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 Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

SECOND REPORT AND ORDER, DECLARATORY RULING, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing separate statements.

Comment Date: 30 days after publication in the Federal Register.
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I. INTRODUCTION

1. In this item, we address a Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates (NASUCA) seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customers' bill that was not mandated or authorized by federal, state or local law.[1] In light of the significant consumer concerns with the billing practices of wireless and other interstate providers raised in this proceeding and outstanding issues from the 1999 *Truth-in-Billing Order and Further Notice*,[2] we also take this opportunity to reiterate certain aspects of our existing rules and policies affecting billing for telephone service. Specifically, we: 1) remove the existing exemption for Commercial Mobile Radio Service (CMRS) carriers from 47 C.F.R. § 64.2401(b) – requiring that billing descriptions be brief, clear, non-misleading and in plain language; 2) reiterate that non-misleading line items are permissible under our rules; 3) reiterate that it is misleading to represent discretionary line item charges in any manner that suggests such line items are taxes or charges required by the government; 4) clarify that the burden rests upon the carrier to demonstrate that any line item that purports to recover a specific governmental or regulatory program fee conforms to the amount authorized by the government to be collected; and 5) clarify that state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are preempted under section 332(c)(3)(A).

2. In addition, in a Further Notice of Proposed Rulemaking, we propose and seek comment on certain measures to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications service offerings. In particular, we: 1) tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges; 2) seek comment on the distinction between government "mandated" and other charges; 3) seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item; and 4) tentatively conclude 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 disclosure must occur *before* the customer signs any contract for the carrier's services. In an effort to address the potential for balkanized state regulation of CMRS and other interstate carrier billing practices, we also

[1] Petition for Declaratory Ruling, filed by National Association of State Utility Consumer Advocates' (March 30, 2004) (NASUCA Petition). NASUCA is an association of 44 consumer advocates designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999) (*Truth-in-Billing Order and/or Further Notice*).

tentatively conclude that the Commission should reverse its prior holding permitting states to enact and enforce telecommunications carrier-specific truth-in-billing rules, and that the Commission should preempt inconsistent state regulation. We emphasize, however, that no action we propose will limit states' ability to enforce their own generally applicable consumer protection laws.

3. We believe that the truth-in-billing rules proposed herein and the clarifications we make will allow consumers to better understand their telephone bills, compare service offerings, and thereby promote a more efficient competitive marketplace. As the Commission noted in 1998 when it initiated the Truth-in-Billing proceeding, the proper functioning of competitive markets is predicated on consumers having access to accurate, meaningful information in a format that they can understand.[3] Unless consumers are adequately informed about the service choices available to them and are able to make reasonable price comparisons between service offerings, they are unlikely to be able to take full advantage of the benefits of competitive forces.

II. BACKGROUND

A. The Truth-in-Billing Orders

4. In 1999, the Commission released the *Truth-in-Billing Order* to address concerns that there was growing consumer confusion relating to billing for telecommunications service and an increase in the number of entities willing to take advantage of this confusion. Consistent with sections 201(b) and 258 of the Communications Act of 1934, as amended (the "Act"),[4] 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."[5]

5. The Commission stated that these truth-in-billing principles should apply to all carriers, including wireless carriers.[6] In general, the principles require: 1) that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new providers; 2) that bills contain full and non-misleading descriptions of charges that appear therein; and 3) that bills contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges on the bill.[7] The Commission incorporated these principles into rules "because we intend for these obligations to be enforceable to the same degree as other rules."[8] However, most of the details

[3] *See Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Proposed Rulemaking, 13 FCC Rcd 18176 (1998).

[4] Section 201(b) requires that common carriers' "practices ... for and in connection with ... communications service, shall be just and reasonable, and any such ... practice ... that is unjust or unreasonable is hereby declared to be unlawful ...". 47 U.S.C. § 201(b). Section 258(a) makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258.

[5] *See Truth-in-Billing Order*, 14 FCC Rcd at 7498, para. 9.

[6] *Id.* at 7501, para 13.

[7] *Id.* at 7496, para 5.

[8] *Id.* at 7499, para. 9; *see* 47 C.F.R. §§ 64.2400 and 2401.

regarding compliance with these obligations were left to the carriers to satisfy in a manner that best fit their own specific needs and those of their customers. At that time, the Commission determined that, although the *principles* and section 201(b) applied to all carriers, it would be appropriate to exempt CMRS carriers from three of the codified *rules* because they were deemed either inapplicable or unnecessary in the CMRS context.[9] In a Further Notice, however, the Commission sought comment on whether these rules should apply to CMRS carriers in the future.[10]

6. On March 29, 2000, the Commission modified some of the Truth-in-Billing requirements in an Order on Reconsideration.[11] In addition, the Commission clarified that where an entity bundles a number of services, some of which may be provided by different carriers, as a single package offered by a single company, such offering may be listed on a telephone bill as a single offering.[12]

B. Joint Advertising Statement

7. On March 1, 2000, the Commission released a Joint Policy Statement with the Federal Trade Commission (FTC) to provide carriers with guidance about how principles of truthful advertising apply in the long distance service marketplace.[13] The Commission explained that the need to address such issues arose from a proliferation of advertisements for dial-around numbers, long-distance calling plans, and other new telecommunications services; combined with an increase in the number of complaints regarding how these services were promoted.[14] In addition, the Joint Policy Statement noted that the FCC found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b) of the Act.[15] The Commission and FTC provided specific

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[9] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 15. *See also* 47 C.F.R. § 64.2400(b).

[10] *Truth-in-Billing Further Notice*, 14 FCC Rcd at 7535, para. 68. In the Further Notice, the Commission also proposed standard labels for line items for charges associated with federal regulation. The Commission tentatively concluded that the following labels would be appropriate: "Long Distance Access" to identify charges related to interexchange carriers' costs for access to the networks of local exchange carriers; "Federal Universal Service" to describe line items seeking to recover universal service contributions; and "Number Portability" to describe charges relating to local number portability. The Commission asked for comments on these proposed labels and alternatives. *Id.* at 7537, para 71.

[11] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Order on Reconsideration, 15 FCC Rcd 6023 (2000). Specifically, the Reconsideration Order: 1) modified the requirement for identification of new service providers to apply only to subscribed services for which the provider places periodic charges on the bill (i.e. not per-transaction basis such as dial-around or directory assistance—although those still have to be separated by provider); and 2) modified the "contact" requirement to allow for other electronic means in addition to the toll-free number, in limited cases where the customer does not receive a paper copy of the bill (for example billed by e-mail or Internet).

[12] *Id.* at 6027, para. 9.

[13] *See Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers*, File No. 00-72, 15 FCC Rcd 8654 (2000) (*Joint Policy Statement*).

[14] *Id.* at 8655, para. 3.

