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July 10, 2006

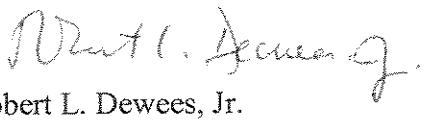
Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Investigation into Retail Billing and Termination Practices for Telecommunications Carriers
D.T.E. 06-8

Dear Ms. Cottrell:

Enclosed please find an original and five (5) copies of the Reply Comments of the CMRS Providers (Cingular Wireless, Sprint-Nextel, T-Mobile and Verizon Wireless).

Very truly yours,



Robert L. Dewees, Jr.

RLD/tlm

cc: Mark J. Ashby

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Notice of Inquiry on the Investigation by the Department of Telecommunications and Energy on its own Motion to Establish Retail Billing and Termination Practices for Telecommunications Carriers.	)	D.T.E. 06-8

REPLY COMMENTS OF THE CMRS PROVIDERS

Cingular Wireless, Sprint Nextel,[1] T-Mobile, and Verizon Wireless (collectively referred to herein as "CMRS Providers")[2] respectfully submit these reply comments. The CMRS Providers incorporate by reference their joint initial comments filed on June 6, 2006 in this proceeding.

I. SUMMARY

The CMRS Providers applaud the Department of Telecommunications and Energy ("DTE" or the "Department") for allowing market forces, competition and customer choice to promote its consumer protection objectives over the last decade. The DTE's previous policy decisions, which have given competition a chance to flourish within the current state and federal legal framework, have proven successful. The Department should maintain its historic pro-

[1] Sprint Communications Company, L.P., Sprint Spectrum, L.P. and Nextel of the Mid-Atlantic, Inc. (collectively, "Sprint Nextel").

[2] Commercial Mobile Radio Service ("CMRS") Providers individually operate in Massachusetts pursuant to licenses granted by the Federal Communications Commission ("FCC") under Title III of the Communications Act of 1934.

competitive stance as the best means for achieving lasting and meaningful consumer protection in the wireless market.[3]

The CMRS Providers submit these reply comments to address certain comments filed in this proceeding that question the DTE's current approach as it pertains to the CMRS Providers. For example, the Attorney General has requested evidentiary hearings to substantiate any finding by the DTE that the market for Verizon's local residential service is highly competitive.[4] To the extent the DTE determines an evidentiary hearing on "competitiveness" is necessary, there is no need for CMRS Providers to participate. A comprehensive demonstration of the competitive nature of the wireless industry is contained in the CMRS Providers' initial and reply comments.

For validation of the CMRS Providers' assertions in these reply comments, the DTE may review and take official notice of Federal Communications Commission ("FCC") wireless consumer complaint data and wireless competition data.[5] The most relevant and recent CMRS complaint data demonstrates a downward trend despite an increase in the subscriber base. In addition, the CMRS competition data overwhelmingly confirms that the wireless market is fiercely competitive. As a result, there is more than ample evidence demonstrating that the CMRS market is competitive and that consumers are benefiting from the plethora of wireless products and services. To include CMRS Providers in any evidentiary hearing would be

[3] Additionally, as a provider of long distance services, Sprint Nextel takes this opportunity through the CMRS Provider comments to support a similar approach for interexchange carriers ("IXCs"). Long distance carriers must have the freedom to respond to consumer and market forces quickly in order to compete in the marketplace. Prescriptive rules are unnecessary and impose additional costs to IXCs. For example, state specific billing rules or termination notices add additional costs if a carrier is required to create a process for Massachusetts customers different than for customers in other states. Sprint Nextel recognizes the importance of providing adequate notices and clear, non-misleading customer bills and provides these types of consumer protections through more cost-efficient methods that still protect consumers --- methods that permit it to efficiently operate its long distance business through national business operations.

[4] Initial Comments of the Attorney General, June 8, 2006, ("Attorney General Comments"), pg. 3, n. 2.

