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

In the Matter of	)	
	)	
Truth-in-Billing and	)	
Billing Format	)	CG Docket No. 04-208
	)	
National Association of State Utility	)	
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Monthly	)	
Line Items and Surcharges Imposed	)	
By Telecommunications Carriers	)	
	)	

MCI, INC. COMMENTS

Karen Reidy
MCI, INC.
1133 19th Street, N.W.
Washington, D.C. 20036

(202) 736-6489

July 14, 2004

TABLE OF CONTENTS

SUMMARY

The NASUCA petition should be denied outright. It asks the Commission to take the sweeping step of prohibiting telecommunications carriers from assessing "monthly line-item charges, surcharges or other fees on customers' bills, unless such charges have been expressly mandated by a regulatory agency." NASUCA's request that the Commission prescribe how carriers structure their rates and recover their costs is misguided. While the Commission possesses authority to ensure that carriers charge just, reasonable, and non-discriminatory rates under sections 201 and 202 of the Telecommunications Act, it should not promulgate a rule dictating to all carriers the way they should charge their customers for service. Doing so would run counter to more than two decades of Commission precedent, is unwarranted in today's competitive marketplace given that NASUCA has made no showing of market failure, and would raise First Amendment concerns. Moreover, because the outcome sought by NASUCA is a change in policy and a rule of general applicability, the Commission should first issue a Notice of Proposed Rulemaking if it were to consider granting NASUCA's request.

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

In the Matter of	)	
	)	
Truth-in-Billing and	)	
Billing Format	)	CG Docket No. 04-208
	)	
National Association of State Utility	)	
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Monthly	)	
Line Items and Surcharges Imposed	)	
By Telecommunications Carriers	)	
_____	)	

MCI, INC. COMMENTS

MCI, Inc. (MCI) respectfully submits these comments pursuant to the Federal Communications Commission's (FCC or Commission) Public Notice (DA 04-1495), in the above referenced docket, putting forth for comment the Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates (NASUCA) on March 30, 2004.[1] The Commission should deny NASUCA's petition which seeks to prohibit telecommunications carriers from imposing line-item charges, surcharges or other fees on customers' bills unless such charges have been expressly mandated by a regulatory agency. NASUCA's petition is contrary to Commission precedent, fails to demonstrate need for Commission action, and raises First Amendment concerns.

[1] Public Notice, Federal Communications Commission, DA 04-1495, CG Docket No. 04-208 released May 25, 2004.

I. BACKGROUND AND SUMMARY

In its comments to the Commission's 1998 *Truth-in-Billing Notice of Proposed Rulemaking* (*TIB NPRM*),[2] NASUCA made several recommendations related to line-item charges. It asked the Commission to mandate that services billed to customers be described in plain language, and not identified as "miscellaneous" or in other such ambiguous terms.[3] NASUCA also recommended that telephone bills should "clearly and accurately describe all services ordered by the customer and itemize all fees, charges, and surcharges generated by the order."[4] Finally, NASUCA suggested that universal service charge descriptions be standardized, and that carriers be prohibited from claiming that surcharges are federally mandated.[5]

In its *Truth-in-Billing First Report and Order* (*TIB Order*),[6] the Commission addressed NASUCA's concerns. The Commission agreed with NASUCA that billing descriptions should be unambiguous.[7] However, it eschewed "prescrib[ing] any particular methods of presentation, organization, or language, but rather encourage[d] carriers to be innovative in designing bills that provide clear descriptions of services rendered."[8] As NASUCA had recommended, the Commission mandated standardized labels for charges resulting from regulatory action.[9] The Commission later limited what carriers could charge under line items labeled as fees for

---

[2] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Proped Rulemaking, FCC 98-232 (rel. Sept. 17, 1998) ("TIB NPRM").

[3] NASUCA TIB NPRM comments at 15-16.

[4] NASUCA TIB NPRM comments at 21.

[5] NASUCA TIB NRPM comments at 4, 18-20.

[6] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (rel. May 11, 1999) ("TIB Order").

[7] TIB Order n.110.

[8] TIB Order, ¶ 41.