[15] *Id.* at para. 4.

examples of misrepresentations in advertisements for long-distance service and material information that carriers should clearly and conspicuously disclose in such advertisements to comply with section 201(b).[16]

C. Universal Service Contribution Order

8. In 2002, the Commission released the *Universal Service Fund Contribution Order* (*USF Contribution Order*), which examined the reasonableness of a line item that purported to describe Universal Service fees under section 201(b).[17] The amount of the Universal Service line item imposed by carriers on customers often varied from the contribution factor used to calculate the carriers' actual obligation to the fund. The Commission noted that an analysis of federal universal service line-item charges across industry segments revealed that such charges often bore little or no relationship to the amount of the assessment.[18] The Commission stated that to the extent that carriers recover their contribution costs through a separate line item on customer bills, they must accurately describe the nature of the charge.[19]

9. The Commission found it was "unreasonable" under section 201(b) for carriers to characterize administrative and other costs as part of regulatory fees or universal service charges. The Commission stated that such costs are no different than other costs associated with the business of providing telecommunications service and, although they could be recovered through rates or other line

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[16] *See id.* at 8657-69, paras. 11-32. For example, the Statement provided the following example of misleading advertising:

> A 30-second television advertisement for a long-distance calling plan features a spokesperson who on three occasion states that calls on the plan are "10¢ a minute anytime." In addition, a graphic reading "10¢ a minute anytime" is depicted twice during the ad. In fact, the 10¢ a minute rate requires the payment of a $5.95 monthly fee. The only disclosure of the monthly fee is through a visual superscript at the end of the ad. Especially because the triggering representation—that calls on the plan are "10¢ a minute anytime"—was made both orally and visually, the visual superscript would likely be less effective in disclosing the monthly fee than had the same information been conveyed both orally and visually.

Joint Policy Statement, Example #20.

[17] *See generally Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, Number Resource Optimization, CC Docket No. 99-200, Telephone Number Portability, CC Docket No. 95-116, Truth-In-Billing and Billing Format, CC Docket No. 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24979, para. 54 (2002) (*USF Contribution Order*).

[18] *Id.* at 24977, para 47. "We are concerned, however, that the flexibility provided under our current rules may have enabled some companies to include other completely unrelated costs in their federal universal service line items." *Id.* at 24978, para 49.

[19] *Id.* at para. 51.

item charges, it is unreasonable to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor.[20] Carriers, therefore, are prohibited from including administrative costs in line items that are "characterized as federal universal service contribution recovery charges."[21]

10. The Commission stated that the elimination of mark-ups in carrier universal service line items would alleviate end user confusion and frustration, and "foster a more competitive market by better enabling customers to comparison shop among carriers."[22] The Commission also concluded that this action would further the goal of "promoting transparency for the end user in order to facilitate informed customer choice."[23] Finally, the Commission declined at that time to mandate a specific label for federal universal service line-items, but said it would monitor the order's effect on carrier practices.[24]

D. State and Industry Actions

11. In 2003, the wireless industry developed the CTIA Consumer Code to facilitate the provision of accurate information between consumers and wireless service providers.[25] Over 30 wireless service providers, including many national providers, are signatories to the Code. In relevant part, the Code requires that signatory carriers "Disclose Rates and Terms of Service to Consumers." [26] Among the disclosures mandated by that provision is the disclosure of "the amount or range of any . . . fees or surcharges that are collected and retained by the carrier." In addition, the Code requires that carriers separately identify carrier charges from taxes on billing statements.[27]

12. In July 2004, Attorneys General from 32 states entered into settlement agreements with Verizon Wireless, Cingular Wireless, and Sprint PCS regarding allegations of misleading advertisements and unclear disclosures relating to service agreement terms and wireless coverage areas.[28] Specifically,

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[20] *Id.* at 24980, para 54.

[21] *Id.*

[22] *Id.* at 24978, para 50.

[23] *Id.*

[24] *Id.* at 24983, para 65

[25] *See* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.

[26] CTIA Code, Item One.

[27] CTIA Code, Item Six:

> On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal, state, or local governments. Carriers will not label cost recovery fees or charges as taxes.

[28] *See* Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, FCC, dated Jan. 10, 2005 (Attachment – Assurance of Voluntary Compliance) (Verizon AVC). The thirty two states include: Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, (continued....)

with regard to consumer bills, carriers agreed to separate "taxes, fees, and other charges that [they are] 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 monthly charges and all other discretionary charges, except when the taxes, fees and other charges are bundled into a single rate with monthly charges for service and all other discretionary charges.[29] The carriers also agreed to not represent, expressly or by implication, that the discretionary costs recovery fees are taxes.[30] In addition, the carriers agreed to make point of sale disclosures describing all charges appearing on consumers' bills.[31]

E. NASUCA Petition

13. On March 30, 2004, NASUCA filed a Petition for Declaratory Ruling in the Truth-in-Billing and Billing Format Docket urging the Commission to address what it describes as the growing problem of consumer confusion with telephone bills. Specifically, NASUCA requested that the Commission clarify that telecommunications carriers – both wireline and wireless – are prohibited from imposing line-item charges, surcharges or other fees on customers' bills unless those charges are expressly mandated or authorized by a federal or state law. NASUCA argues that allowing the inclusion of line items that are not mandated or authorized by the government violates the truth-in-billing principles and rules and both section 201(b) and 202 of the Act. In addition, NASUCA argues that the amount of any such government mandated charge must conform to the amount expressly authorized by federal, state, or local governmental authority. NASUCA's Petition sets forth numerous examples of line item charges imposed by interexchange (IXC) and wireless carriers that it contends are misleading or unreasonable.[32] On May 25, 2004, the Consumer & Governmental Affairs Bureau issued a public notice seeking comment on the Petition in a newly created CG Docket 04-208. In addition to numerous individual consumers, more than 40 parties filed comments in response to the Petition.

III. SECOND REPORT AND ORDER

A. Background

14. In the *Truth-in-Billing Order*, the Commission concluded that the broad principles adopted to promote truth-in-billing should apply to all telecommunications carriers, both wireline and wireless.[33]

(Continued from previous page)
North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming.

[29] Verizon AVC at 14, para. 36(a).

[30] *Id.* at para. 36(b).

[31] *Id.* at 5-9, paras. 17-23.

[32] *See* NASUCA Petition at 18-23, 29 (contending that, for example, surcharges identified as "regulatory assessment fees," "carrier cost recovery charges," "interstate access surcharge," "universal connectivity charge," and "primary carrier charge" do not allow customers to accurately assess what they are being billed for or permit customers to determine whether the amounts charged conform to the price charged for service).

[33] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 13 ("[l]ike wireline carriers, wireless carriers also should be fair, clear, and truthful in their billing practices").

The Commission noted that these principles represent fundamental statements of fair and reasonable practices. The Commission therefore rejected the argument that certain classes of carriers should be wholly exempt from complying with the truth-in-billing guidelines solely because competition exists in the market which they operate.[34] In the wireline context, the Commission incorporated these principles and guidelines into rules for enforcement purposes "after considering an extensive record of both the nature and volume of customer complaints, as well as substantial information about wireline billing practices."[35]

15. In the wireless context, however, the Commission found that the record did not reflect the same high volume of customer complaints, nor did the record indicate that CMRS billing practices failed to provide consumers with the clear and non-misleading information they need to make informed choices.[36] The Commission therefore exempted CMRS carriers from the truth-in-billing rule that requires charges contained on telephone bills to be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered.[37] In addition, the Commission found certain of the truth-in-billing rules inapplicable to CMRS.[38] In a Further Notice of Proposed Rulemaking, the Commission sought comment on whether the truth-in-billing rules adopted in the wireline context should apply to CMRS carriers in order to protect consumers.[39] The Commission reiterated that all consumers expect and should receive bills that are fair, clear, and truthful, but sought further comment on whether such a problem existed in the wireless context, and to what extent the presence of a competitive market is relevant to consumers' ability to protect themselves from the harms that the truth-in-billing rules were designed to address.[40] The majority of commenters, representing primarily CMRS providers, responded that the lack of billing complaints against wireless providers along with the competitive nature of the wireless industry should indicate that it is not necessary to apply these rules to CMRS.[41] The California

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[34] *Id.*

[35] *Id.* at para. 15.