[5] The FCC's quarterly inquiries and complaints reports are available at http://ftp.fcc.gov/cgb/quarter/.

unnecessary and an inefficient use of DTE and CMRS Provider resources as the DTE already has available to it sufficient evidence to confirm that the wireless market is highly competitive.

The Attorney General highlighted the adequacy of existing Massachusetts consumer protection laws for wireless consumers by noting in his Initial Comments the cases resulting in an Assurance of Voluntary Compliance ("AVC") negotiated with three of the largest wireless carriers in the country. In addition, the wireless industry's CTIA Consumer Code for Wireless Service ("CTIA Consumer Code")[6] and the FCC's oversight of the CMRS Providers protect wireless customers. These protections enable consumers to choose winners and losers in the competitive marketplace far more effectively than any regulation could. The current FCC-Massachusetts wireless regulatory regime is working for Massachusetts consumers.

II. ANALYSIS

A. EVIDENTIARY HEARINGS ARE UNNECESSARY TO DEMONSTRATE THE COMPETITIVE BENEFITS OF THE WIRELESS MARKETPLACE

Most of the Commenters recognize the value of a telecommunications environment where competition can flourish and that wireless service is a preeminent example of how competition has encouraged broader consumer access to, and satisfaction with, a telecommunications service. The record contains overwhelming evidence that consumers have benefited and continue to benefit from the existing DTE approach to wireless regulation. A hearing is not necessary to demonstrate the intense competition in the CMRS marketplace. The reduction in the price of service and increased minutes of use resulting from competition from 1993 to 2004 has been astounding: the average price of 44 cents per minute in 1993 has dropped to 9 cents per minute in 2004. Average monthly minutes of use in 1993 were approximately 120

[6] CMRS Providers' Initial Comments at pgs. 14-18 and exhibit (explaining benefits of CTIA Consumer Code).

minutes and have grown to approximately 650 minutes in 2004.[7] The Department can take official notice[8] of FCC CMRS Competition Reports -- from the 1st CMRS Competition Report released in 1995 to the 10th Annual CMRS Competition Report released in 2005 -- to establish that the pressure from the competitive CMRS market has compelled and continues to compel wireless carriers to provide innovative pricing plans and service offerings to consumers at competitive prices.[9] Additionally, the FCC is preparing to release its 11th Annual CMRS Competition Report within the next three months which will provide further evidence to the Department of the competitive nature of the wireless market and how it has benefited consumers.

The competitive conditions in the wireless market today are so robust that carriers cannot afford to alienate consumers. Instead, carriers must strive to win and retain as many customers as possible with innovative, responsive and competitive approaches to ensure customer satisfaction. To the extent carrier practices fall below established consumer protection norms, existing state[10] and federal[11] law provides adequate authority for investigation and appropriate remedies. The Attorney General noted the success of this model by referring to the successful

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[7] See CMRS Providers' Initial Comments at pg. 12 (highlighting dramatic decrease in the price of service from 1993 to 2004); see also FCC Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 95-317, 10 FCC Rcd. 8844, ¶ 74, August 18, 1995 ("1st Annual CMRS Competition Report") (noting that price of wireless service was falling); Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 05-173, WT Docket No. 05-71, ¶¶ 97-144, September 30, 2005 ("10th Annual CMRS Competition Report") (noting dramatic decrease in price of service and increased minutes of use through the life of the wireless industry).

[8] 220 CMR 1.10(2) Official Notice.

[9] See 1st Annual CMRS Competition Report at ¶ 74; see also 10th Annual CMRS Competition Report at ¶¶ 50-51. The FCC's annual CMRS competition reports are available at http://wireless.fcc.gov/cmrsreports.html#annual

[10] See CMRS Providers' Initial Comments at pgs. 8-9 (recognizing existing state laws – for example, Massachusetts Consumer Protection Act, M.G.L. c. 93A, sections 1-11 – that protect consumers with respect to wireless carrier practices). Additionally, the Attorney General, in its Initial Comments, reminds the Department that it has enforced existing state laws by investigating wireless carriers' practices and cites to specific investigations. See Attorney General Initial Comments at pgs. 5-6.

