

Consumer Watchdog: The FCC’s Proposed Rulemaking to Help Consumers Avoid Bill Shock

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I. INTRODUCTION.....	428
II. UNEXPECTED CHARGES AND THE NEED FOR CHANGE.....	429
A. <i>Specific Examples of Bill Shock</i>	430
B. <i>European Union Legislation on Wireless Billing Practices</i>	431
C. <i>Industry and Consumer Response to the FCC’s Notice of Inquiry</i>	432
III. PROPOSED RULEMAKING: EMPOWERING CONSUMERS.....	433
IV. INDUSTRY RESPONSE TO THE PROPOSED RULES	434
V. CONSUMERS SPEAK OUT	440
VI. ARGUMENT IN FAVOR OF THE PROPOSED RULEMAKING.....	442
A. <i>Similar Systems Currently in Operation</i>	442
B. <i>Lack of Tools Currently Available to Consumers</i>	443
C. <i>Arguments by the Wireless Industry Attempt to Preserve a Lucrative Business Model Based on Taking Advantage of Consumers</i>	444
VII. CONCLUSION.....	447

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I. INTRODUCTION

Kerfye Pierre, a Maryland resident, was in Haiti visiting her sister when a massive earthquake struck and caused chaos in the small Caribbean country.¹ In the aftermath of the devastating earthquake, wireless communication became an integral part of contacting emergency crews and loved ones. Pierre had suspended her cell phone service before going on the trip, but due to the disaster she contacted her mobile service provider, T-Mobile, and asked if there was a way she could use her phone at a reasonable cost in order to have contact with family back home and assure them of her safety.² The representative from T-Mobile told Pierre of a courtesy plan that would allow her to use her phone to communicate with her family back home; however, Pierre did not realize and was not thoroughly informed that this plan included only voice minutes, not data and texting.³ Due to the devastation from the earthquake, the cellular voice network was unreliable, forcing Pierre to use texts, email, and Facebook to communicate with the outside world.⁴ Luckily, these systems worked and she was able to contact her family and assure them of her safety. Upon returning to Maryland, the joy of being united with her family was short-lived when Pierre opened a wireless bill from T-Mobile and was shocked to find her bill had skyrocketed from a normally low amount to a huge sum: \$30,000.⁵ After contacting T-Mobile and pleading with them to waive the charges due to her extenuating circumstances, she was able to get a \$25,000 credit added to her account; however, Pierre still owes T-Mobile \$5,000 for her overage charges.⁶ As one can imagine, this scenario would come as quite a shock to any consumer and could lead to severe consequences for many households. The situation involving abnormally large wireless bills has come to the attention of the Chairman of the FCC, Julius Genachowski, who stated, “[s]omething is clearly wrong with a system that makes it possible for consumers to run up big bills without knowing it.”⁷ Apparently, Genachowski is not the only one who feels this way, and that is why the FCC has decided to tackle the problem now known as “bill shock.”

1. Marguerite Reardon, *FCC to Present 'Bill Shock' Rules*, CNET NEWS (Oct. 13, 2010, 1:30 PM), http://news.cnet.com/8301-30686_3-20019526-266.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

This Note discusses the proposed regulation by the FCC and both industry and consumer reaction to the issue of bill shock. In Part II, this Note will discuss the background of bill shock and the Notice of Inquiry released by the FCC. Part II, Subsection A will discuss the background of bill shock and will highlight certain extreme examples of bill shock to show the damage it can produce. Next, a discussion of the current system in place in the European Union (“EU”) will be covered in Part II, Subsection B. Part III of this Note will discuss the proposed rulemaking by the FCC titled: “Empowering Consumers to Avoid Bill Shock.” In Part IV, this Note will highlight the industry response from mobile phone providers and will review the arguments from CTIA-The Wireless Association (“CTIA”) in favor of the current system. Part V will discuss the reaction from consumer groups and major media outlets to the proposed rulemaking, including some groups’ arguments that the proposed rulemaking does not go far enough for consumer protection. Lastly, Part VI of this Note will argue in favor of the proposed rulemaking by the FCC. It will argue that the proposed rulemaking supplies consumers with the protection needed to ensure that unwanted overage charges are avoided. This Note will also argue that the wireless industry is attempting to tarnish the study by the FCC by proposing counterintuitive arguments for the current system in order to retain the lucrative method of operation that takes advantage of consumers’ ignorance.

II. UNEXPECTED CHARGES AND THE NEED FOR CHANGE

In August 2009, the FCC released a Notice of Inquiry seeking comments on the Truth-in-Billing Principles in Section 64.2401 of the FCC’s Rules. Much of the focus was on the subject of how the cellular communication industry can better alert consumers of extra charges they may be incurring without knowing it.⁸ The FCC reported that “[c]onsumer complaints at the FCC relating to billing and rates for wireless services increased from 8,822 in 2006 to 10,930 in 2008, an increase of approximately 24 percent, while the number of wireless subscribers during the same period increased by 16 percent.”⁹ The comments filed in response to the Notice of Inquiry found that state and consumer representatives feel that, due to a lack of clear understanding of the information given to them, many consumers are overpaying for mobile communication or paying for services they do not need.¹⁰ The FCC concluded, “the government has a

8. See Consumer Info. and Disclosure, *Notice of Inquiry*, 24 F.C.C.R. 11380 (2009) [hereinafter *FCC Aug. 2009 Notice of Inquiry*].

9. *Id.* at para. 15.