[36] *Id.* at 7502, para. 16. The Commission also noted that notwithstanding the decision not to apply these guidelines to CMRS providers, that such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202, "and our decision here in no way diminishes such obligations as they may relate to billing practices of CMRS carriers." *See Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 19.

[37] *See* 47 C.F.R. §§ 64.2400(b), 64.2401(b).

[38] For example, because CMRS carriers are excluded from equal access obligations, the Commission concluded that CMRS carriers will seldom need to indicate a new long distance service provider on their bill. *See Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 16. The Commission concluded that CMRS carriers must comply with two of the truth-in-billing rules: 1) that the name of the service provider associated with each charge be clearly identified; and 2) that each bill should prominently display a telephone number that customers may call free-of-charge in order to inquire or dispute any charge contained on the bill. *See* 47 C.F.R. § 64.2401(a)(1) and (d).

[39] *Truth-in-Billing Further Notice*, 14 FCC Rcd at 7535-36, paras. 68-70.

[40] *Id.* at paras. 68-69.

[41] *See, e.g.*, Bell Atlantic Mobile 1999 Comments at 3; CTIA 1999 Comments at 5; PCIA 1999 Comments 4-5.

Public Utilities Commission, on the other hand, argued that section 64.2401(b) of our rules is so fundamental that it should apply to all telecommunications carriers, including CMRS carriers.[42] Finally, responding to the Commission's suggestion that parties address the applicability of a section 10 forbearance analysis,[43] a few commenters suggested that the Commission should consider forbearing the truth-in-billing requirements to CMRS carriers.[44]

B. Discussion

16. We conclude that CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b)'s requirement that billing descriptions be brief, clear, non-misleading and in plain language. In creating this exemption in 1999, the Commission relied upon the fact that the record did not indicate a high volume of complaints in the CMRS context.[45] The Commission's more recent data indicates that complaints regarding wireless "billing & rates" and "marketing & advertising" have increased significantly since that time. For example, in 1999, the Commission received only a few dozen complaints regarding wireless billing.[46] In 2004, the Commission received approximately 18,000 complaints about wireless carrier practices in these categories.[47] This trend is supported by the recent comments of a number of states and consumers in this proceeding.[48] Although we acknowledge that this increase may be due in part to the significant increase in wireless subscribers since 1999, we also believe it is demonstrative of consumer confusion and dissatisfaction with current billing practices.

17. We disagree with those commenters that argue that CMRS providers should be exempted

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[42] *See* Cal PUC July 26, 1999 Comments (also maintaining that 47 C.F.R. § 64.2401(a)(2) and (c) should apply to CMRS carriers, the former in the event a CMRS carrier bills for charges for two or more carriers, and the latter in the event a CMRS carrier also bills for charges for basic local service).

[43] *Truth-in-Billing Order*, 14 FCC Rcd at 7535, para. 69.

[44] *See, e.g.*, Omnipoint 1999 Comments at 5; PCIA 1999 Comments at 8. Neither Omnipoint nor PCIA suggest that they were formally petitioning the Commission for forbearance under section 10(c) of the Act. Section 10(c) establishes a one-year statutory deadline for Commission action on forbearance petitions, and provides that a petitioning party's requested relief is "deemed granted" if the Commission does not act within that timeframe. *See* 47 U.S.C. § 160(c). The Commission did not treat these comments as petitions filed under section 10(c), nor did any party subsequently suggest that the procedure under section 10(c) had been triggered. Accordingly, while we discuss these parties' comments regarding forbearance below, we do not recognize their comments as triggering the requirements of section 10(c) and do not recognize the relief as having been granted by operation of law.

[45] *Truth-in-Billing Order*, 14 FCC Rcd at 7501-02, para. 16.

[46] *See id.* at 7564, Concurring Statement of Commissioner Michael K. Powell.

[47] *See* First and Second *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. Feb. 11, 2005); Third and Fourth *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. March 4, 2005). *See also* 2003 *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. May 10, 2003; Sept. 12, 2003; Nov. 20, 2003 and June 10, 2004). Complaints filed in the categories of "billing and rates" and "marketing and advertising" constituted over one-half of the total complaints filed against wireless providers in 2003.

[48] *See, e.g.*, Cal. PUC Comments at 6-7; Texas OAG Comments at 2; Consumers Union Comments at 3; Joseph Canfora Comments at 1; John Gantz Comments at 1; Nancy Murray Comments at 1.

from this requirement because they operate in a competitive marketplace.[49] The Commission specifically rejected this argument in the *Truth-in-Billing Order* noting that, as competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace.[50] Although we agree that a robustly competitive marketplace provides the best incentive for carriers to meet the needs of their customers and affords dissatisfied customers with an opportunity to change carriers, we also recognize that some providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry.[51] As the Commission emphasized in the *Truth-in-Billing Order*, one of the fundamental goals of the truth-in-billing principles is to provide consumers with clear, well-organized, and non-misleading information so that they will be able to reap the advantages of competitive markets.[52] We believe that making the requirements of 47 C.F.R. § 64.2401(b) mandatory for CMRS will help to ensure that wireless consumers receive the information that they require to make informed decisions in a competitive marketplace.

18. For the reasons discussed above, we also do not believe it would be appropriate to forbear from applying the truth-in-billing rules to CMRS carriers. We find that the record before us does not reflect that all three statutory criteria established under section 10 have been satisfied. Specifically, the record does not reflect that these requirements are unnecessary to ensure that the charges and practices of carriers are just and reasonable, or that forbearance is consistent with the public interest. To the contrary, the increasing number of consumer complaints to this Commission and state regulatory agencies regarding wireless billing practices provides empirical evidence that application of the truth-in-billing rules to CMRS carriers is necessary and in the public interest. It is critical for consumers to receive accurate billing information from their carriers to take full advantage of the benefits of a competitive marketplace. We also note that the Commission declined to forbear from the application of sections 201 and 202 of the Act to broadband Personal Communications Service (PCS), concluding that those sections "lie at the heart of consumer protection under the Act."[53] In the *PCIA Forbearance Order*, the Commission noted that it had never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.[54]

19. The Commission already has concluded that the truth-in-billing principles, including the principle that billing descriptions be brief, clear, non-misleading and in plain language, apply to both

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[49] *See, e.g.*, AT&T Wireless Comments at 2; CTIA Comments at 8; PCIA 1999 Comments at 5.