[11] AT&T Communications of New England, Inc., in its Initial Comments, provides detail to the Department as to how the FCC has applied the federal Truth-In-Billing Rules to wireless carriers, giving the FCC authority to investigate in the event a wireless carrier is non-compliant. See AT&T Communications of New England, Inc. Initial Comments, ("AT&T Initial Comments") pgs. 4-5, (*citing* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, Truth-in-Billing, 20 FCC Rcd. 6448 (2005) ("Second TIB Order")).

negotiation of the AVC on consumer issues with three of the largest wireless carriers in the country as well as consumer actions involving AT&T and Comcast.[12] Perhaps as important, substandard carrier conduct will result in that carrier losing its customers to another carrier with equal or better pricing and more consumer friendly practices in place.[13] As a result, the market and existing federal and state laws keep wireless carriers' practices in check to guarantee proper consumer protections.

Despite the overwhelming evidence of consumer benefits from competition, the National Consumer Law Center's ("NCLC's") Initial Comments express tentative concern with wireless carriers.[14] Citing 2004 complaint data, the NCLC implies that there is a current problem and reserves the opportunity to comment further at a later date.[15] However, not only is the complaint data referenced by the NCLC stale, but it is contradicted by the latest American Customer Satisfaction Index (ACSI) report showing that the wireless sector improved 5 percent over last year and by the J.D. Power and Associates 2006 U.S. Wireless Regional Customer Satisfaction Index (CSI) Study which further confirms that satisfaction in wireless service improved 3 percent from 2005.[16] These reports are consistent with the FCC complaint data CMRS Providers referred to in their Initial Comments.[17]

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[12] *See* Attorney General Initial Comments at pgs. 5-6.
[13] Wireless Local Number Portability ("WNP") has made it easier for consumers to switch wireless carriers. *See* CMRS Providers' Initial Comments at pg. 10 (recognizing benefits of WNP).
[14] *See* Initial Comments of the National Consumer Law Center, June 8, 2006 ("NCLC Initial Comments"), pgs. 3-4. As clarification, all cites to the NCLC Initial Comments refer to the body of its comments not NCLC's Executive Summary.
[15] *Id.* at pgs. 9-10.
[16] *See* "Competing in Customer Care—customer complaints are down, but carriers know they need to do more to keep customers happy", Wireless Week, June 15, 2006.
[17] CMRS Providers' Initial Comments at pg. 14.

The 2006 complaint data cited by CMRS Providers in their Initial Comments confirms that only a small percentage of customers have concerns about their service.[18] Additionally, it is not clear how many of those complaints in 2004 involved coverage -- an issue that wireless carriers are constantly working to improve, despite contradictory and often difficult state and local zoning requirements. It is self evident that wireless coverage today is vastly improved compared to 2004-- thanks in large part to the efforts of the wireless carriers under the current DTE regulatory environment.

The Attorney General contends that the Department should hold evidentiary hearings to substantiate a determination that the telecommunications market for Verizon's local residential service is highly competitive.[19] The evidence from the FCC's competition data, however, overwhelmingly supports a finding that many segments within the telecommunications industry are competitive, particularly wireless service. The Attorney General's request for hearings does not apply to wireless[20] as the CMRS Providers do not market local residential service. CMRS is national in scope and crosses state boundaries. Furthermore, the DTE does not have a statutory requirement to ensure just and reasonable CMRS rates; Congress conferred this responsibility on the FCC.[21]

It would be an inefficient use of Department resources to include CMRS in such a hearing. No additional fact-gathering from the wireless industry is necessary to support the conclusion that the wireless industry is competitive. The FCC has reached this conclusion repeatedly, most recently in the 10th Annual CMRS Competition Report.[22] The DTE reached

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[18] CMRS Providers' Initial Comments at pg. 14, (*citing* FCC Report on Informal Consumer Inquiries and Complaints, 1st Quarter Calendar Year 2006 (noting a downward trend in consumer complaints)). As noted in the Initial Comments, the FCC reported 4,616 complaints out of 182 million customers nationwide. *Id.*

[19] *See supra* note 4.