10. Empowering Consumers to Avoid Bill Shock, *Notice of Proposed Rulemaking*, 25

substantial interest in ensuring that consumers are able to make intelligent and well-informed commercial decisions in an increasingly competitive marketplace.”¹¹

A. Specific Examples of Bill Shock

In May 2010, the FCC launched an initiative to help save consumers from the effects of “bill shock,” a phrase the FCC coined to explain the experience when a consumer receives a wireless phone bill that is unexpectedly high.¹² Examples that the FCC gave of bill shock charges range from the moderate to the outrageous. One example involved a man who watched an NFL football game on his computer via his mobile broadband card while he was onboard a cruise ship docked at a port in the United States.¹³ This consumer was under the belief that because he was docked in the United States, he would not be charged any roaming fees for accessing the Internet via his broadband Internet card.¹⁴ Unfortunately, to this passenger’s dismay, the card did not connect to the local AT&T tower, but rather to the ship’s microcell tower, which caused his bill to reach an astounding \$28,067.31.¹⁵ While this excessive bill was eventually resolved, it was only after the passenger contacted the *Chicago Sun-Times* with his story.¹⁶ Another example involves a T-Mobile consumer who was visiting Belize.¹⁷ This consumer’s phone bill was approximately \$2,600 after a thief stole her phone and ran up charges for international calls and data usage.¹⁸ The woman called T-Mobile after the incident and was told that she was responsible for the charges; this situation was also resolved, but only after the *New York Times* contacted the mobile provider on the woman’s behalf.¹⁹ Both of these wireless consumers were lucky that they were able to gain the interest of large newspapers that aided them in getting the charges waived; however, most consumers do not have this luxury.

F.C.C.R. 14625, paras. 1, 7 (rel. Oct. 14, 2010) [hereinafter *FCC Oct. 2010 Notice of Proposed Rulemaking*].

11. *FCC Aug. 2009 Notice of Inquiry*, *supra* note 8, at para. 21.

12. Press Release, FCC, FCC Bureau Launches Initiative to Help Consumers Avoid “Bill Shock”: Action is One of the First by New FCC Consumer Task Force (May 11, 2010), <http://www.fcc.gov/nr051110.pdf>.

13. *Protect Consumer from Cell Phone “Bill Shock,”* Consumer Action (Aug. 2010), http://www.consumer-action.org/coalition/articles/protect_consumers_from_cell_phone_bill_shock/.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

While many of the complaints received by the FCC were not as outrageous as those described above (47 percent of complaints filed with the FCC were between \$100 and \$999),²⁰ some of the bills were more expensive than most automobiles, including the largest bill complained of, which topped out at the shocking amount of \$68,505.²¹

B. European Union Legislation on Wireless Billing Practices

The FCC has looked at many different possible solutions for ways to notify consumers of possible bill increases. The FCC believes that the rules currently in place in the EU provide a good system to emulate when modeling possible legislation for the United States. The EU Consumer Alert Laws, passed in 2007 and amended in 2009, ensure that mobile communication providers notify consumers about their bills and possible increases.²² Due to the ease of entering an international calling area in Europe, bill shock in the EU has become a serious issue for wireless consumers.²³ Article 6 of the new law passed by the European Parliament states:

[E]ach home provider shall, except when the customer has notified his home provider that he does not require this service, provide the customer, automatically by means of a Message Service, without undue delay and free of charge, when he enters a Member State other than that of his home network, with basic personalised pricing information on the roaming charges²⁴

Article 6 also gives consumers further rights upon request, such as the rights set forth in Article 6, Paragraph 2:

In addition to paragraph 1, customers shall have the right to request and receive, free of charge, and irrespective of their location within the Community, more detailed personalised pricing information on the roaming charges that apply in the visited network to voice calls, SMS, MMS and other data communication services, and information on the transparency measures applicable by virtue of this Regulation, by means of a mobile voice call or by SMS. Such a request shall be to a free-of-charge number designated for this purpose by the home provider.²⁵

In 2009, the EU added Article 6a, which provides other safeguards that allow consumers to better understand the billing structure of his or her

20. FCC CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU, WHITE PAPER ON BILL SHOCK 4 (2010) [hereinafter FCC OCT. 2010 WHITE PAPER ON BILL SHOCK].

21. *Id.* at 3.

22. Council Regulation 544/2009, 2009 O.J. (L 167) 12 (EC).

23. Joel Gurin, *Consumer View: Stop the Shock*, REBOOT.FCC.GOV BLOG (May 11, 2010), <http://reboot.fcc.gov/blog/?entryId=429978>.

24. Council Regulation 544/2009, art. 6, para. 1, 2009 O.J. (L 167) 20, 21. (EC).

25. *Id.* at para. 2.

wireless plan. For example, Article 6a, Paragraph 1, ensures that consumers are well-informed by requiring ongoing reminders from mobile service providers about the risk of roaming charges as well as explaining to consumers how to control the phone's automatic roaming settings.²⁶ According to many commenters, the EU system is a great example of the type of system that should be implemented in the United States. Joel Gurin, Chief of the Consumer and Governmental Affairs Bureau, acclaimed the system set forth in the EU and believes it is simply a solution that would be effective in the United States.²⁷ Mr. Gurin believes this system could be implemented in the United States to ensure that consumers have a fair warning of the potential increases in their wireless bill.²⁸

C. Industry and Consumer Response to the FCC's Notice of Inquiry

However, in response to the inquiry about possible changes that could be made in the United States that would be similar to the changes made in the EU, many industry commenters oppose the implementation of such rules, stating that mandatory usage alerts and cut-off mechanisms are unnecessary given industry innovation and the current tools in place to help consumers avoid bill shock.²⁹ Industry commenters also feel that "an industry-wide regulation will harm consumers by limiting choice and diminishing incentives to develop additional tools."³⁰ In response to the industry's concern, the FCC stated that the proposed rules will simply set a base that all providers must meet, and stated service providers can add on and modify their specific offers as they see fit.³¹ This seems like a reasonable requirement that will act as a starting point for further innovation in the industry and allow for greater competition in the market. Furthermore, state and consumer commenters feel that the current tools available are inadequate, stating "that the currently available tools for addressing bill shock are limited by additional fees, self-enrollment requirements, active monitoring requirements that require subscribers to continually check usage balances online or via the handset device, and inconsistent application across mobile providers and plans."³²

26. *See id.* at art. 6a, para. 1.