[50] *See Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

[51] *See also Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16868 at para. 23 (*PCIA Forbearance Order*) (1998) ("[a]ssuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner").

[52] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

[53] *See PCIA Forbearance Order*, 13 FCC Rcd at 16865, para. 15.

[54] *Id.* at 16866, para. 17.

wireline and wireless.[55] The Commission also noted that CMRS billing practices remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the Act.[56] Thus, we do not believe that making this requirement mandatory will constitute a significant new regulatory burden on CMRS providers, including smaller providers.[57] We believe that eliminating the exemption from 47 C.F.R. § 64.2401(b) for CMRS providers will remove any ambiguity regarding the necessity of CMRS carriers to provide clear and non-misleading billing information to their customers. In addition, CMRS carriers are put on notice that the Commission intends to review complaints regarding unclear or misleading billing descriptions, and may take enforcement action under this rule as appropriate based on such complaints or other evidence of non-compliance.

20. Though we remove the exemption from 47 C.F.R. § 64.2401(b) for CMRS providers, and thereby erase any ambiguity regarding the necessity of CMRS carriers to provide clear and non-misleading billing information to their customers under our rules, we recognize that states may wish to play a role in enforcing rules against CMRS and other interstate carriers providing misleading billing information. At a minimum, we emphasize that no action that we take in this *Second Report and Order* and the *Declaratory Ruling* below limits states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items, nor limits a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute. In the *Second Further Notice* below, we seek comment on specifically where to draw the line between the Commission's jurisdiction and states' jurisdiction over the billing practices of CMRS and other interstate carriers.

IV. DECLARATORY RULING

A. Background

21. In its Petition for Declaratory Ruling, NASUCA raises concerns about the use of line items on consumer telephone bills. NASUCA contends that, in some cases, the exact nature of the line items are often unclear from the descriptions, and the line items are characterized in a way that could mislead consumers into believing these charges are government mandated charges. Further, NASUCA contends that the descriptions of such line items often have little or no relationship to the actual charge listed on the bill.

22. NASUCA requests that the Commission prohibit telecommunications carriers – both wireline and wireless - from imposing monthly line-item charges, surcharges or other fees on customers' bills unless such charges expressly have been mandated or authorized by a regulatory agency.[58] NASUCA does not object to line items for "government mandated fees," nor does it object to "government

[55] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

[56] *Id.* at 7502, para. 19.

[57] *See* Cingular Comments at 7-11 (contending that Cingular is already in compliance); Leap Comments at 9-11 (fees meet truth-in-billing requirements); Verizon Wireless Comments (bills comply with federal law even though Verizon Wireless is not subject to truth-in-billing rules).

[58] NASUCA asks that if we deem a Petition for Declaratory Ruling to be procedurally lacking for their proposals, that we instead initiate a new rulemaking.

authorized fees." NASUCA argues that allowing the inclusion of line items that are not mandated or authorized by the government violates the Truth-in-Billing principles and rules, the *USF Contribution Order*, and both sections 201(b) and 202 of the Act.

B. Discussion

1. NASUCA Petition

23. We deny NASUCA's request for a Declaratory Ruling prohibiting telecommunications carriers from imposing any line items or charges that have not been authorized or mandated by the government. There is no general prohibition against the use of line items on telephone bills under our rules or the Act. As NASUCA has acknowledged, nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items.[59] To the contrary, the *USF Contribution Order* states that while carriers cannot include administrative costs under the umbrella of regulatory charges, they may recover such costs through their rates or "other line items."[60] The truth-in-billing rules require that charges contained on telephone bills be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered.[61] If carriers choose to offer descriptions of various charges in the form of line items, however, there is nothing in the existing Truth-in-Billing requirements to prevent them from doing so.[62] Nor do we believe there is any basis to conclude that such a practice is "unreasonable" under section 201(b). As several commenters have noted, the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers.[63] In sum, we reiterate that carriers are not prohibited *per se* under our existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills.[64]

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[59] *See generally Truth-in-Billing Order*, 14 FCC Rcd 7492; *see also* NASUCA Petition at 8, and n.16. *See also* AT&T Comment at 5 (no Commission order or rule that prohibits impositions of line-item charges).

[60] *See USF Contribution Order*, 17 FCC Rcd at 24979, para. 55. *See also* Sprint Comments at 6 (citing the USF Contribution Order and E911 proceeding); USTA Comments at 4 (the only unresolved matter is how to standardize line items); Verizon Comments at 3-5 (the Commission has expressly authorized the recovery of specific line item surcharges in Commission proceedings such as the USF Contribution Order, and proceeding regarding Local Number Portability fees); BellSouth Comments at 5 (NASCUA has failed to show a controversy or uncertainty).

[61] 47 C.F.R. § 64.2401(b).

[62] *See* Sprint Comments at 15 and AT&T Comments at 10, 13 (the Commission left it up to the carriers to decide how to meet Truth-in-Billing requirements).

[63] *See, e.g.*, CTIA Comments at 3; Global Crossing Comments at 2; Verizon Wireless Comments at 14.

[64] We note that this finding does not alter the role of any other specific prohibition or restriction on the use of line items. For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802, 1806, para. 22 (1993). *See also* Report and Order and Request for Comments, 6 FCC Rcd 4657, 4664, para. 34; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 (continued....)

24. Commenters in this docket have supplied evidence that there is considerable consumer confusion regarding telephone bills and even possible abuse of line item charges.[65] Both the Texas Office of the Attorney General and the Iowa Utilities Board, for example, note that increasing amounts of their resources are devoted to reviewing various surcharges, in response to consumer complaints.[66] We recognize that the provision of accurate information on consumer telephone bills is among one of the most important issues for telecommunications consumers. In particular, we are concerned that some carriers may be disguising rate increases in the form of separate line item charges and implying that such charges are necessitated by governmental action. As a result, we take this opportunity to reiterate, and provide some additional clarifications to, our existing rules, and we seek further comment on additional proposals below that we believe would be beneficial in ensuring that consumers receive accurate information. We also recognize that overbroad state regulations in this area may frustrate our federal rules and the federal objective of minimizing regulatory burdens on the competitive CMRS industry. Moreover, we note that in establishing the regulatory framework for CMRS, Congress expressly assigned certain tasks, including rate regulation, to the federal government. Accordingly, we also discuss the roles of federal and state authority in this area, and identify those types of state regulations that expressly are preempted by the Act.

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FCC Rcd 12224, 12228 n.33 (2004). As noted *infra*, we intend to revisit the prohibition on line items referring to interstate TRS in a future proceeding in a separate docket that will take into consideration the policy objectives outlined in this proceeding.