[20] *See* Attorney General's Initial Comments at pgs. 3-4.

[21] *See* CMRS Providers' Initial Comments at pgs. 5-7 (explaining Congressional policy for wireless service).

[22] *See generally* 10th Annual CMRS Competition Report.

this conclusion in 1994 when the marketplace was much less competitive than it is today.[23] The DTE, on the facts before it, should reach the same conclusion today. CMRS Providers, therefore, believe it is unnecessary to include them in any hearings.

B. COMPETITION PROVIDES CONSUMERS REASONABLY PRICED AND INNOVATIVE PRODUCTS AND SERVICES

The benefits of competition extend to many aspects of the customer experience with wireless companies.[24] In addition to reduced prices, the intense level of competition within the wireless industry has also led to innovative products and services for traditionally underserved populations such as members of the disabled community and persons residing in rural or hard-to-serve areas. The current regulatory environment is encouraging the growth and use of wireless services and state regulation will only hamper competition and create inefficiencies in a service that is inherently national in scope.

1. Wireless Companies Deliver Reasonably Priced Services

The NCLC focused its initial comments on the need for access to affordable basic wireline and wireless telecommunications services for low-income Americans.[25] Wireless companies operating in Massachusetts address this issue in the form of

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[23] *See Investigation by the Department of Public Utilities upon its own Motion on Regulation of Commercial Mobile Radio Services,* D.P.U. 94-73, 1994, at pg. 14.

[24] Additionally, the CMRS Providers support other Commenters' positions that the DTE should decline to extend the DTE rules to innovative Voice over Internet Protocol ("VoIP") services. As noted in XO Communications Services, Inc.'s Initial Comments, VoIP services are in the early stages of development. *See* Comments of XO Communications Services, Inc. In Response To Notice of Inquiry, pgs. 4-5; *see also* Initial Comments of Comcast Phone of Massachusetts, Inc., June 6, 2006, ("Comcast Initial Comments") at pgs. 5-7. Application of state wireline rules to VoIP could hamper this growth and impede the rollout of new and innovative VoIP services and create inefficiencies in a service that is inherently interstate in nature. As a result, the DTE should hold-off applying state billing rules, especially since Congress and the FCC are currently considering the interplay of state/federal regulation of VoIP services.

[25] *See* NCLC Initial Comments at pgs 5-9.

increasingly attractive post-paid price plans, heavily subsidized handsets, family share plans, and prepaid service accounts:

- Post Paid Price Plans: Each of the CMRS Providers offer post paid price plans at diverse price points, including price plans attractive to those with modest means or those who simply do not desire to spend money on features beyond voice calling. Rate plans may be compared at the various CMRS Providers' websites.

- Heavily subsidized Handsets: Wireless carriers often subsidize their handsets as part of their rate structure to attract consumers. Often, deals are structured whereby the prices of handsets are drastically reduced when combined with contracts of specific duration or multi-line family share plans. These practices are a key component of the ways in which wireless companies compete with each other locally and nationally. Handsets offered at low prices are not solely low end phones with minimal capabilities; in fact, feature-rich phones are often sold at reduced and/or promotional prices.

- Family-Share Plans: Family-Share plans allow multiple users to share minutes attributed to an account and thereby control their spending. In addition, handsets for the additional lines on the account often are deeply discounted.

- Prepaid Service Accounts: Prepaid accounts offer the ultimate in customer flexibility and cost management. Customers are not required to submit to any credit checks or otherwise provide any credit history to obtain wireless service. Without monthly billing, customers can choose when to purchase additional minutes of use as their finances allow. Customers, therefore, can control their wireless consumption consistent with their ability to purchase additional minutes of use.