27. *See* Gurin, *supra* note 23.

28. *Id.*

29. *FCC Oct. 2010 Notice of Proposed Rulemaking*, *supra* note 10, at para. 10.

30. *Id.*

31. *Id.* at para. 14.

32. *Id.* at para. 10.

III. PROPOSED RULEMAKING: EMPOWERING CONSUMERS

On October 14, 2010, after reviewing data from complaints as well as survey results, the FCC released a Notice of Proposed Rulemaking for the initiative titled: “Empowering Consumers to Avoid Bill Shock.”³³ Upon reviewing the survey results and other data, the FCC concluded that consumers face many challenges in keeping track of their wireless charges in the current market and are open to risk of substantial extra fees and charges.³⁴ The FCC’s goal in this proposed rulemaking is to “propose requirements that will provide consumers with timely information about their usage, such as voice or text alerts when a subscriber is approaching or begins incurring overage or roaming charges, and clear disclosure of the available tools subscribers can use to limit usage and review their usage history.”³⁵ Considering the possible charges from going over one’s mobile service plan—at least four times the price of the regular per minute plan according to *Consumer Reports*³⁶—it appears this proposed rule is in response to many valid concerns of consumers. One concern of the FCC is that the major providers are inconsistent in the types of services they offer to alert consumers about possible overage charges.³⁷ This inconsistency leads to many consumers not being able to make use of these tools because they do not own the right type of phone or because they are confused about when they are being charged fees and when they are not. The FCC noted that even if these tools exist, gaining access to them is difficult, and many consumers lack any knowledge of the availability of such tools.³⁸

The FCC proposed three main rules to help consumers avoid bill shock. These rules include: Over-the-Limit Alerts, Out-of-the-Country Alerts, and Easy-to-Find Tools.³⁹ On October 14, 2010, the FCC issued a press release that went into some detail about these proposed rules. The Over-the-Limit Alerts will require wireless providers to notify a consumer via text or voice message when he or she is close to reaching the monthly limit and incurring extra charges.⁴⁰ The Over-the-Limit Alerts will help

33. *See id.*

34. *Id.* at para. 2.

35. *Id.* at para. 4.

36. *5 Ways to Avoid Cell-Phone “Bill Shock,”* CONSUMER REPORTS, Sept. 2010, www.consumerreports.org/cro/magazine-archive/2010/september/money/cell-phonebills/overview/index.htm.

37. *See FCC Oct. 2010 Notice of Proposed Rulemaking, supra* note 10, at para. 2.

38. *Id.*

39. Press Release, FCC, FCC Proposes Rules to Help Mobile Phone Users Avoid “Bill Shock” (Oct. 14, 2010), http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1014/DOC-302192A1.pdf.

40. *Id.*

consumers make better-informed decisions on whether or not the phone call or text message they are about to send is worth the extra fees that will come with it. The Out-of-the-Country Alerts will require wireless providers to send notification to a consumer when he or she is at risk of incurring international or other roaming charges not covered by his or her current wireless plan.⁴¹ The Out-of-the-Country Alerts will also require wireless providers to inform the consumer if the roaming charges he or she is about to incur will come with any extra fees that are higher than the normal rate.⁴² Lastly, the Easy-to-Find Tools will require clear disclosure of any tools that may be offered by the wireless provider that assist the consumer in setting usage limits or reviewing the balance of his or her current wireless bill.⁴³ The hope with these alerts is that the consumer will be well-informed and able to make his or her own decisions on what is important and what charges and fees he or she is willing to accept on the monthly wireless bill. The FCC also sought comments on a possible usage cap based on limits that the consumer could set.⁴⁴ It is obvious that the proposed plans from the FCC have taken into account the current system in place in the EU and have attempted to modify and structure a consumer-friendly system that has the ability to conform to any special needs and limitations of the United States.

The proposed rules seem to put in place a relatively straightforward system for monitoring one's wireless bill. The belief that a consumer should be in charge of deciding what features and charges he or she is willing to incur on his or her own wireless bill is not a difficult concept and was even called a "simple idea" by Chairman Genachowski, who stated further that "[p]eople should be told they're risking extra fees *before* they incur them."⁴⁵ While this seems like a relatively "simple idea" to those who wish to put an end to the fear of opening a wireless bill only to find out that the bill looks more like a house payment than a wireless payment, according to the comments made by the CTIA—the plan set forth by the FCC is anything but "simple."

IV. INDUSTRY RESPONSE TO THE PROPOSED RULES

After the release of the findings from the FCC's survey, comments were submitted in dispute of the survey by the CTIA. Adamant opposition to the idea of the FCC regulating the consumer tools for account

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *FCC Oct. 2010 Notice of Proposed Rulemaking, supra* note 10, at 14651.

management has been voiced by the CTIA, claiming that the regulation is unnecessary.⁴⁶ According to the CTIA, many tools are currently available from the wireless carriers that are designed to assist consumers in monitoring wireless usage, and due to market competition there is more incentive for innovation from individual carriers to create better applications to meet consumers' needs.⁴⁷ The CTIA claims that the dissatisfaction shown by consumers towards cell phone companies in the FCC's survey is supported by flawed data.⁴⁸ It argues that the survey disregarded key advancements in the wireless marketplace, which allow consumers to access many programs designed to assist them in keeping track of account information such as their wireless bill and usage.⁴⁹

