NARUSCA v. FCC: Federalism, Line Item Billing, and the Future of Wireless Consumer Protection

*By Seth Cooper**

States can regulate line items in customer billing for cellular wireless services. Thus spoke the U.S. Supreme Court, it seems, when it refused to hear *National Association of State Utility Consumer Advocates v. F.C.C.* The denial of certiorari left standing a Eleventh Circuit Court of Appeals decision that state truth-in-billing rules for wireless are *not* preempted under federal law. Here follows a look back at the Eleventh Circuit's ruling, as well as a short take on the past, present, and possible future of wireless consumer protection regulation.

Congressional Wireless Policy and the FCC's Truth-in-Billing Proceeding

The Communications Act of 1934 vested the Federal Communications Commission with authority to regulate radio frequencies used in cellular wireless services.[1] In 1993, Congress amended the Act to grant the federal government the exclusive authority to the "rates charged" and the "entry" of wireless carriers.[2] In significant respects, this cordoned off wireless carriers from state regulation. Under the amendment, however, states were permitted to continue regulating "other terms and conditions" of wireless services.[3]

In May, 1999, the Commission adopted Truth-in-Billing Rules "to ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications marketplace, while at the same time protecting themselves from unscrupulous competitors."[4] The Commission applied those rules to wireline services, but exempted wireless providers from several such rules.

The State Consumer Advocates later petitioned the Commission for a declaratory ruling that prohibits wireless providers "from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state, or local law."[5] A line item is "a discrete charge identified separately on an end user's bill."[6] The State Consumer Advocates argued that those line items do not allow customers to accurately assess what they are being billed for or whether they are being billed for government-mandated taxes and fees.

In March, 2005, the Commission issued its "Second Report and Order," amending and clarifying the application of truth-in-billing rules to wireless providers. It concluded that wireless providers were no longer exempt from requirements that billing descriptions be "brief, clear, non-misleading and in plain language."[7] The Commission also issued a "Declaratory Ruling," in which it denied the Consumer Advocates petition and declared state laws requiring or prohibiting use of line items on bills for wireless services preempted by Section 332(c)(3)(A) of the Communications Act of 1934, as amended.[8]

The Commission's preemption of state regulations for wireless line-item billing "rates" included "rate levels," "rate structures," and "rate elements."[9] It concluded that line items are "rate elements" and that state regulations prohibiting or requiring line items directly affect how wireless providers structure their rates. On the other hand, the Commission also concluded that state taxes, state universal service support charges, and other state regulations only have an "indirect effect… on a company's behavior."[10] The Commission's preemption ruling cited "the pro-competitive, deregulatory framework [for wireless providers] prescribed by Congress" in 1993.[11] According to the Commission, different state laws regulating line items would result in a variety of conflicting rules.

In preempting state regulations for wireless line item billing, the Commission left undisturbed state authority to impose taxes on wireless services, assess state universal service support charges, and enact other disclosure laws. However, it also requested comments about the role of states in regulating truth-in-billing issues and whether federal law preempted other state regulations of billing practices.

National Association of State Utility Consumer Advocates v. F.C.C.

The State Consumer Advocates, joined by the National Association of Rate Utility Commissioners (NARUC), petitioned for legal review of the Commission's ruling. Wireless providers Sprint Nextel and Cingular Wireless were granted intervenor status in support of the Commission.

In *National Association of State Utility Consumer Advocates v. F.C.C.* ("NASUCA v. FCC"), a unanimous panel of the Eleventh Circuit reversed the Commission's preemption ruling.[12] The court's opinion was penned by Judge William Pryor. A federalism-minded jurist, Judge Pryor's analysis of the Commission's preemption order began with citation of the Supremacy Clause of Article VI of the U.S. Constitution:[13]

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The basics of modern preemption doctrine followed.[14] In the context of administrative law, federal agencies acting within their scope of congressionally delegated authority may preempt state regulation. Agencies entrusted with discretionary powers must not exceed their statutory authority or act arbitrarily.

