Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

On October 14, 2010, the Commission put out for public comment proposed regulations that would require wireless providers, using widely available technology, to provide consumers of wireless services – voice, text and data – with simple alerts designed to protect such consumers from the sudden, unexpected and often exorbitant charges commonly known as "bill shock."[1] The National Association of State Utility Consumer Advocates ("NASUCA")[2] files these comments in support of the proposed regulations.

The NPRM well documents the need for action. In an increasingly-changing marketplace, in which providers constantly seek to find new ways to outperform one

[1] Notice of Proposed Rulemaking, FCC-10-180 (rel. Oct. 14, 2010) ("NPRM"). The NPRM was published in the Federal Register on November 26, 2010. On December 17, 2010, the comment date was extended to January 10, 2011.

[2] NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

another financially, consumers quickly become lost in an increasingly complex maze of choices, requirements and restrictions. Other life pressures make it impossible for them reasonably to devote the necessary personal resources to tracking all of these choices, requirements and restrictions. Even if they could do so, much of the needed information would still be unavailable or not apparent.

Providers, meanwhile, capitalize on this confusion, often extracting or attempting to extract exorbitant payments, commonly pressuring consumers to pay under threat of damage to their credit scores. Whether companies act in good faith or bad faith is largely irrelevant: The harm inflicted is typically commonly the same if they act in good faith as it is if they act bad faith.

The market provides no solution.[3] If it did, the problem would not have persisted as long as it has.

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[3]For the reasons stated in text, the proposed rules would be justified even if the relevant markets were not highly concentrated. In fact, however, the markets are increasingly oligopolistic. See *Fourteenth Annual Report on Mobile Wireless Competition (Fourteenth Annual Report)*, FCC 10-81, 2010 WL 2020768 (May 10, 2010):

> Over the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T .… and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009). The two next-largest providers, T-Mobile … and Sprint Nextel Corp…. had a combined 1.7 million net loss in subscribers during 2008 and gained 827,000 subscribers during 2009. One widely-used measure of industry concentration indicates that concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data are available…. The weighted average of the [Herfindahl-Hirschman indexes] (weighted by [Economic Area] population) was 2848 in 2008, an increase from 2674 in 2007. The weighted average HHI has increased by nearly 700 since we first calculated this metric in 2003…. For context, [the U.S. Department of Justice] antitrust guidelines consider a market to be 'highly concentrated' if the post-merger HHI exceeds 1800… [T]he Commission has previously used a higher screen, 2800 for the HHI and 100 for the change in HHI, in reviewing mergers of mobile providers.

The ability of giant companies in highly concentrated markets to continue the shocking and oppressive pricing practices for many years further justifies the proposed rules. See id., quoting U.S. Department of Justice ("[t]he operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition").

The shocking billings the proposed regulations seek to end distort the market in favor of companies that seek to succeed not by offering products and services of superior quality at lower cost but rather by capitalizing on the confusion faced by consumers. They do so at the expense of consumers and of companies who do seek to succeed on the basis of products and services of superior value.[4] The distortion is not unlike that observed by the Commission in the case of slamming offenses.[5]

The proposed regulations attack the problem directly. The regulations' modest goal is to provide consumers with the information they need, when they need it, in order to make informed decisions that are in their best financial interests, rather than unwitting uninformed decisions at odds with their best financial interests.

Under the proposed regulations, alerts would be required when subscribers approach an allotted time limit for voice, text and data usage, and again when subscribers reach the allotted time limit. Alerts would also be required when subscribers will incur international or roaming charges that are not covered by their plans.

The European regulations on which the proposed regulations draw for support provide a specific trigger point for such alerts. They require that wireless providers notify a consumer using a data roaming service when the consumer has reached 80

[4] For this reason, the market alone cannot be expected to solve the problem. See *In the Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Initial Comments, National Association of Regulatory Utility Commissioners, p. 10 (Jan. 17, 2006): "History, economics and common sense suggest there are some problems market forces cannot be relied upon to correct…. In [this] category are problems that result from practices that actually enhance a particular market participant's profits. The classic example is slamming. But for . . . penalties and enforcement, it is more profitable for even mainstream carriers to encourage (or at least take no action to curtail) such practices."