One of the arguments put forth by the CTIA is that the term "bill shock" was not stated anywhere in the survey questions; therefore, the consumer did not state whether or not the increase in bill prices caused them to be "shock[ed]."⁵⁰ The CTIA argues that consumers are overwhelmingly satisfied with their wireless service and that the survey skewed statistics to show dissatisfaction that was nonexistent.⁵¹ According to a study released by the FCC on May 26, 2010, over 92 percent of American consumers are happy with their wireless service.⁵² According to the CTIA, "the recent American Consumer Satisfaction Index [] found wireless customer satisfaction set an all-time high for the second consecutive year, and the Better Business Bureau [found] that 97.4 percent of complaints by consumers about their wireless service are resolved."⁵³ According to the survey questions as they were given to consumers, the CTIA concluded that the finding of bill shock was unreliable.⁵⁴ Mainly, the CTIA found that two survey questions, Question 52 and Question 53, were flawed in key ways that led the FCC to conclude that bill shock existed.⁵⁵ The questions under review by the CTIA "asked respondents if their 'cell phone bill ever increased suddenly, from one month to the next, even if [they] did not change the calling or texting plan on [their] phone,'"⁵⁶ and

46. Comments of CTIA – The Wireless Association at 1, Measures Designed to Assist U.S. Wireless Consumers to Avoid "Bill Shock," FCC CG Docket No. 09-158 (rel. July 6, 2010) [hereinafter CTIA July 2010 Comments].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2.

51. *Id.* at 14.

52. *Id.*

53. *Id.*

54. *Id.* at 15.

55. *Id.*

56. *Id.*

“[d]o you happen to remember how big the most recent increase was?”⁵⁷
The CTIA stated:

These questions raise troubling issues. First, of the over 3,000 people interviewed, only 13 percent had *ever* experienced a sudden increase from one month to the next. Moreover, the questions did not differentiate between a “sudden increase” based on a significant increase in use, or a change in use patterns. The survey questions also did not ask whether the bill, upon receipt, was a “shock.” Second, as phrased, Question 52 permitted respondents to answer affirmatively—*i.e.*, that they had experienced a sudden increase in their bill—even if they had changed their calling or texting plan, contrary to the FCC’s own definition of “bill shock.” Third, amazingly, Question 53 was not limited in time. Therefore, respondents could have recalled “sudden increases” from years ago and not reflecting today’s carrier practices, such as unlimited calling or texting plans or buckets of minutes/texts. Fourth, based on the bill increase ranges provided to respondents in Question 53, “bill shock” occurred if there was a “sudden increase” in a monthly bill of as little as one dollar. It is questionable how this amount credibly could be characterized as a “shock,” particularly with the astronomical and steadily increasing level of taxation of wireless services at the state and local levels. Fifth, no survey question followed up with those respondents who reported a bill increase to ask whether they knew the reason for their sudden cell phone bill increase or if they were confused about the increase. With no change in plan, for example, if a subscriber with typical monthly use of 100 minutes increases minutes of use to 500 in a single month, a bill increase could result. Sixth, there were no follow-up questions that asked the respondents whether the bill had been resolved to their satisfaction after contacting their wireless provider.⁵⁸

According to the CTIA, Question 53 was flawed because of the amount of increase that the respondent could state they experienced. The CTIA stated that “[o]f the 391 that responded that they had experienced an increase . . . half of those that responded said they didn’t know the amount of increase, or it was between one dollar and twenty-four dollars.”⁵⁹

Another flaw the CTIA believes the FCC’s survey has is that of the 3,005 people who participated in the survey, only 902 of the respondents answered “yes” when asked if they were over eighteen years of age.⁶⁰ The CTIA concluded that this response means that only about 30 percent of the people who responded to the survey were adults, leading to an even higher

57. *Id.*

58. *Id.* at 15–16.

59. Christopher Guttman-McCabe, *Peeling the Onion on the FCC’s “Bill Shock” Survey: Part I*, CTIA BLOG (July 14, 2010), <http://blog.ctia.org/2010/07/14/peeling-the-onion-on-the-fccs-bill-shock-survey-part-i/>.

60. *Id.*

doubt in the results of the survey.⁶¹ In response to this allegation, the Consumer and Governmental Affairs Bureau stated that “[t]he [CTIA’s] latest attack on the FCC’s study is based on an astounding misstatement: that as many as 70 percent of the people we interviewed were teenagers. This is simply untrue—in fact, we made it clear that we interviewed only adults.”⁶²

The FCC responded to the opposition to the survey and proposed regulation by the CTIA with a concern that instead of focusing on possible ways to address the concerns voiced by consumers, the CTIA is attempting to find ways to criticize the FCC’s data and make the results appear to be flawed and misleading.⁶³ The FCC went on to say:

It’s unfortunate that CTIA, which represents one of the country’s most innovative and productive industries, has decided that ignoring or distorting the facts is a better strategy than simply addressing wireless customers’ concerns. This trade association apparently believes there’s nothing to worry about if 30 million Americans have gotten sudden increases on their cell-phone bills.⁶⁴

On December 13, 2010, the CTIA submitted a request for an extension on the comment and reply deadline set by the FCC in response to the proposed legislation, which was granted on December 17, 2010.⁶⁵ The CTIA felt “[a] limited two-week extension is in the public interest to allow interested parties to meaningfully address the issues raised by the Commission’s *Bill Shock NPRM* and provide a robust record.”⁶⁶ The CTIA also felt an extension was necessary to address meaningfully and thoroughly the issues raised in the *Bill Shock NPRM*.⁶⁷

The CTIA took full advantage of the two-week extension, and on the final day for comments, released a fifty-page report commenting on the proposed legislation.⁶⁸ In this report, the CTIA notes many concerns it has with the proposed legislation, including: First Amendment limitations, industry innovation, a distortion of facts by the FCC, a lack of authority by the FCC to adopt the legislation, and an overall concern about the

61. *Id.*

62. Joel Gurin & John Horrigan, *Denying Bill Shock by Distorting Facts*, BROADBAND.GOV BLOG (July 15, 2010), <http://blog.broadband.gov/?entryId=577810>.