[9] TIB Order, ¶ 50.

universal service programs.[10] But the Commission ensured that carriers continued to have flexibility "to recover any administrative or other costs they currently recover in a universal service line-item through their customer rates or through another line item."[11]

Today, NASUCA reverses its position that bills should "itemize all fees, charges, and surcharges." Instead it seeks to collapse all charges, except federally mandated fees, into customer rates.[12] To this end, NASUCA claims that carrier surcharges violate the *TIB Order's* broad mandate that line items be clearly described.[13] In the alternative, it argues that even if surcharges do not violate the *TIB Order*, all surcharges assessed by carriers are, as a class, misleading and therefore unreasonable and unjust.[14]

The NASUCA petition should be denied outright. It asks the Commission to take the sweeping step of prohibiting telecommunications carriers from assessing "monthly line-item charges, surcharges or other fees on customers' bills, unless such charges have been expressly mandated by a regulatory agency."[15] NASUCA's request that the Commission prescribe how carriers structure their rates and recover their costs is misguided. While the Commission possesses authority to ensure that carriers charge just, reasonable, and non-discriminatory rates under sections 201 and 202 of the Telecommunications Act, it should not promulgate a rule dictating to all carriers the way they should charge their customers for service. Doing so would

---

[10] *In the Matter of Federal State Joint Board on Universal Service*, Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13,2002) ("Contribution Order").

[11] Contribution Order, ¶ 40.

[12] NASUCA Petition at 65.

[13] NASUCA Petition at 27.

[14] NASUCA Petition at 37.

[15] NASUCA Petition at 1.

run counter to more than two decades of Commission precedent,[16] is unwarranted in today's competitive marketplace given that NASUCA has made no showing of market failure, and would raise First Amendment concerns. Moreover, since the outcome sought by NASUCA is a change in policy and a rule of general applicability, the Commission should first issue a Notice of Proposed Rulemaking if it were to consider granting NASUCA's request.[17]

II. THE COMMISSION CANNOT FIND SURCHARGES *PER SE* UNREASONABLE.

NASUCA asks the Commission, pursuant to its section 201 and 202 authority, to ban all non-mandated "monthly line-item charges, surcharges or other fees on customers' bills." Essentially, such action would require the Commission to find that the assessment of such charges and fees is *per se* unjust and unreasonable and therefore unlawful. The Commission cannot make such a finding. Particular billing practices may be unreasonable or fraudulent and therefore merit enforcement action. However, the potential of such particular unreasonable charges does not justify eliminating all line-item charges. NASUCA's proposal is what it itself calls a "sweeping

[16]The Commission long ago declared interexechange carriers (IXCs) non-dominant and not subject to the full scope of regulatory jurisdiction. The doctrine of non-dominance was a regulatory recognition that the new IXCs in the 1970s and early 1980s could not exercise market power over any portion of the long distance market, and the regulation of their practices and prices was unnecessary. *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order (Fifth Report), 98 FCC 2d 1191 (1984); Sixth Report and Order (Sixth Report) 99 FCC 2d 1020 (1985).

[17] A declaratory ruling, under the Commission's rules, is for the purpose of "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. The Commission's current rules and order clearly do not prohibit carriers from assessing of surcharges.

action" to deal with the perception of a problem that it does not—and it admits it cannot—substantiate.[18]

a) The Commission has Already Found Line-Item Charges, in General, to be Reasonable and NASUCA Offers No Basis for Reversal.

The Commission has already found line-item charges, in general, to be acceptable. For example, in the *TIB Order*, the Commission said that "[w]hile we adopt guidelines to facilitate consumer understanding of [line item charges] and comparison among service providers, we decline … to limit the manner in which carriers recover these costs of doing business."[19] Indeed the Commission understood the need "to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates, or to *list the charges in separate line items*."[20] The Commission even expressed concern that combining charges into a single fee or otherwise not itemizing surcharges, as NASUCA would have it today, might act as a disservice to consumers in determining for what they are being charged.[21] Additionally, while limiting the universal service line-item charge to the contribution factor, the Commission specifically allows carriers to recover additional administrative or other costs they had been recovering through the universal service line item through customer rates or through *another line item*.[22]

NASUCA offers no evidentiary basis to reverse these Commission decisions. Its petition does not contain a shred of evidence that consumers are harmed when carriers assess separate