Judge Pryor cited case authorities for a clear-statement rule of federal preemption: "the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress."[15] "[T]his presumption, he wrote "guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'"[16]

Judge Pryor cited the Commission's finding that "'Congress did not specifically define 'rates,' 'entry,' or other key terms in section 332(c)(3)(A), but explained that 'rate regulation

* *Seth Cooper is the Director of the Telecommunications and Information Technology Task Force at the American Legislative Exchange Council in Washington, D.C., the nation's largest nonpartisan, individual membership organization of state legislators.*

extends to regulation of 'rate levels' and 'rate structures' for' wireless service providers.[17] But the court took exception to the Commission's rationale.

In the panel's view, "[t]he language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills."[18] This determination was made through an examination of the defined terms of the Communications Act, as well as the meaning those defined terms and common dictionary definitions give to the undefined terms of the Act. Deeming a "rate" to be an amount of charge or payment, Judge Pryor wrote that "[t]he prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service."[19] Whereas states may regulate billing practices of wireless providers, but not the amounts charged to consumers, "the presentation of line items on a bill is not a 'charge or payment for service'… it is an 'other term or condition' regulable by the states."[20]

Moreover, the panel found fault with the Commission for failing to follow the definition of "rates" that it relied upon in its previous rulings. In prior proceedings, the Commission defined "rates" as an "amount of payment or charge based on some other amount,"[21] and defined "rates charged" as prohibiting states from "prescribing, setting or fixing rates" of wireless providers.[22]

In seeking to preempt state line item billing requirements for its alleged effect upon rates, the Commission's stance was complicated by its own decisions upholding state universal service charges on wireless customers as an "other term or condition."[23] The Commission argued that line items had a "direct effect" on rates, whereas universal service charges only have an "indirect effect" on rates. The panel flatly rejected this argument as unavailing and without logical distinction.

The panel also concluded that the legislative history of the 1993 amendments to the Communications Act "shows that Congress intended to leave the authority to regulate line items with the states." If line items were a matter of "rates," concluded the panel, the Commission could preempt almost any form of state regulation of wireless service. Wrote Judge Pryor, "[t]he failure of the Commission to delineate the proper scope of rate regulation allows the Commission indefinitely to expand its authority without regard to the mandate by Congress that 'other terms and conditions' remain the realm of state regulation." In so concluding, the panel vacated the Commission's preemption ruling, remanding the case to the Commission.

Sister Circuit Case Comparison

The Eleventh Circuit panel's opinion in *NASUCA v. FCC* did not include any close examination of related decisions from other circuit courts of appeal. But its ruling against any easy preemptive presumptions for state laws relating in some way to wireless rates under 47 U.S.C. § 332(c)(3)(A) nonetheless finds some consistency in circuit court case law.

For instance, *Fedor v. Cingular Wireless Corporation* considered an argument to "interpret the preemption provision as covering any claim that touches on the rates charged in any manner."[24] The Seventh Circuit rejected that argument, concluding that position "overstates the scope of the preemption and in fact is a position that has been repeatedly rejected by the Courts and the FCC."[25] The Seventh Circuit panel reviewed prior rulings by the FCC concerning wireless regulations and preemption—including rulings also analyzed by the Eleventh Circuit in *NASUCA v. FCC*. "Those decisions," ruled the Seventh Circuit, "reject the argument that any claims related to the billing amount are automatically preempted under section 332.[26] Instead, the Seventh Circuit concluded that courts must "examine whether the claims require the state court to assess the reasonableness of the rates charged, or impact of market entry."[27]

In *Fedor*, the Seventh Circuit held that state law claims in contract and under state consumer protection laws for a wireless providers' improper attribution of calls and charges did *not* address rates themselves, but only the conduct of a provider in failing to adhere to those rates. Ultimately, the state law claims at issue in *Fedor* were not preempted but were "preserved for the states under §332 as the 'terms and conditions' of commercial mobile services."[28]

The Future of Line Item Billing Regulation

The U.S. Supreme Court declined to hear, and thereby upheld the Eleventh Circuit panel's decision, in January.[29] (Defendant intervenors Sprint Nextel filed the petition with the Supreme Court, as the FCC declined to pursue further litigation.) The FCC is therefore now forbidden from preempting the states on line item billing requirements for wireless carriers as "other terms and conditions" under Section 332(c)(3)(A). But the future suggests the possibility of regulatory reform in consumer protection—including line item billing—for wireless customers.