[65] *See, e.g.*, TURN & UCAN Comments at 4 (contending that there has been a proliferation of deceptive, misleading charges). The National Consumers League says that complaints about billing descriptions have increased, prompting the group to create a link on their website regarding "Understanding Your Phone Bill," but the group has difficulty keeping this up-to-date with the vague line items (Consumers League Comments at 4-5). Consumers Union, the National Consumer Law Center, and the Massachusetts Union of Public Housing Tenants say the truth-in-billing principles have failed to clean up the clutter and to help consumers make informed choices about their service (Consumers Union Comments at 4). Ohio PUC describes consumer confusion over vague charges that appear to be regulatory in origin, such as "Government Assessment" charges (Ohio PUC Comments at 8-10). Indiana URC contends that the practice of placing extra charges not expressly mandated or clearly disclosed on customer bills is misleading and does not comport with the spirit of the Act (Indiana URC Comments at 2). The Iowa UB says that it is difficult to determine if the surcharge is recovering only what the actual regulatory costs are to that carrier or operating costs; thus, the true cost of service is obscured, which makes it difficult for a consumer to make cost-based comparisons between competing service providers (Iowa UB Comments at 2). The Texas OAG states: "The State of Texas has received countless bills containing instances of regulatory fees and surcharges purporting to recover 'regulatory' or 'administrative' costs, but which upon further analysis are nothing other than regular operating expenses, such as those incurred by any other business" (Texas OAG Comments at 2). The commenting "Rural Wireline Carriers" contend that some of them provide interexchange services in competition with carriers that impose misleading line item surcharges described in NASUCA's Petition (RWC Comments at 2). Massachusetts OAG contends that market forces alone are not sufficient to ensure that consumers are not deceived and can make accurate price comparisons (Massachusetts OAG Comments at 2). Teletruth provides details of a two-year investigation into consumer phone bills by Teletruth and New Networks Institute, a market research firm, and LTC Consulting, a phone bill auditing firm (*see generally* Teletruth Comments). Several consumer commenters also express discontent with the line item charges on their bills. *See, e.g.*, Jason G. Campbell Comments.

[66] Texas OAG Comments at 2; Iowa UB Comments at 2 (hundreds if not thousands of consumer inquiries concerning current billing practices).

2. Application of Section 201(b) to Line Items

25. Section 201(b) of the Act requires that all charges, practices, classifications, and regulations for and in conjunction with interstate communications service be just and reasonable, and gives the Commission jurisdiction to enact rules to implement that requirement.[67] The Commission has concluded that a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b).[68]

26. Although we have not prohibited carriers from using line items, we reiterate here that all carriers are prohibited from including misleading information on their telephone bills. We believe that it is useful to now provide some additional detail on whether certain practices may be deemed unreasonable or misleading under our rules.[69] It appears from the record that a common source of consumer confusion derives from the myriad of charges that are assessed by carriers ostensibly to recover costs incurred as a result of specific government action. These regulatory charges generally can be characterized as mandated fees or taxes that the carrier is required to collect from the consumer (*e.g.*, federal excise tax),[70] authorized fees that the carrier has the discretion to pass on to the consumer (*e.g.*, universal service), and administrative or other costs that may be associated with the cost of compliance with regulatory requirements. We emphasize that it is permissible for carriers to recover these costs so long as they do so in a manner that complies with our rules.

27. Consistent with the Commission's prior findings, we reiterate that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge.[71] Consumers may be less likely to engage in comparative shopping among service providers if they are led to believe erroneously that certain rates or charges are unavoidable federally mandated amounts from which individual carriers may not deviate.[72] This prohibition includes not only misleading statements or descriptions, but also placement of the charge on the bill in such a way as to lead a reasonable consumer to believe that the charge has been mandated by the government. For example, because placing a discretionary charge in a section or subsection of the bill that otherwise contains only government required charges or taxes may mislead a reasonable consumer into believing that such charge also is required, such placement is not allowed. We also are concerned that some carriers may be labeling certain non-regulatory line item charges in such a way as to create confusion with regulatory programs. As a result, carries should take great caution in using terms that are most commonly associated with governmental programs to describe other charges that are

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[67] 47 U.S.C. § 201(b).

[68] *See Truth-in-Billing Order*, 14 FCC Rcd at 7560, para. 24.

[69] We emphasize that our statements herein are of general applicability and are not intended to supersede more specific federal rules that may govern the recovery of particular fees.

[70] *See, e.g.*, 26 U.S.C.A. § 4251(a)(2) ("Payment of [excise] tax. – The tax imposed by this section shall be paid by the person paying for such services").

[71] *See Truth-in-Billing Order*, 14 FCC Rcd at 7527, para. 56.

[72] *See id.* at 7522-23, para. 49.

unrelated to those programs.[73]

28. Consistent with the Commission's conclusion in the *USF Contribution Order*, we reiterate that it is unreasonable and misleading for carriers to include administrative and other costs as part of "regulatory fees or universal service charges" or similar line item labels that imply government mandated charges.[74] Although the Commission focused primarily on the universal service charge, we reiterate here that, as the language in that order indicates, this prohibition applies to all regulatory fees. It is our view that these costs are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates or other line item charges.[75] Thus, it is an unreasonable practice for carriers to include any costs that do not accurately reflect the carrier's actual obligation to the specific governmental program that the line item purports to recover. For example, carriers that elect to recover their universal service contribution costs through a separate line item may not mark up the line item above the relevant contribution factor established by the Commission.[76] As a result, a regulatory line item charge should never exceed any maximum amount or cap established by the government to recover for that specific program. Carriers that are not rate-regulated by this Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers will have the same flexibility that exists today to recover legitimate administrative and other costs, and may recover those legitimate administrative and other related costs through rates or other line items.

29. To the extent that a carrier decides to collect a regulatory fee through a separate line item, we clarify that the burden rests upon the carrier to demonstrate that the charge imposed on the customer accurately reflects the specific governmental program fee it purports to recover. This burden is satisfied if the carrier demonstrates that the line item charge in question falls within any maximum level allowed by the government for its recovery.[77] In those instances, however, when a carrier is not subject to a maximum cap or other specific guidelines for its recovery, the carrier should be prepared to demonstrate that the cost imposed pursuant to a regulatory line item charge corresponds to the amount remitted to the government or its agent for that program. As discussed above, it is not permissible for a carrier to collect administrative or other charges pursuant to a line item that describes a specific governmental program or fee. Thus, carriers should be able to demonstrate with probative accounting documentation and other relevant evidence that the amounts collected for specific governmental programs and fees equals the amount submitted to the government or its agent for that program.

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[73] *See, e.g.*, NASUCA Petition at 29-30 (arguing that one carriers' "TSR Administrative Fee" is designed to be confused with the Telecommunications Relay Service (TRS) charge, and another's "Universal Connectivity Charge" may be confused with a separate universal service charge on that carrier's bill).

[74] *USF Contribution Order*, 17 FCC Rcd at 24979, para. 54.

[75] *Id.*

[76] *See id.* at 24978, paras. 49-51 (noting that if the contribution factor is 7.28%, a carrier's federal universal service line item charge cannot exceed 7.28%).

[77] *See, e.g.*, 47 C.F.R. § 54.712 ("the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor").

