consumer from California sent recently sent the following note to www.EscapeCellHell.org: *"I was quoted $39 – Not told of hidden charges, taxes, handling charges. Not told of 15 day grace period…HELP! I am a senior citizen who thought I was too smart to be taken in by a fast-talking salesman who had no thought about my expenses."*

cancellation penalty. Currently, consumers do not receive adequate information about the true cost of their services from wireless carriers. In a recent *Consumer Reports* survey, 43 percent of respondents found it difficult to determine the actual total cost of the service when they were shopping for a wireless carrier.[10]

The settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS contain several provisions obligating the carriers to disclose material rates and terms of service at the point of sale -- whether that is at the carrier's retail location, via the carrier's website, or during a telephone conversation between the carrier and a consumer.[11] In ¶ 55 of the Second FNPRM, the Commission seeks to address the point of sale disclosures only as they apply to rates and fees and not to other terms and conditions. These comments therefore solely address the point of sale disclosures referenced in ¶ 55. Consumer groups contend that there are other disclosures that must be made at the point of sale outside of rates and fees and reserve the opportunity to address these elements at the appropriate designated time. In this regard, the Consumer Groups believe the settlement provides a basis for a point of sale disclosure rule, with the following amendments:

1. The rules must apply to agents. Carriers often use agents to sell service, whether in shopping mall kiosks or over the Internet. The Commission must require carriers to ensure their agents adhere to the point of sale disclosures required by the Commission. This can be done through the contractual or agency agreements between the carrier and the agent. The

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[10] "Cellular Service: Best Carriers," *Consumer Reports*, at 19 (Feb. 2005).

[11] *See, e.g.,* Verizon AVC at 5-9, ¶ 17-23.

AVC does apply to both carriers and their agents; however, the Second FNPRMM does not mention applicability to agents.

2. Carriers should have the burden of proof to show that the disclosures were made. The point of sale disclosure rules are ineffective unless they are enforceable. These rules are only enforceable if carriers have the burden of proof that consumers were provided the required disclosures.

As a result of slamming practices (unauthorized switching of service) in the long distance industry, both the FCC and States require carriers and their agents to implement verification procedures to confirm that a consumer authorized their change of carrier. If the carrier cannot provide verification when a consumer complains of slamming, the carrier is liable. Similar verifications are necessary to ensure consumers receive the point of sale disclosures.

Verification should include a separate document or section of a contract, clearly set off from the remainder of the document, which includes a clear and conspicuous disclosure signed by the subscriber. For electronic transactions, a separate screen should be checked by the consumer. For telephone transactions, a third-party verification procedure should be modeled on the one required by the slamming rules.

3. Carriers should make these point of sale disclosures readily available to any consumer who is shopping around for a carrier. The Commission tentatively concludes that disclosure at the point of sale must occur <u>before</u> the customer signs any contract for

service. Consumer Groups agree with the Commission, which notes that a disclosure after contract signing, when most customers are locked into long-term contracts with significant early termination fees, is contrary to a pro-competitive goal of enabling consumers to make informed comparisons of different carriers' plans before subscribing.[12]

Point of sale disclosures will benefit the consumer who is in the process of signing a contract that has not been adequately or accurately explained. However, providing key disclosures only *during* a sales transaction, as adopted under the AVC, is insufficient to allow consumers the opportunity to engage in comparative shopping. In order for the competitive market to function properly, consumers must have access to all relevant information about price, terms and conditions, so that they can compare wireless service plans.

Consumer Groups recommend that, in addition to requiring the disclosures prior to contract signing, the Commission should require that the complete list of disclosures be readily available in printed form or on the carrier's Internet site. Disclosures should be easy for consumers to find and available well in advance of the sales transaction. In adopting the original TIB guidelines, the Commission stated as its goal to "ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications marketplace, while at the same time protecting themselves

[12] A consumer from California sent the following to www.EscapeCellHell.org:
"I'm tired of dealing with them and feel that I was tricked into accepting an agreement that I STILL haven't received the terms of on paper. I feel powerless and all I want is to cancel my contract, but the termination fees are 300 dollars for myself and my grandmother who is also on my plan. I feel like I've been ripped off."

from unscrupulous competitors." In this regard, consumers need meaningful and readily available information to make their choice. Access to disclosures about key price, terms and conditions will enable consumers to shop for the best deal that suits their own needs and budget.