63. *Id.*

64. *Id.*

65. Empowering Consumers to Avoid Bill Shock, *Order*, 25 F.C.C.R. 17405 (2010) [hereinafter *FCC Dec. 2010 Order*].

66. Joint Request for Extension of Comment and Reply Comment Deadlines, Empowering Consumers to Avoid Bill Shock, FCC CG Docket No. 10-207 (rel. Dec. 9, 2010).

67. *Id.*

68. See CTIA July 2010 Comments, *supra* note 46.

substantial challenges the proposed legislation will create for carriers.⁶⁹ The CTIA begins its comments by proposing that instead of requiring a complete overhaul to the current system, the FCC should work with carriers to help consumers become aware of available tools.⁷⁰ The CTIA stated that the FCC's Consumer Task Force should be supplemented to help consumers by giving tips on ways to avoid unexpected charges as well as providing links to websites with tips and tools to help keep track of mobile usage.⁷¹ According to the CTIA, "an educational initiative such as this would help consumers avoid unexpected mobile charges without stifling the development of innovative, new account management tools or increasing the cost of wireless service."⁷²

Next, the CTIA argues that the Consumer Code for Wireless Service adopted by wireless carriers ensures that the industry is responsive to consumer issues, and therefore the FCC does not need to step in.⁷³ The CTIA describes the Code as:

[A]n evolving document that currently includes, among other things, commitments by wireless providers to:

- disclose rates, additional taxes, fees, surcharges and terms of service in their billing materials;
- make available maps showing where service is generally available;
- provide contract terms to customers and confirm changes in service;
- permit trial periods for new service;
- provide specific disclosures in advertising;
- separately identify carrier charges from taxes on bills;
- provide customers the right to terminate service for changes to contract terms;
- ensure readily accessible customer service;
- respond promptly to consumer inquiries and complaints from government agencies; and
- abide by policies for the protection of customer privacy.⁷⁴

The CTIA goes on to argue many of the original points it made in the first comments given to the FCC. These arguments, include features that are already in place for consumers to monitor usage, industry innovation is leading to better options and protection for consumers, the distortion of facts in the FCC's original report and survey, as well as warning of the

69. *See id.*

70. *Id.* at 5.

71. *Id.*

72. *Id.* at 6.

73. *Id.* at 8.

74. *Id.*

limitations that a “one-size-fits-all” rule places on the possible innovation and competition in the wireless market.⁷⁵

Another argument that the CTIA poses is that the FCC does not have authority to adopt the rules that it is proposing.⁷⁶ According to the CTIA, “the Commission lacks authority to require usage alerts and other information disclosures – particularly delivered via SMS – related to SMS and broadband data usage under Titles I, II or III of the Act.”⁷⁷ The CTIA goes on to argue that requirements on usage alerts—whether sent by voice or SMS and data services—are unduly burdensome and, therefore, are a direct violation of the First Amendment.⁷⁸ According to the CTIA, Title III of the Communications Act does not give the FCC authority to mandate these proposed rules because of the limits set forth in Section 332(c).⁷⁹ The CTIA also cites other sections of Title III that prohibit the FCC from implementing rules regarding wireless broadband data services and SMS services, including Sections 301, 303(r), 307(a), and 316.⁸⁰ The CTIA also argues that the FCC only has authority to regulate services that fall under “telecommunications services” covered in Title II of the Act.⁸¹ According to the CTIA, wireless broadband Internet services and SMS services do not qualify as “telecommunications services” as defined in Title II, and, therefore, both services fall under Title I of the Act, leading the CTIA to the conclusion that the FCC lacks authority to regulate these services.⁸²

75. *Id.* at 9–31.

76. *Id.* at 34.

77. *Id.*

78. *Id.*

79. *Id.* at 35 (“[F]or mobile services, common carrier obligations may be imposed only on services that constitute a ‘commercial mobile service’ (*i.e.*, CMRS), defined as ‘any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) such classes of eligible users as to be effectively available to a substantial portion of the public.’” *Id.* at 36 (quoting 47 U.S.C. § 332(d)(1)).

80. *Id.* at 38–39 (“Section 301 grants the Commission subject matter authority to regulate ‘radio communications’ and the ‘transmission of energy by radio’ . . . however, such grants of subject matter authority do not confer authority to adopt any specific regulations. Section 303(r) does not . . . similarly contain an independent grant of regulatory authority; it only authorizes rules where the Commission has separate authority and where such rules are ‘not inconsistent with the law.’ . . . Section 307(a) authorizes the issuance of licenses ‘if public convenience, interest, or necessity will be served thereby’ and has effect only before a license is granted Section 316 provides authority to modify licenses, but it is concerned with individual licenses and licensee action, not broad rulemaking proceedings.”).

81. *Id.* at 40.