Moreover, as discussed in more detail below, the DTE is without authority to regulate CMRS rates. The NCLC suggests that a state commission is required to ensure universal availability of telecommunications services at affordable *rates*. This position should not apply to wireless if the NCLC intends that the DTE regulate the rates for wireless service.[26] Universal service programs, such as the federal Lifeline-Linkup program that is a part of the federal Universal Service Fund, are the established methods to address affordability of telecommunications services, and wireless carriers contribute heavily to the federal USF.

[26] *Id.* at 10.

2. Wireless Companies Deliver Products and Services Accessible to Members of the Disabled Community

Carriers have an affirmative obligation under Section 255 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to ensure that their services are "accessible to and usable by individuals with disabilities, if readily achievable."[27] Moreover given the shifting demographics of this country as the population ages, no telecommunication service provider can ignore the market potential of this evolving group of consumers. To this end, all of the CMRS Providers provide a wealth of material on their company websites regarding the availability of accessible products. Accessibility has gone beyond the identifiable "5" key, large font displays, speed dialing, and tactile and tonal feedback from keys. Many new generation products can perform voice-activated dialing or other voice commands, are TTY and/or Hearing Aid Compatible, have text-to-speech functionality, and have adjustable contrast screens.

In addition, the CMRS Providers' websites and customer service indicate how persons with disabilities may access the carrier's customer service via TTY devices, text messaging, or other methods of facilitated communication. Also, bills and product and service brochures are available in alternate media formats such as Braille and large print, among others. Given these measures, plus the ongoing efforts by wireless carriers to dialogue with members of the disabled community, the CMRS Providers are meeting the wireless communication needs of persons with disabilities.

C. THE WIRELESS INDUSTRY IS COMPETITIVE AND NOT AN OLIGOPOLY

NCLC on the one hand credits the telecommunications industry with being "far more competitive than it was 30 years ago when the Department adopted the current rules and

practices incorporated in DPU 18448...,"[28] but on the other hand "sees it more as an oligopoly dominated by a few, very large players..."[29] NCLC warns that "the current marketplace may be the most risky of all possible worlds for consumers, where a few, large companies provide relatively few choices for customers but where the dawning of some level of competition makes the carriers eager to cut back on consumer protections."[30] The CMRS Providers have a different perspective: the current wireless marketplace provides the best of both worlds for consumers -- a significant number of stable facilities-based providers, as well as mobile virtual network operators ("MVNO's") competing against each other on price, products and customer service.

As noted in the CMRS Providers' Initial Comments, there are no less than five facilities-based wireless providers and numerous MVNOs competing for wireless business in the state.[31] This level of competition certainly does not comport with the definition of an "oligopoly," a condition in which a few sellers dominate a particular market to the detriment of competition by others.[32]

In fact, the wireless marketplace is replete with more than "a few sellers." Multiple carriers are competing fiercely and daily for wireless customers. A brief non-exhaustive listing of ways in which wireless carriers compete is illustrative.

1. Offer differing amounts of minutes at a fixed price;
2. Allow unused minutes to rollover to the next month;
3. Emphasize network quality;
4. Allow customers interactive coverage maps prior to purchasing services;

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[27] 47 USC 255(c). The terms "disabilities" and "readily achievable" are defined in this section of federal law as well.
[28] *Id.* at p. 5
[29] *Id.*
[30] *Id.* at p. 9.
[31] CMRS Providers' Initial Comments at pg. 10.
[32] Merriam-Webster's Dictionary of Law, 1996-Merriam-Webster, Inc.

5. Provide a longer grace period to test a new service;
6. Offer better video content and faster data speeds;
7. Sell the sleekest and most feature-rich handsets;
8. Provide the largest overall coverage area;
9. Train the most knowledgeable and friendliest customer service representatives;
10. Provide the best international roaming rates;
11. Offer the most affordable prepaid plans;
12. Meet the needs of hearing impaired consumers or those with other disabilities in the most creative and innovative ways; and
13. Allow parents to monitor the location of their children.