4. Carriers should be required to provide the actual full rate of any non-mandated line items. The AVC allows carriers to disclose monthly discretionary charges that they assess subscribers based on locale by providing only the possible range of their total amounts. As the Commission itself indicates, providing only a wide range of potential surcharges at the point of sale could be misleading. Accordingly, Consumer Groups recommend that the Commission require carriers to disclose the full rate of these surcharges. This requirement should not overly burden the carriers, and will provide consumers with important information regarding the real cost of service.

Given that at least one of the major carriers has demonstrated that it can provide the actual, full rate of any non-mandated line items in a simple format, the Commission should require all carriers to provide this level of disclosure.13 Such a requirement will reduce consumers' frustration over monthly bills that are much higher than the plan's advertised price.

The Commission also seeks comment on whether actual government mandated surcharges in excess of 25 percent greater than estimated government mandated surcharges would be

[13] See, http://www.cingular.com/customer_service/additional_changes (accessed June 23, 2005).

misleading; or whether it would be misleading if such actual surcharges were in excess of 10 percent greater than such estimated surcharges. Consumer Groups believe carriers should be required to be as accurate as possible in estimating mandated surcharges and taxes. As the Commission itself noted, providing only a wide range of potential surcharge amounts at the point of sale could be misleading. Legitimate government mandated charges and taxes are either specified dollar amounts, or percentages of the other charges on the bill. Carriers should be given no more than 10 percent leeway on estimation of government mandated charges, or the point of sale disclosures will be meaningless.

Finally, the Commission seeks comment on whether it should adopt an enforcement regime where States are permitted to enforce rules developed by the Commission regarding point of sale disclosures, similar to the current "slamming" rules that provide that state commissions may elect to administer the federal rules. Consumer Groups agree that the slamming rules provide a good model for joint enforcement of rules, provided that States are not prohibited from enacting and enforcing their own point of sale disclosure rules.

The Commission further asks for comment on whether it should also establish rules prescribing specific penalty amounts and procedures for point of sale disclosure violations, similar to the penalty provisions in the slamming rules. Consumer Groups agree that penalties, if sufficient in size and enforceable, can be an effective deterrent to fraudulent and misleading behavior. Carriers must have the burden of proof to demonstrate that they made the required disclosures, at the appropriate time in the transaction. Requiring state

commissions and consumers to prove the absence of required disclosures is an impossible standard. Penalties are irrelevant if enforcement is impossible.

VII. Conclusion

The Consumer Groups are deeply concerned that the Commission's new regulatory framework will construe "rates" so broadly as to preempt any state consumer protection regulations regarding billing formats. The record in this proceeding contains thousands of consumer complaints about confusing telecommunications bills. The Commission and the States need to work together to protect telecommunications consumers from unjust and misleading business practices. A healthy, competitive marketplace requires the strong enforcement of rules to promote truthful, accurate and easy-to-understand bills. In the First Report and Order, the Commission recognized that TIB rules are an essential component of the telecommunications marketplace:

> In sum, we take this action in furtherance of the pro-competitive goals of the 1996 Act and our responsibility to ensure that *all* consumers have a fair opportunity to share in the benefits of competitive telecommunications markets. Certainly, in a competitive marketplace, consumers should investigate the choices available to them and decide which service best fits their needs. In this item, we seek to provide consumers with the basic tools they need to participate meaningfully in a competitive telecommunications marketplace. (First Report and Order and Further Notice of Proposed Rulemaking, CC Docktet No. 98-170, May 11, 1999, ¶ 8)

Consumer Groups are concerned that the Commission, by attempting to preempt states' ability to regulate misleading, confusing and deceptive billing formats, will leave a regulatory void in the protection of consumers from misleading and unfair line items.

Respectfully Submitted,

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