[18] NASUCA claims that "[i]t would be administratively impossible to look at each carrier, or each carrier's fee," to determine if they are lawful. NASUCA Petition at 23-24.
[19] TIB Order, ¶ 50.
[20] TIB Order, ¶ 55 (emphasis added).
[21] TIB Order, ¶ 55.
[22] Contribution Order, ¶ 40.

surcharges rather than raise rates to recover costs. Nor does NASUCA show that there has been consumer outcry over surcharges on bills. Rather, the petition is conclusory and makes generalizations and unsupported assertions about carrier surcharges and consumer reaction to these surcharges.[23] Specifically, NASUCA reasons that solely because of the "*sheer number* of carriers and surcharges," the Commission must take the "sweeping action" of banning all surcharges.[24] NASUCA goes on to claim that because it is impossible for it to adequately assess the reasonableness of each carrier's fee, the *only* reasonable action the Commission can take is to outright prohibit *all* line items, surcharges, and fees unless the government expressly mandates them.[25] Thus NASUCA argues that because it does not know to what degree carrier surcharges are reasonable (and indeed provides no evidence to support its claim of customer confusion), the Commission should just outright ban all carrier surcharges.

Instead of taking such unprecedented action, the Commission should continue to recognize the varying needs of consumers in the telecommunications market and the challenge their needs represent for carriers. There is no one-size-fits-all solution to satisfy what consumers want in the pricing of telecommunications services. The market should be allowed to offer consumers varying pricing options.

---

[23] For example, NASUCA broadly asserts that all carriers' surcharges are "misleading and deceptive in their application, bear no demonstrable relationship to the regulatory costs they purport to recover, and therefore constitute unreasonable and unjust carrier practices and charges." NASUCA Petition at vi. This is quite a leap, especially when it is clear later in NASUCA's petition that it does not know the degree to which there is consumer confusion or whether carriers are actually engaging in unjust and unreasonable practices. NASUCA Petition at 23-24.

[24] NASUCA Petition at 23 (emphasis added).

[25] NASUCA Petition at 23-24.

b) Carrier's Rate and Fee Structure is a Distinct Aspect of the Carrier's Service Offering.

Customer service and a carrier's rate and fee structure, *i.e.* calling plans, are primary aspects of a carrier's telecommunications services offerings. If the Commission were to limit carriers to one monthly, or per-minute, rate as NASUCA suggests, it would eliminate an aspect of the service through which a carrier is able to differentiate its service offerings from other providers. Doing so would limit consumer choices.

Contrary to NASUCA's assertion, carriers are not forced to impose separate line charges simply because that is how other carriers operate.[26] If, as NASUCA claims, there were widespread consumer confusion and outcry regarding these line-item charges, carriers would be prompted to not assess them and to begin advertising no monthly fees or surcharges to attract frustrated consumers. Indeed, carriers such as MCI expend substantial resources surveying consumers, training customer service representatives, updating billing formats, and developing national marketing messages to ensure that customers know and understand what services, promotions, and rates are available, and to ensure that customers can easily contact the company with any questions and concerns. MCI's customer relations experience does not reveal any significant customer confusion created by MCI's surcharges and fees. Over the past year (July 2003-June 2004), only 2% of the billing complaints MCI received at both the federal and state level were related to surcharges and fees.[27]

[26] NASUCA Petition at 60.

[27] This is not due to a lack of knowledge of these charges. In surveying customers that leave MCI, one of the primary reasons is a better offer for that particular customer's needs. When asked, customers say they include monthly surcharges and fees in their consideration of the offers.

c) NASUCA Presents No Evidence of Consumer Confusion.

The premise of NASUCA's petition is that consumers shop for telecommunications carriers based on usage-based rates without considering fees and surcharges.[28] But NASUCA underestimates today's consumer. Contrary to NASUCA's assertions, consumers are in fact capable of shopping around for the carriers that best meet their needs and determining which carriers offer pricing structures that result in the lowest bottom line. Consumers are accustomed to paying surcharges and fees for products in a variety of industries, such as electricity and gas, hotel, car rental, airline, and others. If, as NASUCA alleges, there is a proliferation of surcharges currently appearing on consumers' telephone bills, customers would surely take note to include them as factors in their decision-making. Indeed, MCI representatives are trained to proactively inform consumers on every sales call that taxes and surcharges apply, and to answer questions related to these charges.[29] Moreover, NASUCA presents no evidence that consumers do not know to inquire about total charges when shopping for the best deal, or to look at the bottom line on a bill when reviewing the service and rates they have been provided.