Wireless carriers are fierce competitors and the wireless consumer reaps the benefits of that competition. Competition continues to drive consumer choice and protect Massachusetts consumers. The drive for customer satisfaction, together with the fundamental protections of consumer laws of general applicability and FCC oversight, makes imposition of detailed prescriptive state billing and termination rules unnecessary. Forcing prescriptive regulations on such a competitive industry would fail any reasonable cost-benefit analysis.[33]

The current FCC-DTE paradigm for the treatment of wireless services has been successful for Massachusetts consumers. The imposition of billing and termination regulations on CMRS Providers would not provide consumers with any material protection beyond that which is already provided in existing law. Any incremental benefits to consumers by imposing billing and termination regulations on wireless would be outweighed by the potential for corresponding compliance cost increases on the carriers and their customers, as well as the impediment to wireless investment in the state that could be caused by such regulation. In the

[33] Comcast Initial Comments at pgs 11-12.

absence of market failure or serious lapses in the benefits of competition, there is no basis to upset the well-functioning current system.

D. THE DEPARTMENT MAY NOT ADOPT REGULATIONS INCONSISTENT WITH FEDERAL RULES AND CASE LAW

As detailed in the CMRS Providers' Initial Comments and reiterated here, application of the DTE's Billing and Termination Procedures to the highly competitive wireless industry remains unnecessary. In spite of comments suggesting the contrary[34], existing state law and federal regulations applicable to the CMRS Providers[35] as well as the adoption of the CTIA Consumer Code[36] appropriately protect Massachusetts consumers while maintaining the benefits of a competitive marketplace. Extending any DTE Billing and Termination regulations to CMRS Providers would be contrary to the pro-competitive principles established by Congress and may, in fact, be legally inconsistent with FCC rules and case law interpreting those rules.[37]

Although 47 U.S.C. Section 332(c)(3)(A) preserved existing state authority, but did not expand or grant additional state authority, to regulate "other terms and conditions of wireless services,"[38] it is plain that a state may not engage in rate or entry regulation under the rubric of regulating "other terms and conditions." Federal courts[39] and FCC decisions[40] have addressed, and continue to address, the limits of permissible state terms and conditions authority.

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[34] *See* Attorney General Initial Comments at pgs. 6-7; *see also* NCLC Initial Comments at pg. 2.
[35] *See* CMRS Providers' Initial Comments at pg. 8 (*citing* 47 CFR §§ 64.2400, 64.2001, 22.946-947, 22.951, 24.103 and 24.203).
[36] *See* CMRS Providers' Initial Comments at pg.15-18.
[37] *See e.g.,* Initial Comments of Conversent Communications of Massachusetts, Inc. at pgs. 6-8; Comcast Initial Comments at pgs. 5-6; AT&T Initial Comments at pgs. 5-6 (noting caution of extending rules that may currently or soon become inconsistent with federal rules and case law interpreting same).
[38] *Id; see also* H.R.Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588.
[39] *See Bastien v. AT&T Wireless Services, Inc.,* 205 F.3d 983, 987 (7th Cir. 2000), wherein the Seventh Circuit held that section 332(c)(3)(A) denies the state "any authority to regulate...the rates charged by any commercial mobile service...."
[40] In *Southwestern Bell Mobile Systems, Inc.,* 14 FCC Rcd. 19898, 19908 (¶ 20)(1999), the FCC made clear that prohibiting carriers from "rounding up" and charging for incoming calls is preempted regulation of a carrier's rate structure rather that permissible regulation of the "others terms and conditions" of the carrier's service under Section

Most recently, in *Cellco Partnership v. Hatch,*[41] the Eighth Circuit held that a Minnesota telecommunications statute, requiring that consumers of wireless telecommunications services be notified 60 days before effective date of a rate increase, and requiring that consumers consent to any substantive change that could result in an increase in wireless telecommunications charges, was equivalent to rate regulation of CMRS service providers which is prohibited under Section 332 (c)(3)(A). [42] The Court disagreed with the State of Minnesota's arguments that the new statute, '"further[s] the underlying traditional requirements of contract law as a way to protect consumers interests" by guarding consumers against unilateral contract changes;'" and that, "'consumer protection matters' were among the matters listed by the House Budget Committee as illustrative of 'terms and conditions' that would be open to state regulation under § 332(c)(3)(A).'"[43] The Court specifically found such interpretation of Section 332 "overbroad",[44] and further stated:

> ...any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a 'consumer protection measure,' but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A).[45]

General application of the Department's current Billing and Termination Procedures to CMRS Providers would challenge federal policy and run the risk of placing such rules on the impermissible side of state regulation of CMRS provider rates under Section 332.

In March 2005, the FCC issued an order detailing and extending the preemptive impact of Section 332, and which included guidance in the area of terms and conditions

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332(c)(3)(A). Specifically the FCC opined that "states not only may not prescribe how much may be charged for [CMRS] services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."

[41] 431 F. 3d 1077, Eighth Circuit, (May 1, 2005).

[42] *Id.* at 1082-3.

[43] *Id.*

[44] *Id.*

authority. In the *Second TIB Order,* the FCC noted that section 332(c)(3)(A) is "broad in scope" and that it "has made clear that the proscription of state rate regulation extends to regulation of 'rate levels' and 'rate structures' for CMRS."[46] In addition, the FCC noted that it 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."[47] In recognizing "the Commission's broad prior interpretation of rate regulation and statements about line items," the FCC found that "state regulations requiring or prohibiting line items similarly fall within the statute's zone of proscribed state regulatory activity."[48] Consequently, in considering any proposed extension of Department Billing and Termination regulations to the wireless industry, the Department must ensure that the proposed regulation is not inconsistent with the existing or soon to be effective federal standards or policies.[49]

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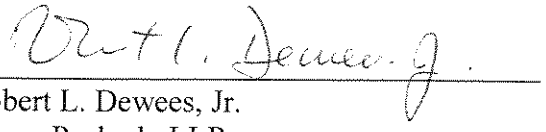
[45] *Id.* at 1083.
[46] *See Second TIB Order* at 16, ¶ 30.
[47] *Id.*
[48] *Id.*
[49] The FCC has further determined that Section 332(c)(3)(A) does not preempt the "neutral application of state contractual or consumer fraud laws." *Southwestern Bell. Mobile System Inc.*, 14 FCC Rcd. At 19903; *Moriconi v. AT&T Wireless PCS, LLC*, 280 F.Supp. 867 (E.D. Ark. 2003) *see also Wireless Consumers Alliance Inc.*, 15 FCC Rcd 17021, 17025, ¶ 8 (FCC 2000); *In the Matter of Petition of the State Independent Alliance*, 17 FCC Rcd. 14802, 19821 n.119 (FCC 2002). In considering the application of a neutral consumer protection measure, the Department must also ensure that billing and termination regulations are consistent with Congressional policy as it relates to CMRS. Therefore, in addition to the express preemption under 47 U.S.C. § 332(c)(3)(A), state regulation may be *impliedly preempted* where: (1) Congress has legislated comprehensively, thus "occupying the field" and leaving no room for States to supplement federal law; or (2) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-369 (1986). This *implied preemption* may result not only from action taken by Congress, but also from action taken by a federal agency acting within the scope of its congressionally delegated authority. *Id.* at 369. This means that even where Department regulation might address the "other terms or conditions" of CMRS, the state regulation could, nonetheless, be preempted if it frustrates FCC (or other federal) policy.

III. CONCLUSION

For the reasons detailed above, the CMRS Providers renew their request for the DTE to refrain from applying billing and termination of service rules to wireless carriers. The DTE should rely on the overwhelmingly evidence demonstrating that consumers have benefited and continue to benefit from the highly competitive wireless market. If the DTE proceeds with evidentiary hearings, the CMRS Providers urge the DTE to exclude wireless carriers since wireless carriers continue to operate in an intensely competitive market.

Respectfully submitted:



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July 10, 2006