3. Section 332

30. We find that state regulations 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) of the Act. This statutory provision states, in relevant part:

> [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 service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[78]

As the D.C. Circuit has recognized, Congress did not specifically define "rates," "entry," or other key terms in section 332(c)(3)(A).[79] The Commission, however, consistently has interpreted the rate regulation provision of the statute to be broad in scope. The Commission has interpreted this provision to "prohibit states from prescribing, setting or fixing rates" of wireless service providers.[80] The Commission also has made clear that the proscription of state rate regulation extends to regulation of "rate levels" and "rate structures" for CMRS.[81] Along these lines, the Commission has found that section 332(c)(3)(A) not only prohibits states from prescribing "how much may be charged" for CMRS, but also prohibits states from prescribing "the rate elements for CMRS" or "specify[ing] which among the CMRS services provided can be subject to charges by CMRS providers."[82] We also note that our interpretation here is consistent with prior Commission statements equating "line items" with "rate elements."[83] Recognizing the Commission's broad prior interpretation of rate regulation and statements about line items, we find that state regulations[84] requiring or prohibiting line items similarly fall within the statute's

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[78] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[79] *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

[80] *Id.*, citing *Pittencrief Communications, Inc.*, 13 FCC Rcd 1735, 1745 (1997) ("*Pittencrief Order*").

[81] *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19906-07, paras. 18-20 (1999) (*"Southwestern Bell Order"*).

[82] *Id.* at 19907, para. 20.

[83] For example, in discussing the manner in which federal universal service contributions may be reflected on end users' bills, the Commission explained that "incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*." *USF Contribution Order*, 17 FCC Rcd at 24979, para. 53 n.133 (emphasis added). And in a prior order on the same subject matter, the Commission approved a plan permitting local phone companies to establish "a separate rate element (*e.g.* line item)" to recover federal universal service contributions. *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13057-58, paras. 218-19 (2000).

[84] We note that the terms "state regulation" and "state regulatory action" have broad application in the context of section 332. *See Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning* (continued....)

zone of proscribed state regulatory activity.[85]

31. A closer look at the type of state regulations in question reveals that many directly affect CMRS carriers' rates and rate structures in a manner that amounts to rate regulation. State regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates.[86] Parties have submitted several examples of state regulations and proposals in this category, all of which are preempted by the Act.[87] As a further illustration, we note that the regulatory relief sought by NASUCA in its Petition (*i.e.*, a regulation curtailing a CMRS carrier's ability to structure its bills and isolate charges into separate line items) would have a direct effect on a CMRS carrier's rate structure presented to its end users and, if instituted by a state commission, would be preempted by the Act. We find that the converse is also true: a state rule *requiring* CMRS carriers to segregate particular costs into line items represents the other side of the same coin, and similarly would limit a carrier's ability to set and structure its rates. Parties have submitted at least one example of such a requirement.[88] That this type of line item regulation would

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Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17027, para. 12 (2000) ("*Wireless Consumers Alliance Order*") (recognizing that judicial, legislative and administrative action all can constitute state regulation under section 332).

[85] We note that our analysis of section 332 herein has no effect on voluntary agreements between CMRS carriers and states such as the one discussed above in para. 12.

[86] We recognize that precluding states from prohibiting carriers from using line items on an end user's bill may be in tension with our prior conclusion in the TRS context that carriers may not recover interstate TRS costs as a specifically identified line item. *See supra* n.64. Although we recognize that the prohibition on line items referring to interstate TRS reflects concerns specific to TRS's genesis in Title IV of the Americans with Disabilities Act of 1990, as noted above, we intend to revisit this TRS-related prohibition in a future proceeding in a separate docket.

[87] *See, e.g.*, Letter from John T. Scott, III, Vice President & Deputy General Counsel Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 04-208 and CC Docket No. 98-170, at 5 (filed Jan. 25, 2005) (Verizon Wireless Jan. 25 *Ex Parte*). Such state regulations include a Vermont Public Service Board proposal to prohibit carriers from itemizing a separate charge to recover the Vermont gross receipts tax imposed on carriers, *see* Public Service Board Proposed Rule 7.617(c); an Indiana Utility Regulatory Commission letter prohibiting carriers from placing a line item for the Indiana Utility Receipts tax on their bills, *see* Letter from Christopher R. Day, Counsel, Government Affairs, Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 04-208 (filed Dec. 22, 2004); and a Georgia law prohibiting recovery of carrier contributions to the state universal service fund through separate charges, *see* NASUCA Petition at 65 n.170. The statutory preemption we recognize in this item is not limited to these particular state rules, but would apply to other rules, now and in the future, that constitute "rate regulation" in the manner described above.

[88] *See* Verizon Wireless Jan. 25 *Ex Parte* at 5, citing a requirement under Colorado law, 4 Colo. Code Regs. Sec. 723-41.2.3, which requires carriers to segregate a particular cost and collect it through "a line item on the monthly bill of each...end user."

affect a CMRS carrier's rates and rate structure is particularly evident when considering that most CMRS carriers (as discussed in more detail below) market and price their services on a national basis. A CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction.

32. While we hold that state regulation prohibiting or requiring CMRS line items constitutes preempted rate regulation, we emphasize that this preemption does not affect other areas within the states' regulatory authority. For example, our ruling does nothing to disturb the states' ability to require CMRS carriers to contribute to state universal service support mechanisms or to impose other regulatory fees and taxes. The Commission previously has recognized that section 254(f) of the Act authorizes states to require CMRS providers to contribute to state universal service support mechanisms – and that section 332(c)(3) does not take this authority away.[89] Indeed, in distinguishing rate and entry regulations from "other terms and conditions," which are not expressly preempted under section 332, Congress explained that the latter includes "such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a state's lawful authority."[90] Similarly, consistent with section 601(c)(2) of the 1996 Act, we do not read section 332(c)(3) to limit a state's authority to impose taxes or other regulatory fees.[91] What section 332(c)(3)

[89] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9181-82, para. 791 (1997); *Pittencrieff Order*, 13 FCC Rcd 1735, *aff'd, CTIA v. FCC.*

[90] H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261 (1993). The Commission previously has recognized that state regulation of customer billing practices fall within "other terms and conditions" in section 332(c)(3)(A). *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, Memorandum Opinion and Order, 17 FCC Rcd 14802, 14805, para. 6 (2002) (*Western Wireless Kansas Order*); *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Docket No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 10861, 10881, para. 37 (1999) (*Calling Party Pays NPRM*). The Commission never has considered, however, where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall. We address this issue for the first time in this item and, for the reasons expressed above, find that such regulation represents rate regulation. For similar reasons, our ruling here is not at odds with the decision of the Court of Appeals for the Seventh Circuit in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004) (holding that challenge to wireless carrier's billing practice was not preempted by section 332(c)(3)(A) and thus not removable to federal court). The issue of state regulation of line items was not before that court, and we address it for the first time here. In addition, the *Fedor* court did not call into question the Commission's findings in the *Southwestern Bell Order* and the *Wireless Consumers Alliance Order*, which support our declaratory ruling here, and the *Fedor* court indeed relied on those decisions. Moreover, the court stated that, in deciding whether a billing-related claim is preempted, the proper inquiry was whether the claim requires the state court to assess what rate a carrier may charge. By addressing what may or may not be presented as part of a provider's rate, regulations of the sort we preempt here would directly affect what subscribers see as the provider's rates, which the Act expressly precludes the states from regulating.