In fact, in its comments to the Commission's *TIB NPRM*, NASUCA recommended that telephone bills should "itemize all fees, charges, and surcharges" for services ordered by a customer.[30] Additionally, consumer organizations and regulators for years have made sure consumers take line items into account when shopping for service. On its website, AARP advises: "Call your long distance company and ask which of their special plans would work best

[28] NASUCA Petition at 11.

[29] Taxes and surcharges are also referenced with the product offerings, and a list of state specific taxes, surcharges and fees are made avaliable, on the company website. Additionally, a new customer receives information about taxes and surcharges in the General Service Agreement with the welcome information within the first serveral days of signing up with MCI.

[30] NASUCA TIB NPRM comments at 21.

for you. Ask if the plan includes a monthly surcharge or minimum fee as well as their per minute charge."[31] FCC consumer information explains, "When an ad promises 10 cents a minute, look for any monthly fees or surcharges you have to pay to get that rate."[32]

d) Competitive Long Distance Market Keeps Carrier Practices in Check.

To the extent a consumer was not aware of applicable charges prior to accepting service from a particular provider, the long distance telecommunications market is such that a consumer can freely switch to an alternative provider. Long distance competition, with over 1,000 providers in the market,[33] is even greater today than when the Commission declared IXCs non-dominant and thus not subject to rate regulation. The incumbent local exchange carriers (ILECs) offer long distance service in all 50 states, and wireless carriers, cable companies, and voice-over-IP providers offer consumers a variety of long distance plans.

Given these competitive alternatives, long distance service providers are under constant pressure to provide consumers with competitive rates, terms, and conditions. Carriers are punished in the marketplace for high rates or poor customer service. Similarly, they would be punished if the line-item fees they charge were unreasonable. The Commission has acknowledged that "it is in the interest of IXCs and other carriers to inform fully their end user customer of the nature and amount of all charges they assess, including any separate line-item

[31] AARP, *Saving Money on Long Distance*, *at* http://www.aarp.org/money/consumerprotection/telephones/Articles/a2002-10-04-Utilities.html (last visited Jul. 7, 2004).
[32] FCC, *Market Sense*, *at* http://www.fcc.gov/marketsense/ (last visited Jul. 7, 2004).
[33] *See* NASUCA Petition at 23.

charges they choose to impose for universal service and access, in order to preserve their customers' belief in the integrity of carrier billing."[34]

In its *TIB Order*, the Commission acknowledged the competitive value of line-item charges when it stated: "We believe that so long as we ensure that consumers are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner. Moreover, we are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures."[35]

III. CARRIERS' LINE-ITEM CHARGES DO NOT VIOLATE THE *TRUTH-IN-BILLING ORDER'S* GUIDELINES.

NASUCA claims that carriers' line-item charges violate the *TIB Order*'s guidelines on non-misleading billing.[36] Enforcement mechanisms currently exist to punish truly fraudulent charging that violates Commission rules. MCI for one, however, complies with the *TIB Order*, and presumes the vast majority of carriers do as well.

As NASUCA notes, the *TIB Order* requires charges to be explained in "brief, clear, plain language." These brief and plain descriptions are precisely what carriers such as MCI have been providing. As the Commission explained, the purpose of these descriptions is to allow customers to "accurately assess that the services for which they are billed correspond to those that they have requested and received" in order to prevent cramming.[37] NASUCA presents no evidence that customers have not been able to glean from their bills whether or not they have received the

[34] TIB NPRM, ¶ 9.
[35] TIB Order, ¶ 55.
[36] NASUCA Petition at 27-36.
[37] TIB Order, ¶ 38.

services for which they are charged. Nor has NASUCA alleged any cramming. Furthermore, MCI, for one, has a website and trained representatives that provide detailed explanations of the specific costs recovered through MCI's surcharges.[38] Nevertheless, NASUCA would have carriers disregard the *TIB Order* by including something other than the "brief, clear, plain" descriptions called for.