82. *Id.*

V. CONSUMERS SPEAK OUT

After the release of the Notice of Inquiry from the FCC, many consumer groups and technology-focused blogs released opinion columns about the proposed legislation. One of the consumer groups that submitted comments to the FCC was Consumer Action, a nonprofit group focused on consumer rights and connecting consumers to agencies where they can voice complaints.⁸³ Consumer Action complained that due to industry-wide early termination fees and the fact that “[c]urrent mechanisms for addressing ‘bill shock’ are dependent on consumers proactively deciding to use carrier-provided monitoring and notification services, often in exchange for a monthly fee,” there is a disincentive for consumers to terminate service due to bill shock, as well as a disincentive for providers to institute a proactive system of notification.⁸⁴

Another consumer group, Consumer Union, the nonprofit publisher of *Consumer Reports*, applauded the FCC for the proposed legislation.⁸⁵ The director of Consumer Union, Ellen Bloom, stated that due to the evolution of the wireless industry and the introduction of technologically-advanced smartphones, consumers should be provided with a better and more sophisticated way to be informed that they are about to go over their allotted monthly limits.⁸⁶ Bloom then referred to a survey of over 58,000 *Consumer Reports* subscribers that found one in five adults received a significantly higher wireless phone bill in the previous year.⁸⁷

Many major news outlets also ran articles on the proposed legislation, praising it for what it included to help consumers, but also stating that the rules can do even more in the effort to assist in informing consumers about their wireless bills. David Lazarus of the *Los Angeles Times* voiced the concern that the FCC is going too easy on wireless providers, noting that the FCC should set the bar higher for wireless companies.⁸⁸ Lazarus went on to criticize the CTIA for its warnings that the proposed rulemaking will stifle industry innovation, stating, “if wireless companies could no longer count on ridiculous overcharges as a revenue stream, they’d have to

83. *About Consumer Action*, CONSUMER ACTION, <http://www.consumer-action.org/about/> (last visited Feb. 20, 2012).

84. *Protect Consumer from Cell Phone “Bill Shock”*, *supra* note 13.

85. Press Release, Consumers Union, Consumers Union Praises FCC Proposal Aimed at Cell Phone “Bill Shock” (Oct. 13, 2010), http://www.consumersunion.org/pub/core_telecom_and_utilities/016985.html.

86. *Id.*

87. *Id.*

88. David Lazarus, *FCC ‘Bill Shock’ Rules Don’t Go Far Enough For Consumers*, L.A. TIMES, Oct. 19, 2010, <http://articles.latimes.com/2010/oct/19/business/la-fi-lazarus-20101019>.

compete all the harder on such things as quality of service and nifty features.”⁸⁹ Lazarus concluded by questioning the wireless industry’s motives, saying, “since every single wireless company says it places customers first, I can’t imagine why the industry would settle for anything less [than quality service that keeps customers informed].”⁹⁰

One *Washington Post* article claimed many advocacy groups believe that the FCC’s proposed legislation addresses only the tip of the iceberg presented by expensive wireless bills that are only escalating in price.⁹¹ In his *New York Times* article, Randall Stross was very critical of the billing practices of wireless providers.⁹² Stross noted that due to new changes in cell phone rate plans, many of the popular smartphones on the market are now exposed to a greater possibility of receiving unexpectedly high monthly bills.⁹³ Stross cited other consumer groups, including Consumer Union, the Consumer Federation of America, and the New America Foundation, that “urg[ed] the F.C.C. to go further, by requiring wireless carriers to get a customer’s permission to continue service when use limits have been reached.”⁹⁴ Stross was also critical of the CTIA’s arguments against the proposed legislation, noting, “by [the CTIA’s] logic, the carriers should be allowed to remain silent while your phone gobbles up data bits beyond your plan’s allocation.”⁹⁵ Stross went on to argue that while the CTIA says that consumers can rely on carrier and third-party provided systems for checking one’s phone usage, many of the consumer protections that are not required by FCC action are liable to disappear without notice.⁹⁶ Stross experienced this scenario firsthand when trying to access a free application offered by T-Mobile, only to be told that it had been shut down and replaced with a system that would cost consumers \$4.99 a month.⁹⁷

The backlash against mobile service providers and the praise of the FCC’s proposed legislation provide insight to the FCC that consumers are in favor of the proposed system. However, it also appears that while many groups are in favor of the proposed system, the FCC may have to go even

89. *Id.*

90. *Id.*

91. Cecilia Kang, *FCC Seeks to Remedy Cellphone Users’ ‘Bill Shock,’* WASH. POST (Oct. 7, 2010, 8:18 PM), http://voices.washingtonpost.com/posttech/2010/10/fcc_seeks_to_remedy_cell_phone.html.

92. Randall Stross, *Please, Just Tell Me When I’m Nearing My Limit*, N.Y. TIMES (Jan. 22, 2011), http://www.nytimes.com/2011/01/23/business/23digi.html?_r=1&adxnlnl=1&adxnlnl=1297962054-mzLZrPzSwxDpZnBtAEa3CQ.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

further when finalizing the rules. If what many consumer groups say is true, and the proposed rules only scratch the tip of the wireless industry iceberg, then other rules will need to be added to address other growing concerns. While consumers likely do not take into account the cost of the system that would be put in place, the fact that there is such a large positive response to the legislation shows that something must be done in order to satisfy consumers in a flawed system.

VI. ARGUMENT IN FAVOR OF THE PROPOSED RULEMAKING

The FCC's proposed legislation is a much-needed opportunity for consumers to finally be better informed of possible fees and charges and to be in a better position to get control of their wireless bills. The proposed legislation will allow consumers to no longer be plagued by unwanted mystery charges due to a lack of information concerning monthly usage. The consumer groups and news outlets that have spoken in favor of the proposed legislation help to prove that these rules are long overdue in the eyes of consumers. While the CTIA has made many arguments in opposition to the legislation, many of these arguments appear to be attempts to save the "golden goose" that the carriers have with charging these massive overage fees.

The successful implementation of a similar system in the EU, the lack of sufficient tools currently available for consumers in the United States, and the outcry by consumer groups for an end to bill shock all prove that a change in the current wireless system is needed. This need for change, combined with the lack of convincing arguments by the wireless industry against the reform proposed by the FCC, demonstrate that the implementation of the proposed rulemaking to empower consumers against bill shock is an innovative and vital step towards reforming a system that currently takes advantage of the confusion of its consumers.