[5] See *In the Matter of Implementation of the Subscriber Carrier Selection Changes of the Telecommunications Act of 1996*, No. CC-94-129, 2008 WL 89702 (Jan. 9 2008) ¶ 2; *id*., 14 F.C.C.R. 1508, 14 FCC Rcd. 1508, 1998 WL 1064770 (Dec. 23, 1998) ¶ 1.

percent of an agreed financial or volume limit.[6] By contrast, the proposed regulations provide only a generic unquantified requirement that notice be given when consumers "are approaching an allotted time limit for voice, text and data usage."[7]

The benefits to consumers of quantitative specificity and uniformity outweigh any benefits to providers in leaving the requirement unquantified and subject to variation. The proposed regulations should therefore be refined to include a specific trigger point for the approaching allotted time limits. In the absence of persuasive comments suggesting a different trigger or triggers, the 80 percent European figure is appropriate for consumers in the United States.[8]

When a financial or volume limit is exceeded, the European regulations also require providers to send a notification indicating the procedure to be followed if the customer wishes to continue provision of this service. If the customer does not respond, the provider must cease to provide the service and cease to charge the roaming customer for regulated data roaming services until the customer requests the continued provision of service.[9] The proposed regulations omit, but should include, a similar requirement.

The European regulations require that the alerts be sent free of charge and without undue delay.[10] The proposed regulations omit, but should include, this requirement.

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[6] NPRM, ¶¶ 9, 20.

[7] NPRM, proposed regulations ¶ (c)(1).

[8] The Commission asks whether a single notification at the 80 percent usage mark would be sufficient to provide consumers with reasonable notice that they are approaching a limitation for voice, text, or data usage or whether additional notifications should be sent to the consumer at the 90 or 95 percent mark of their monthly allotments. NPRM, ¶ 20. NASUCA takes no position on that question at this time but reserves the right to do so after reviewing initial comments.

[9] NPRM, ¶ 9.

[10] *Id*.

These problems consumers face are not unique to the telecommunications industry. In finalizing these proposed regulations, and in considering future consumer protection initiatives, the Commission should therefore consider relevant experience in other industries.

Elizabeth Warren, of the recently formed Consumer Financial Protection Bureau, when asked if disclosure should be the priority in the credit industry, responded: "No, [the priority should be] clarity.... Disclosure has become like shrubbery, a dense thicket of words that are a good place to hide tricks and traps. Clarity is about emphasizing the key pieces of information that someone needs to know: price, risk, easy comparison of other products."[11]

Warren's point is certainly not that disclosures are not needed. Quite to the contrary, her point is that disclosures need to be relevant: "I have faith in people to make good financial decisions – when they have good information. No one makes great decisions – consumers or businesses – if the relevant information is hidden. This agency is designed around the premise that with good information, consumers can make good decisions for themselves, their families and ultimately for the economy."[12]

The goal in telecommunications should similarly be the disclosure of key information in such a way as to maximize meaningfulness and clarity for consumers in their decision-making. Here, the proposed regulations are appropriately designed and tailored to provide such key relevant information, but should be improved to include the additions suggested by NASUCA here.

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[11]"*Consumer agency creator wants clarity, not disclosure*," *Des Moines Register (*from *Los Angeles Times*), Oct. 28, 2010, p. 5A.

[12]*Id*.

Enforcement will also be needed in order to solve the problem. Again quoting Warren: "The fact that the agency is in place means that credit providers are starting to re-examine their business models for long-term sustainability in a world with a cop on the beat.... Look at the credit card offerings online and note how many are trying to advance the notion of clarity, simplicity and the absence of tricks and traps...."[13]

The proposed regulations are by no means a complete solution to all the complaints about wireless services or voice services generally. The cramming problem remains a persistent, largely unaddressed problem.[14] The same may be said of early termination fees.[15] Nor can the federal government alone reasonably be expected to solve the problems.[16]

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[13]*Id.*

[14]See *In the Matter of Consumer Information and Disclosure, Truth-in-Billing and IP-Enabled Services*, Nos. CG 09-158, CC 98-170 and WC 04-36, Initial Comments, NASUCA, pp. 42-58 (Oct. 13, 2009).

[15] See *In the Matter of Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, WT Docket No. 05-194, Comments of NASUCA, et al. (June 26, 2009).

[16] Federal law preserves to the states an ability to regulate the terms and conditions of wireless services, including such consumer protection matters as customer billing information and practices, billing disputes and the bundling of services and equipment. 47 U.S.C. § 332(c)(3)(A); see H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993). States that have granted exemptions to wireless providers from laws that regulate such consumer protection matters, see for example, Iowa Code § 476.103(2)(f) (exempting wireless providers from state prohibition against slamming and cramming), should re-examine those exemptions and re-assert their historical police powers to regulate such consumer protection matters. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879-80 (8th Cir. 2002); *Communications Telesystems Intern. v. California Pub. Serv. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999); *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998).

The proposed regulations are, however, both needed and well-conceived. The Commission should therefore adopt them – including the additions proposed by NASUCA – with all deliberate speed.

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