[91] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). In particular, section 601(c)(2) of the 1996 Act provides, with limited exceptions, that "nothing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation." 1996 Act, § 601(c)(2), published as a note to 47 U.S.C. § 152; *see also Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section* (continued....)

does address, however, in precluding state regulation of a CMRS carrier's rates, are rules that dictate whether and how CMRS carriers may incorporate these regulatory fees into their end user bills.

33. We also emphasize that not all regulation relating to a carrier's bills and its relationship with customers represents preempted "rate regulation." For example, state regulations that address the disclosure of whatever rates the CMRS provider chooses to set,[92] and the neutral application of state contractual or consumer fraud laws, are not preempted by section 332.[93] In addition, state requirements that are consistent with our federal truth-in-billing rules can coexist with these rules.[94] As with other types of state "truth in billing" regulation, however, regulation of interstate services that conflicts with federal rules and objectives may be subject to future preemption. In the *Second Further Notice* that we adopt in this proceeding, we seek comment on, among other things, how to define more clearly prohibited and permissible state regulation pursuant to section 332(c)(3)(A).[95]

34. Our ruling is further consistent with and supported by the Commission's decision in the *Wireless Consumers Alliance Order.* In that decision, the Commission found that state court damage awards do not necessarily fall within the concept of "rates" in section 332(c)(3)(A) because "there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior."[96] Here, however, we find that state regulation requiring or prohibiting the use of line items representing charges for CMRS is preempted because of its direct effect on the CMRS carrier's rates and rate structure. The Commission further stated in the *Wireless Consumers Alliance Order* that state damage awards "may, in specific cases, be preempted by section 332[(c)(3)(A)]."[97] As we found in the *Wireless Consumers Alliance Order*, here we find that "it is the substance, not merely the form" of the line item at issue that determines whether the state is engaging in rate regulation proscribed by section 332(c)(3)(A).[98] Because "[w]e recognize that the line between prohibited and permissible" state

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1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673 (1999).

[92] *See Southwestern Bell Order*, 14 FCC Rcd at 19908, para. 23.

[93] *See Southwestern Bell Order,* 14 FCC Rcd at 19903, para. 10; *Western Wireless Kansas Order*, 17 FCC Rcd at 14819, para. 30 n.119.

[94] *See* 47 C.F.R. § 64.2400(c); *see also Truth-in-Billing Order,* 14 FCC Rcd at 7507, para. 26 ("states will be free to continue to enact and enforce additional regulation *consistent with* the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today").

[95] *See infra* paras. 49-54.

[96] *Wireless Consumers Alliance Order,* 15 FCC Rcd at 17034, para. 23.

[97] *Id.* at 17036, para. 28.

[98] *Id.* at 17037, para. 28.

regulations of line items "may not always be clear,"[99] we issue a *Second Further Notice* seeking comment on how further to define the scope of section 332(c)(3)(A)'s preemption, as well as in general on where to draw the line between the Commission's jurisdiction and states' jurisdiction over wireless and wireline carriers' billing practices.

35. Even setting aside the preemptive effect of section 332(c)(3), we note that the type of state regulations described above also may be subject to preemption because they conflict with established federal policies. It is recognized widely that federal law preempts state law where, as here, the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[100] or of federal regulations.[101] The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers.[102] In this environment, Congress has directed that the rate relationship between CMRS providers and their customers be governed "by the mechanisms of a competitive marketplace," in which prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators.[103] To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis.[104] Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans.

36. The preemption recognized above under the rate regulation provisions of section 332(c)(3)(A) is limited to state regulations that require or prohibit the use of line items. We thus decline in this *Declaratory Ruling* to go as far as urged by some CMRS carriers in the record, to the extent they

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[99] *Id.*

[100] *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982).

[101] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *United States v. Shimer*, 367 U.S. 374, 381-382 (1961).

[102] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, Ninth Report, 19 FCC Rcd 20597, 20601, para. 4 (2004) (*Ninth CMRS Market Conditions Report*).

[103] *Wireless Consumers Alliance Order*, 15 FCC Rcd at 17032-33, paras. 20-21; *see Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review—Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, GN Docket No. 94-33, *GTE Petition for Reconsideration or Waiver of a Declaratory Ruling*, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998).

[104] *Ninth CMRS Market Conditions Report*, 19 FCC Rcd at 20644, para. 113; *see also* CTIA Comments at 4-6.

suggest that *any* state regulation affecting line items is prohibited rate structure regulation.[105] We seek comment in the *Second Further Notice* below regarding appropriate federal rules to govern, among other things, the description of line items, and we also ask questions about the balance between federal and state regulation on these subjects.

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Introduction

37. In soliciting comment on the NASUCA Petition, we highlighted that the NASUCA Petition raised issues implicated in our Truth-in-Billing proceeding.[106] However, the broader issue of the role of states in regulating billing was addressed primarily in reply comments and *ex parte* submissions, and received only cursory treatment in comments on the NASUCA Petition. Given the importance and complexity of this broader issue, a second Further Notice of Proposed Rulemaking is appropriate in order to garner as complete and up-to-date a record as possible.[107] We also seek comment on other truth-in-billing issues, as specified below, and invite commenters to refresh the record on any issues from the *Truth-in-Billing Further Notice* that we have not addressed above.[108]

B. Discussion

1. Billing of Government Mandated and Non-Mandated Charges

38. In the *Truth-in-Billing Order,* the Commission required carriers that list charges in separate line items to identify certain of such line item charges through standard industry-wide labels and to provide full, clear and non-misleading descriptions of the nature of the charges.[109] The Commission sought comment on the specific labels that carriers should adopt, while tentatively concluding that such labels will, without unduly burdening carriers, identify adequately the charges and provide consumers

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[105] *See, e.g.,* Verizon Wireless Jan. 25 *Ex Parte* at 8-10; Letter from Leonard J. Kennedy, Senior Vice President and General Counsel, Nextel Communications, and Thomas J. Sugrue, Vice-President, Government Affairs, T-Mobile USA, to Michael K. Powell, Chairman, Federal Communications Commission, et al., CG Docket No. 04-208, at 2, 10-11 (filed Dec. 13, 2004) (Nextel/T-Mobile Dec. 13 *Ex Parte*).

[106] National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format; Comments Requested, 69 Fed. Reg. 33021 (June 14, 2004).

[107] *But see* Verizon Wireless Jan. 25 *Ex Parte* at 11-14 (suggesting that this issue is ripe for resolution now and that Administrative Procedure Act requirements have been satisfied).

[108] For instance, while we do resolve above the *Truth-in-Billing Further Notice*'s question regarding whether 47 C.F.R. § 64.2401(b) should apply to CMRS carriers, *see Truth-in-Billing Further Notice,* 14 FCC Rcd at 7534-35, paras. 68-69, we do not decide above, however, whether 47 C.F.R. § 64.201(a)(2) and (c) should apply in the wireless context. *See Truth-in-Billing Further Notice,* 14 FCC Rcd at 7535-36, para. 70. We invite commenters to refresh the record on these issues.