At present, state regulation of consumer protection in wireless services coincides with private self-regulation. In the past few years, wireless carriers have embraced some self-policing efforts. For instance, in 2003 the wireless industry adopted the "CTIA Consumer Code for Wireless Service."[30] Established through the industry's primary trade association, the CTIA Consumer Code is a ten-point set of best practices that its members agreed to for marketing services and billing customers. Also, in 2004, several wireless carriers entered into the "Assurance of Voluntary Compliance" with thirty-three state attorneys general.[31] The agreement set out nationwide consumer protection standards that wireless carriers agreed to follow.

However, the wireless industry has recently become more vocal in articulating its own vision for a National Regulatory Framework for Wireless. CTIA President Steve Largent has urged Congress to "close the 'other terms and conditions loophole,'" and establish "a clear, regulatory framework for all wireless consumers in all states."[32] According to Largent, states should continue to regulate wireless just like any other industry through its generally applicable state consumer protection laws.[33] But specific requirements for wireless carrier consumer protection would be federalized.

Moreover, legislation in the 110th Congress proposes express rulemaking authority for the FCC to address billing requirements for wireless carriers. For instance, Senator Amy Klobuchar has introduced the Cell Phone Consumer Empowerment Act of 2007.[34] Among other things, Sec. 5(f)

of the bill requires the Commission to initiate proceedings under the Communications Act to establish regulations for line item billing. The Klobuchar bill includes a section expressly preempting state laws inconsistent with those of the legislation, except for "any State laws that provide additional protection to subscribers of wireless telephone service."[35] In addition, Senator Mark Pryor has introduced the Uniform Wireless Consumer Protection Act.[36] The bill requires the Commission to adopt consumer protection regulations for wireless customers within one year of the legislation's enactment. But Pryor's bill does not contain an express preemption section.

More recently, House Representative Ed Markey has circulated a draft bill titled the Wireless Consumer Protection and Community Broadband Empowerment Act of 2008.[37] This draft bill includes a section requiring the Commission to issue line item billing regulatory requirements for wireless carriers. But Markey's draft bill also does not include any express preemption section. These legislative proposals have not gone uncriticized.[38]

CONCLUSION

In sum, the Supreme Court's denial of certiorari in *NASUCA v. FCC* appears to bring some finality to the issue of whether states can regulate line items in wireless service. The Eleventh Circuit opinion in the case is a straightforward federal preemption ruling. States are not preempted from adopting line item requirements, and any action undertaken by the FCC on remand from the Eleventh Circuit must be made in that light. The judiciary has expounded on Congress's purposes in the 1993 amendments to the Communications Act. Whether Congress will take a different path through future legislation remains to be seen.

Endnotes

1 47 U.S.C. § 303.

2 *Id.* § 332(c)(3)(A).

3 *Id.*

4 *In re* Truth-in-Billing and Billing Format, 14 F.C.C.R. 7492 (1999).

5 *See In re* Truth-in-Billing and Billing Format, Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing ("Second Report and Order"), 20 F.C.C.R. 6448, at 6449 (2005).

6 *Second Report and Order*, 20 F.C.C.R. at 6462.

7 *Id.* at 6454-6458.

8 *Id.* at 6458-6467.

9 *Id.* at 6456. *See also* 47 C.F.R. § 64.2401(b).

10 *Id.* at 6463.

11 *Id.* at 6466.

12 Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C., 457 F.3d 1238 (11th Cir. 2006), *modifying opinion on denial of panel reh'g*, 468 F.3d 1272 (11th Cir. 2006), *reh'g en banc denied* (Nov. 29, 2006).