A. Similar Systems Currently in Operation

The CTIA is relying on the argument that the proposed system is too difficult and unfeasible to implement. However, the successful implementation of a similar system by the EU years ago proves that such a system is not impossible or too burdensome for wireless carriers. The fact that the EU implemented a system even with the added challenge of dealing with many different countries, languages, cultures, and wireless providers, should be an indication that it would be easier to implement a similar system in the United States, where many of these difficulties are not present. Furthermore, similar systems designed to provide consumers with alerts from various companies are already in place in the United States on a smaller scale. In a report from an unnamed business executive who spoke

with Chairman Genachowski, the executive described a system that he currently uses for his business that seems very similar to the one proposed by the FCC.⁹⁸ The executive spoke of the ease and feasibility of sending text alerts to consumers, stating, “I know how easy it is to send a consumer a text message; we send one 10 minutes before a parking meter expires so they don’t get a parking violation ticket; we do it numerous times a day. The only reason not to do it is if you’re trying to take advantage of a customer.”⁹⁹

The existence of these systems offered by smaller companies makes it appear that the argument against these systems by large wireless service providers is not due to the fact that these systems are impossible and unrealistic, but rather because there is too much of a profit to be made by wireless providers with these systems not in place. However, just because a small company can provide something does not mean that a larger company can do the same. Many factors go into a large-scale operation such as price, size of coverage area, and reliability of the system. While these are all factors that must be taken into account when considering the CTIA’s argument, it nevertheless appears that a system that requires them to send out alerts via their own network is not overly burdensome on an industry as lucrative and technologically advanced as wireless communication services.

B. Lack of Tools Currently Available to Consumers

The CTIA argument that systems are already in place for consumers to keep track of cell phone use is faulty for many reasons. Many of the systems offered to consumers cost money and are only available for certain phones.¹⁰⁰ Making these tools available only to those who are able to afford an expensive phone is very counterintuitive to the purposes of the proposed system. The reason many of these consumers need alerts is because they cannot afford extra fees on their wireless bills. Many consumers, especially in the current economy, are on a fixed budget, and requiring them to buy an expensive phone for the sole purpose of helping them save money is simply not an option. Furthermore, charging consumers to check their usage promotes a backward system designed only to generate large profits for wireless carriers. One wonders, why charge consumers a fee to assist them with the task of not incurring fees? This design is similar to a system that requires someone to stand in line in order to get a ticket to not stand in a line.

98. See FCC Oct. 2010 Notice of Proposed Rulemaking, *supra* note 10, at 14652.

99. *Id.*

100. See CTIA July 2010 Comments, *supra* note 46, at 12 n.23.

In acknowledging this flaw in the current tools offered by service providers, FCC Chairman Genachowski stated that many of the tools are insufficient, and that the industry needs to use the innovation of the industry to better empower consumers to be informed about their wireless bills.¹⁰¹ Genachowski spoke out about his concern that consumers need a straightforward system to monitor usage, stating, “[m]ost people don’t know what a megabyte is . . . [b]ut they do understand when they get an alert telling them they’re about to go over their limit and incur additional fees.”¹⁰² The requirement that these alerts be in plain language that the average consumer can understand does not seem to be too demanding on wireless providers. Instead of telling consumers that they are about to send a picture that is a certain size in technical terms, simply informing consumers that the picture will cost them a certain amount to send would fix any ambiguities with the bill. Consumers will be more empowered to make a decision on their own bill if they know the exact dollar amount that it will cost them to send something or to access the Internet. This way consumers can decide for themselves if the current action they are about to take is worth the extra charge on their monthly wireless bill.

C. Arguments by the Wireless Industry Attempt to Preserve a Lucrative Business Model Based on Taking Advantage of Consumers

Possibly one of the biggest reasons why the CTIA is so opposed to this proposed rulemaking is that there is just too much money to be made by charging fees to consumers. Although many of the astronomical amounts are at least partially forgiven, if one thinks about the number of people that are being charged overage fees on their phone bills, this amount adds up very quickly to a large profit for mobile providers. Chairman Genachowski spoke out against this type of profit gained by service providers, stating, “[c]ompanies should compete on the basis of value, price and services, not consumer confusion.”¹⁰³ In the current system, it appears that there is a competition for wireless providers to get as many of their consumers to incur overage charges as possible, thus allowing them to be charged a small fee and providing the wireless company with a much greater cash flow.

The requirement for service providers to actually compete on quality and services offered will allow for much greater innovation and growth in the wireless industry. Contrary to the argument made by the CTIA that the

101. Lazarus, *supra* note 88.

102. Reardon, *supra* note 1.

103. *FCC Oct. 2010 Notice of Proposed Rulemaking*, *supra* note 10, at 14652.

imposed rules would stifle innovation, a system that is based completely on quality of service will require wireless companies to be on the cutting-edge of technology and to strive to be the industry-leading service provider for consumers. If a company cannot provide the features and services the consumer wants based on a fair and informed price, the fierce competition provided in this new market will ensure that the consumer will have the option to move to another provider that can offer these services, thus causing companies to be ever-changing and innovating if they want to retain their consumer base and revenues.