NASUCA also claims that carriers' line-item charges do not meet the Commission's standardized billing labels guideline.[39] However, as NASUCA itself admits, the Commission has not adopted standardized labels for charges that are not mandated by the federal government. Carriers such as MCI fully comply with standardized labeling of charges resulting from federal action as required by the *TIB Order*. NASUCA is therefore wrong to say that carriers are in contravention of labeling guidelines. As for non-mandated line-item charges, as long as they are not labeled as being government mandated, the Commission has made it clear that "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."[40]

IV. NASUCAS' PROPOSAL RAISES FIRST AMENDMENT CONSIDERATIONS.

NASUCA's proposed ban on line items statements also raises serious First Amendment concerns. Although petitioners try to characterize line-item billing as "conduct," it is clear that the proposed ban would not regulate the amount that can be charged, but instead would dictate

[38]http://consumer.mci.com/TheNeighborhood/res_local_service/jsps/help.jsp?subpartner=DEFAULT.

[39] NASUCA Petition at 30.

[40] TIB Order, ¶ 56.

how a phone company may explain those charges to its customers. As the United States Supreme Court found in *Liquormart, Inc. v. Rhode Island,* "it is no answer that commercial speech concerns products and services that the government may freely regulate. Our decisions from *Virginia Bd. of Pharmacy* have made plain that a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods."[41] NASUCA's proposed rule would directly restrict commercial expression and thus threaten core constitutional safeguards.

As NASUCA implicitly acknowledges, truthful and non-misleading commercial speech is constitutionally protected under the First Amendment.[42] Those First Amendment protections undoubtedly extend to companies' billing correspondences.[43] The line items in MCI's customer billing statements are neither deceptive nor misleading. The government bears a heavy burden where, as under the proposed restriction, it suppresses truthful, non-misleading information,[44] and mere speculation cannot support a characterization of speech as "potentially misleading." "If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a

---

[41] *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996). *See also, Rubin v. Coors Brewing Co*. 514 U.S. 476 (1995) (striking down regulation that prohibited advertising of alcohol content but did not restrict the legally permissible amount of alcohol).

[42] *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

[43] *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (striking down an order requiring Pacific Gas to include competitors' messages in its billing envelopes).

[44] S*ee Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

material degree."[45] "[A] concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment."[46] Without evidence that the line items are in fact misleading and harmful to consumers, NASUCA's mere preference for an alternative billing format is not nearly strong enough to justify a restriction on speech.[47]

Additionally, the proposed rule is constitutionally suspect in light of the availability of less restrictive alternatives. Even if the Commission ultimately determined that some individual carriers' billing statements were inadequately descriptive, that would not justify a flat ban on truthful, non-misleading information. The government "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."[48] The proposed ban on line items is unsupported by any empirical data or evaluations of less intrusive alternatives. "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."[49]

---

[45] *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 146 (1994) (citations and quotations omitted).

[46] *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 111 (1990) (plurality opinion).

[47] *Cf. Ibanez*, 512 U.S. at 148 ("We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the [government] relies here.") The mere possibility that some customers may be unfamiliar with the described charges hardly would justify suppressing the dissemination of truthful billing explanations. "Unfamiliarity is not synonymous with misinformation." *Mason v. Florida Bar*, 208 F.3d 952, 957 (11th Cir. 2000) (holding that "consumers need not be familiar with, nor fully understand, Martindale-Hubbell's ratings system in order to find it useful and not misleading."). For example, in *In re R.M.J*, the Supreme Court held that advertisements stating that an attorney has been admitted to the Bar of the Supreme Court could not be banned as misleading, despite the possibility that "the general public [is] unfamiliar with the requirements of admission to the Bar of this Court." *In re. R.M.J.*, 455 U.S. 191, 205 (1982).

[48] *In re R.M.J.*, 455 U.S. at 203.

[49] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

V. CONCLUSION

For the aforementioned reasons, the Commission should deny NASUCA's petition.

Respectfully submitted,

/s/ Karen Reidy

MCI, Inc.
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

Its Attorney

July 14, 2004