

Comments of the Attorneys General Before the Federal Communications Commission Regarding Truth in Billing and Billing Formats

Executive Summary June 24, 2005

Background and Statement of the Problem

In 1999, the Federal Communications Commission (“FCC” or “Commission”) addressed growing consumer and marketplace confusion related to carrier abuses in billing for telecommunications services by releasing its *Truth-in-Billing Order*.¹ In that Order, the Commission adopted “broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices.”² 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.³ The details of compliance with these requirements were left to the carriers and wireless providers were exempt.⁴

This approach was intended, in part, to foster competition but led to the proliferation of deceptive billing practices in the industry which in turn, became the source of widespread dissatisfaction among its customers. Telecommunications services now have a regular place on the Federal Trade Commission’s (“FTC”) top ten list of consumer fraud-related complaints, joining the ranks of work-at-home schemes, foreign money offers, sweepstakes and lotteries.⁵ In Texas, telecommunications issues have ranked in the top three of consumer complaint generating industries for the last three years.

At the heart of much consumer confusion is the carriers’ practice of adding line item charges to the bills of wireless consumers to mask the true cost of the services they provide (“carrier add-on

¹See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Proposed Rulemaking, 13 FCC Rcd 18176 (1998).

²*Id.* at 14 FCC Rcd at 7498, para. 9.

³*Id.* at 7496, para. 5.

⁴In later adjustments to the *Truth-in Billing Order*, the FCC determined that: (1) bundled services offered by different carriers as a single package may be listed on a telephone bill as a single offering; and (2) carriers are prohibited from including administrative costs in a line item designed to recover the carrier’s federal universal service contribution. See Second Report and Order, Declaratory Ruling, an Second Further Notice of Proposed Rulemaking (March 18, 2005) * FCC Rcd. * , para. 6 and 9.

⁵FTC Releases Top 100 Consumer Complaint Categories for 2004 (Feb. 1, 2005), at <http://www.ftc.gov/opa/2005/02/top102005.htm> as of June 7, 2005.

charges”). In other words, at the time that the consumer enters into an agreement with a carrier, that carrier will specify a monthly price for the service but will fail to disclose additional variable add-on charges which the carrier knows it will include in the consumer’s bill. The amount of these add charges is determined by the carriers and reflects efforts by carriers to recover additional costs of doing business even while offering consumers a lower “price” for their services.

In addition, the carriers’ bills often use misleading terms to describe these add-on charges. Phrases such as “regulatory assessment” imply to consumers that these line item charges are governmental fees which carriers are required to impose upon customers- just like the line item charges for taxes which customers are accustomed to paying on many goods and services. These phrases are also misleading in that the consumer, examining a lengthy and fragmented bill, has no way of knowing that it is the carrier who has elected to generate additional revenue by adding this amount to a bill. The practice of including a line item on consumer’s bills for these add-on charges is pervasive in the industry, and the end result has been to frustrate the goal of fair competition since it is virtually impossible for consumers to compare prices among wireless providers. In fact, despite diligence on the part of consumers, it is only when a consumer receives a bill that he or she will discover the total price that they will pay. This consumer protection problem is further compounded by the fact that the contracts required by many wireless carriers impose substantial penalties for early cancellation of contracts.

In the face of these problems States have endeavored to address consumer protection related wireless problems via legislative action, rule-making proceedings, and court litigation depending on the individual state’s legal and regulatory structure.⁶

The Pending Rulemaking

On March 30, 2004, the National Association of State Utility Consumer Advocates (“NASUCA”) filed a petition for declaratory ruling requesting that the FCC clarify its Truth-in-Billing-Rules and provide that wireline and wireless carriers be prohibited from imposing line-item fees or surcharges on customers’ bills unless those charges are expressly mandated or authorized by local, state or federal law. In response, the FCC recently issued its Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking in which it took the step of eliminating the existing exemption for wireless carriers from the *Truth-in-Billing Order* and also “tentatively concluded” that it should reverse its prior holding permitting states to enact and enforce telecommunications carrier-specific truth-in-billing rules, and that “state regulations requiring or prohibiting the use of line items constitutes rate regulation and are preempted” by federal law.⁷ .

Summary of Proposed Comments

The proposed Comments are in response to this latest FCC rulemaking. The Comments commend the FCC’s recognition of problems in the wireless industry and its decision to bring

⁶ One such notable effort was reflected in the recent 32 state multistate settlement which among other things required carriers to provide point of sale disclosures to consumers. During the same time period, the “FCC’s Truth-in-Billing rules have not been the basis for a single Notice of Apparent Liability” against any telecommunications carrier. See Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking (March 18, 2005) * FCC Rcd. * (Statement of Commissioner Adelstein Approving in Part, Dissenting in Part).

⁷*Id.* at para. 1.

wireless carriers within the fold of Truth-in-Billing Regulations.⁸

The Comments also strongly urge the Commission to reconsider the wisdom of any analysis which would preempt states' efforts to curb abuse in this area. Such a position represents a significant departure from that previously taken by the FCC—a position which was grounded on sound legal reasoning because the federal law, legislative history and case law amply demonstrate that Congress neither intended to preempt the states, nor authorized the FCC to preempt the States.⁹

With respect to some of the more specific questions raised by the Commission in its notice, the Comments further submit the following:

(1) The FCC should prohibit carriers from imposing carrier add-on charges to telecommunications bills. Instead, the FCC should allow only two categories of charges: (a) price and (b) taxes and regulatory fees.¹⁰

(2) If the Commission elects to allow these add-on charges as line items on bills, those line items should be clearly defined, accurately stated, and separated from taxes and regulatory fees. The Commission should prohibit the use of descriptions which directly or indirectly represent to customers that these add-on charges are related to governmental charges, fees or taxes. In this scenario, the Commission would allow three categories of charges: (a) price; (b) taxes and regulatory fees; and (c) carrier add-on charges.

(3) Should the Commission elect to adopt point of sale disclosures, the States concur with the Commission's initial assessment that such disclosures should occur **before** the customer signs any contract for the carriers service. Further, point-of-sale disclosure requirements and related enforcement schemes should complement, not displace, traditional state regulatory and police authority. The Commission's approach should be modeled after similar federal enactments relating to consumer protection which have incorporated the goal of national uniformity by setting a national floor and permitting states to use additional approaches not inconsistent with federal law. This allows states to respond to specific problems which arise in the context of changing marketing conditions, rapidly evolving technology and local problems.

(4) Finally, any enforcement model contemplated by the Commission should give states flexibility to implement mechanisms in accordance with individual state resources and structures, and should promote enforcement by allowing states to collect penalties, reasonable attorney's fees and costs.

⁸*Id.* at para. 2.

⁹As elaborated upon in the States' comments, the federal statutes themselves, the historical context, the legislative history and case law all demonstrate Congress neither intended such preemption, nor authorized the FCC to preempt the states. Instead, Congress made clear its intent to preempt the states only in the narrow area of regulation of rates and market entry of wireless carriers and warned that only if stated expressly was any preemption intended. State neutral enforcement of prohibitions on unfair, deceptive or fraudulent billing practices, whether effected by general consumer protection or contract law or by regulations or laws that specifically preclude such identified practices do not conflict with Congress' intent. Similarly, when Congress has delineated the lines of authority, as it has here, that delineation supercedes a dormant Commerce clause claim.

¹⁰"Taxes and regulatory fees" refers to taxes and fees that federal, state or local authorities require carriers to collect from consumers and remit to the appropriate governmental entity.