13 *See, e.g.*, William H. Pryor, *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 Ala. L. Rev. 1167 (2002); William H. Pryor Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 Cumb. L. Rev. 361 (2002); William H. Pryor, "Fighting for Federalism," Remarks Before the Federalist Society (Mar. 28, 2001), *available at* http://www.fed-soc.org/chapters/id.83/default.asp (May 5, 2008).

14 To briefly summarize, federal preemption of state law is typically analyzed through a three-part taxonomy: (1) express preemption of state laws contained in federal statutes; (2) conflict preemption when federal and state laws cannot be reconciled; and (3) field preemption where Congress appears to have occupied the whole scope of a subject area and mutual compliance with state and federal law is practically impossible. *See* Wardair Canada, Inc. v. Fla. Dept. of Rev., 477 U.S. 1, 6 (1986). Congressional purpose is central of preemption analysis. La. Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 369 (1986). For a more detailed background discussion of federal preemption doctrine, *see* David E. Engdahl, Constitutional Federalism (2d ed) (1986) 74-92, 332-56.

15 *Nat'l Ass'n of State Util.Consumer Advocates,* 457 F.3d at 1252.

16 *Id.* (cite omitted).

17 *Second Report and Order*, 20 F.C.C.R. at 6462-63 (cite omitted).

18 *Nat'l Ass'n of State Util. Consumer Advocates,* 457 F.3d at 1254.

19 *Id.*

20 *Id.*

21 *Id*. at 1254-55 (citing *In re* Sw. Bell Sys., Inc., 14 F.C.C.R. 19898, 19901 (1999)).

22 *Id*. (citing Cellular Telecomms. Indus. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C.Cir.1999) (quoting *In re* Pittencrieff Commc'ns, Inc. 13 F.C.C.R. 1735, 1745 (1997)).

23 *See Pittencrieff*, 13 F.C.C.R. at 1742, *aff'd sub nom. Cellular Telecomms. Indus.*, 168 F.3d at 1332 (cited in NARUSCA v. FCC, 457 F.3d at 1255-1256.

24 *Id*. at 1072.

25 *Id.*

26 *Fedor*, 355 F.3d at 1072-1073 (citing *In re* Sw. Bell Mobile Sys., Inc., 14 F.C.C.R. 19898 (1999) for the proposition that "state law claims stemming from contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted under §332," and that the FCC held such claims fall within the 'other terms and conditions' regulable by the states); *Id.* (citing *In re* Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021 (2000) as holding that damage awards against commercial mobile service providers based on state court tort or contract claims are not preempted by §332 but that the FCC holds "such claims are generally preempted only where they involve the court in rulemaking").

27 *Id.* at 1074.

28 *Id.*

29 Sprint Nextel Corp. v. Nat'l Ass'n of State Util. Consumer Advocates, 128 S.Ct. 1119 (2008).

30 http://files.ctia.org/pdf/The_Code.pdf (May 5, 2008).

31 http://www.nasuca.org/CINGULAR%20AVC%20FINAL%20VERSION.pdf (May 5, 2008).

32 http://files.ctia.org/pdf/Testimony_Largent_WirelessConsumerProtection_2_27_08.pdf (May 5, 2008).

33 *Id* ("States should exercise their role in consumer protection to the same extend they do for competitive industries, no more and no less, by enforcing generally applicable consumer protection laws, but *not* through the promulgation of wireless-specific economic regulations").

34 S. 2033, 110th Congress, 1st Session (introduced Sept. 07, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2033is.txt.pdf (May 5, 2008).

35 *Id*., § 12.

36 S. 2171, 110th Congress, 1st Sess. (introduced Oct. 17, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2171is.txt.pdf (May 5, 2008).

37 H.R. _____ [Staff Discussion Draft], 110th Congress, 2d Session (February 15, 2008), *available at* http://markey.house.gov/docs/telecomm/draft_wireless_legislation.pdf (May 5, 2008).

38 *See, e.g.*, *supra* note 32.