Given the current economic hardship in the United States, the last thing people need to worry about is being nicked and dimed by their wireless service providers. While many people are not being charged large fees, even fees that are less than \$100 can have a serious impact on many households. Chairman Genachowski stated in a speech that “[e]ven smaller unexpected charges can pose real problems for consumers on fixed incomes.”¹⁰⁴ FCC data shows that in the first two quarters of 2010, there were 764 complaints involving bill shock. Of these complaints 6 percent were from one dollar to twenty-four dollars, 15 percent were from twenty-five to forty-nine dollars, 6 percent were from fifty to seventy-four dollars, 6 percent were from seventy-five to ninety-nine dollars, 47 percent were from \$100 to \$999, and 20 percent were over \$1,000.¹⁰⁵ It is clear that while this may not be a widespread problem, being that only about 1,500 consumers are faced with bill shock each year, for those who are faced with these bills, the price can be significant. The FCC also warns that there is much more to “bill shock” than just a dollar amount. The FCC has noticed that many of the complaints can take months or even years to be resolved, and this is with the FCC’s mediation—it can take even longer without.¹⁰⁶ Consumers who face bill shock and appeal are faced with many challenges while waiting for the appeal to be resolved. These challenges include an interruption to wireless service during the appeal and even a risk to the consumer’s credit rating, which in the current state of the economy is devastating to someone looking for a loan or trying to find a job.¹⁰⁷ Consumers should not have to be faced with a choice between having cell phone service and being able to provide for themselves and their families, especially when that choice comes because of frivolous fees that the consumer is incurring because of a lack of clear understanding of the charges and rate structure of their wireless carrier.

104. Reardon, *supra* note 1.

105. FCC OCT. 2010 WHITE PAPER ON BILL SHOCK, *supra* note 20, at 4.

106. *Id.*

107. *Id.*

The CTIA argues that the FCC has blown the problem of bill shock out of proportion and that consumers are generally satisfied with their wireless service. The CTIA is relying on a statistic from the Better Business Bureau, which states that “[w]hen there are concerns raised by consumers, the Better Business Bureau reports that 97.4 percent of them are resolved . . . [a]nd the industry continues to develop tools to keep customers informed about their level of usage of voice, text, or data to ensure positive customer experiences.”¹⁰⁸ However, one must consider how high the percentage of satisfied consumers would be if consumers were better informed about their wireless charges.

Furthermore, it is also not clear how many consumers take a “that is the way things are” attitude when it comes to extra charges on wireless bills. Many consumers likely shrug off a minor rise in their wireless bills because they feel it is too minute of a difference to protest. However, when this amount is multiplied by the number of people who simply accept these charges, the amount that wireless providers receive from these consumers is enormous. This huge revenue stream provides incentive for wireless companies to charge just enough that they continue to see large returns, but not enough to make consumers realize that something is wrong and complain about it. The fact that the wireless industry has a system in place that allows it to basically print money without consumers bringing forth any considerable complaint does not mean that the industry should be rewarded for this type of business practice. The FCC’s job is to make sure consumers are able to have fair dealing when it comes to service providers, and the current system in place appears to be just the type of situation where consumers need help to rid themselves of unwanted fees.

The CTIA states that industry innovation ensures that consumers are getting the full efforts of the wireless industry when it comes to their service. However, it is obvious that the “innovation” that the CTIA relies upon in the industry is not enough to fulfill the demand of the consumers. If the true motive of the industry were to keep consumers better informed about wireless charges, then there would already be a system in place similar to the one being proposed by the FCC. With the advances in wireless technology in the recent past and with all of the new applications consumers are given on their phones that let them play games, keep track of their day, conduct banking services, and even have video conversations with someone on the other side of the world, it is clear that the industry has not been focused on the small task of sending consumers alerts to inform them of when they may incur higher charges.

108. Reardon, *supra* note 1.

VII. CONCLUSION

The intense arguments from both sides of the issue of bill shock prove that this is not an issue that is going to go away any time soon. Even with the proposed rules, many consumer groups urge that more must be done. Consumers will have to wait to find out if they will be receiving warnings from service providers when they are about to incur extra charges. The FCC has set the Revised Reply Comment date for this matter for February 8, 2011; after that time, the FCC will release a response to those comments.¹⁰⁹ Hopefully, the process can go rather quickly and the proposed legislation can go before Congress in the near future; however, this seems like an unlikely scenario. Due to the commitment of the CTIA and other industry groups to quash this bill in any way possible, it appears that there will continue to be intense debate on the issue for quite some time, making consumers wait even longer before they are able to be fully empowered to take control of their wireless bills and decide for themselves what charges they are willing to incur.

Until the issue is resolved, consumers will need to pay close attention to their usage, and use the advice the FCC has given on its website, as well as any possible tools currently available, to ensure that they do not incur overage charges that lead to bill shock. Luckily, the proposed rulemaking has brought this issue to the spotlight of many news outlets and consumer groups, so consumers can now be more aware of the issue and ways in which they can guard themselves while waiting to find out if the proposed rules are adopted. However, this awareness of the problem does not replace a permanent remedy for the problem of bill shock. Consumers, advocacy groups, and news outlets will have to continue to pressure wireless companies to make a change in the system, as well as gather support for the proposed legislation from the FCC.

Until the time when consumers are able to make choices involving their wireless plans based on quality of service and advanced features, many people will be forced to settle for confusion and mystery charges. Hopefully, during this wait, there will be a limited number of astronomically large bills, such as those referenced previously that amounted to tens of thousands of dollars. For now, during the tough economic times people are facing in this country, consumers can have some solace in the fact that there are groups looking out for them, as was said best by Chairman Genachowski, “[n]ow, more than ever, we need to make sure consumers aren’t being charged for more than what they signed up for, and that they have the information they need to make the best

109. See *FCC Dec. 2010 Order*, *supra* note 65, at para. 3.

decisions for their families. Consumers need a watchdog—and they can rest assured knowing the FCC is looking out for them.”¹¹⁰

110. Press Release, FCC, FCC Paper Finds Ongoing Consumer Frustration With “Bill Shock,” (Oct. 13, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302162A1.pdf. (emphasis added).