[109] *See Truth-in-Billing Order and Further Notice,* 14 FCC Rcd at 7522-23, 7525-26, paras. 50, 55.

with a basis for comparison among carriers.[110] In addition, while declining to formulate standardized descriptions for billed services, the Commission encouraged carriers to develop uniform terminology for such descriptions.[111] The Commission also encouraged industry and consumer groups to consider further whether some categorization of charges would be advisable.[112]

39. Nearly six years after adoption of the *Truth-in-Billing Order*, the record reflects that consumers still experience a tremendous amount of confusion regarding their bills,[113] which inhibits their ability to compare carriers' service and price offerings, in contravention of the pro-competitive framework of the 1996 Act. To help alleviate this situation, consistent with our prior finding,[114] as well as the recommendations of commenters such as the Ohio PUC,[115] we tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes.

a. Distinction Between Mandated and Non-Mandated

40. We solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes. Should we define government "mandated" charges as amounts that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments? Under this definition, some examples of mandated charges would include state and local taxes, federal excise taxes on communication services,[116] and some state E911 fees. Non-mandated charges then could be defined as comprised of government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer. Under this definition, some examples of non-mandated, government authorized but discretionary charges would include state Telecommunications Relay Service[117] and universal service charges.[118] Another form of non-mandated charges also would include

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[110] *See id.* at 7537, para. 71. We will address these issues in the order that we adopt in response to this *Truth-in-Billing Second Further Notice.* Given that it has been over five and a half years since the comment cycle on the *Truth-in-Billing Further Notice* closed, we encourage commenters to refresh the record on these issues.

[111] *See Truth-in-Billing Order,* 14 FCC Rcd at 7518-19, para. 43.

[112] *See id.* at 7526, para. 55. The Commission provided as an example one method that carriers may use to provide clear descriptions of services rendered would be to identify a section of the telephone bill as "long distance service," followed by an itemized description of calls. *See id.* at 7517-18, para. 41.

[113] *See supra* paras. 16 and 24; *but see* Verizon Wireless Jan. 25 *Ex Parte* at 6 n.27 (asserting that the record in this proceeding "contains no credible evidence that CMRS providers fail to provide consumers with clear and non-misleading information they need to make informed choices").

[114] *See supra* para. 27.

[115] *See generally, e.g.,* Ohio PUC Comments at 2.

[116] *See* 26 U.S.C. § 4251.

[117] *See supra* note 64.

administrative fees and other purely discretionary charges.[119] We believe that these definitions would be consistent with the settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS,[120] and with our precedents. For instance, discussing the universal service charge in the *Truth-in-Billing Order,* the Commission stated:

> [W]e would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill . . . would be misleading.[121]

Similarly, after discussing carrier imposition of line items for charges such as access charge recovery and universal service, the Commission expressed concern that consumers may be confused about the nature of these charges, because the "names associated with these charges as well as accompanying descriptions (or entire lack thereof) may convince consumers that all of these fees are federally mandated."[122]

41. Another possible distinction between government mandated and non-mandated charges could be based on whether the amount listed is remitted directly to a governmental entity or its agent.[123] Pursuant to this distinction, "mandated" charges would differ from non-mandated ones in that non-mandated charges only would be composed of fees collected by carriers that go to the carrier's coffers, and which are not directly related to any regulatory action or government program. For example, under this definition, a charge to recover universal service contributions would be considered to be government

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[118] Government authorized but discretionary charges only could include those costs that are directly related to the specific governmental program or action that the line item purports to recover. *See supra* para. 26.

[119] Though carriers may recover such costs, we emphasize that carriers may not include such costs in the line item purporting to recover costs directly related to the specific underlying governmental program or action. For example, while carriers may recover administrative and other costs related to collection of universal service charges from end users, carriers may not include such costs as part of a line item for "regulatory fees or universal service charges." *See supra* para. 28.

[120] *See, e.g.,* Verizon AVC at 14, para. 36(a), stating that on consumers' bills, carriers will separate "taxes, fees, and other charges that [carriers are] required to collect directly from Consumers and remit to federal, state, or local governments . . . from . . . all other discretionary charges (including, but not limited to, Universal Service Fund fees)."

[121] *Truth-in-Billing Order,* 14 FCC Rcd at 7527, para. 56 (citations omitted). The Commission further noted that its view was consistent with the then-recent decision of the Federal-State Joint Board on Universal Service recommending that the Commission "'prohibit carriers from depicting [universal service] charges as . . . mandated by the Commission or the federal government by terms or placement on the bill.'" *Id.* (citations omitted).

[122] *Id.* at 7524-25, para. 53.

[123] Charges also would be considered mandated if the government required that the funds be remitted to a quasi-governmental authority such as the Universal Service Administrative Company.

"mandated," though a line item charge for administrative and other costs related to collection of universal service charges from end users still would be considered non-mandated. We observe that this proposed distinction is consistent with that in the CTIA Consumer Code, which states that on customers' bills, carriers will distinguish "(a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees, and other charges collected by the carrier and remitted to federal, state or local governments."[124]

42. We seek comment on these potential distinctions between government mandated and non-mandated charges that we have set forth, as well as any others that commenters may wish to propose. It would be helpful if commenters indicate how whatever proposal they support is in accord with our truth-in-billing policy goals and other policy considerations, and if they address how whatever distinction and definitions they advocate comport with Commission precedents and/or industry efforts to address billing and other consumer issues. We also encourage commenters to assess the ease or difficulty of administering any proposed distinction between government mandated and non-mandated charges.

b. Separate Section for Government Mandated Charges

43. Section 64.2400(a) of the Commission's rules provides that our truth-in-billing rules are intended "to aid customers in understanding their telecommunications bills, and to provide them with the tools they need to make informed choices in the market for telecommunications service."[125] Section 64.2401(b) requires that descriptions of billed charges be brief, clear, non-misleading, and in plain language.[126] The Commission adopted these rules in the *Truth-in-Billing Order,* where it elaborated that the "proper functioning of competitive markets . . . is predicated on consumers having access to accurate, meaningful, information in a format that they can understand."[127] The Commission further emphasized that one of the fundamental goals of the truth-in-billing principles is "to provide consumers with clear, well-organized, and non-misleading information so that they may be able to reap the advantages of competitive markets."[128] We believe that separating government mandated charges from all other charges satisfies all of these policy goals, and will strike a balance between some carriers' desires to explain that they incur costs associated with government programs, and the needs of consumers and regulators to assess bills accurately. At the same time, such separation will discourage a carrier from misleading consumers by recovering other operating costs as government mandated charges. We also note that the proposed rule is consistent with the relevant obligations of the aforementioned settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and

[124] CTIA Consumer Code, Item Six.

[125] 47 C.F.R. § 64.2400(a). *See also Truth-in-Billing Order,* 14 FCC Rcd at 7493, para. 1; 7523, para. 50.

[126] *See* 47 C.F.R. § 64.2401(b). In the *Order* above, we explicitly apply the requirements of 47 C.F.R. § 64.2401(b) to CMRS carriers. *See supra* paras. 16-19.

[127] *Truth-in-Billing Order,* 14 FCC Rcd at 7494, para. 2. *See also id.* at 7498, para. 8; 7519, para. 43 ("Adopting understandable common descriptions for services offered could enable consumers to comparison shop more readily, and thereby take full advantage of the benefits of a competitive telecommunications market").

[128] *Id.* at 7501, para. 14. *See also id.* at 7498, para. 7.