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Federal Court Calls into Question FCC's Authority to Preempt State Regulation of Wireless Bills

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Last week, the United States Court of Appeals for the Eleventh Circuit overturned a Federal Communications Commission order barring states and cities from regulating wireless carriers' use of line-item charges on their customers' bills. The case, *National Association of State Utility Consumer Advocates v. FCC*, No. 05-11682 (11th Cir. July 31, 2006), is significant because it rejects the primary legal argument that the FCC has used to oust the states and assert exclusive authority over wireless billing issues. The Eleventh Circuit's opinion construes the FCC's exclusive statutory authority over wireless "rates" narrowly and literally, potentially frustrating the FCC's future ability to address inconsistent and often burdensome state-by-state regulation by establishing a single, nationwide set of fair billing and other regulatory requirements.

Section 332(c)(3)(A) of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(3)(A)) has been understood to create separate spheres of state and federal regulation of wireless services. It provides that "no State or local government shall have any authority to regulate the entry of[,] **or the rates charged by**[,] any commercial mobile service"--leaving such authority over "rates" exclusively to the FCC. By contrast, the provision clarifies that it does not preempt the states' authority to regulate "the other terms and conditions of commercial mobile services."

In the FCC's Second Truth-in-Billing Order (Second Report and Order, *In the Matter of Truth-in-Billing and Billing Format*, 20 FCC Rcd 6448 (2005)), the FCC held that its exclusive authority over "rates" extended to the structure of those rates and the manner in which they are presented on customer bills, thereby preempting state and local regulation requiring or prohibiting the use of line items by wireless carriers. Importantly, the only source of authority the FCC cited for this ruling was its statutory authority over "rates." It did not, as an additional or alternative basis of its holding, rely on its general power to preempt state regulation inconsistent with the federal policy of ensuring nationwide economical wireless service.

National Association of State Utility Consumer Advocates (NASUCA) sought judicial review of the FCC's preemption holding, and the court found that the FCC's statutory interpretation failed at the first step of the *Chevron* analysis--i.e., it was contrary to the clear intent of Congress. The court rejected the FCC's argument that because "rate regulation extends to regulation of rate levels and

rate structures for wireless service providers" it also encompasses line-item billing, instead finding that line-item regulation falls squarely within the "other terms and conditions" that Section 332(c)(3)(A) leaves subject to state regulation [Opinion at 33 (quotation marks and citations omitted)]. The court relied on both dictionary definitions of the term "rate," (*id.* at 33-34) and the FCC's own past use of the term (*id.* at 34-37) in finding the FCC's construction of "rates" to be untenable. The Eleventh Circuit also relied on a report of the House Budget Committee, which stated that the "other terms and conditions" language--defining the areas of traditional state regulation that are not automatically preempted by Section 332(c)(3)(A)--was intended to "'include such matters as customer billing information and practices and billing disputes and other consumer protection matters'" [*Id.* at 41 (quoting H.R. Rep. No. 103-111, at 211 (1993))].

The wireless industry understandably finds the court's opinion very troubling. If billing issues other than the use of line items are similarly held to constitute "other terms and conditions" of wireless service that are presumptively left in the hands of the states, the FCC could be hamstrung in establishing nationwide rules for truth-in-billing, account statement formats or other issues that the industry would prefer be regulated on a nationwide basis. It remains an open question whether the court's opinion would prevent the FCC from using its **general** powers to preempt state regulation that frustrates federal policies--as opposed to its specific statutory authority over wireless "rates"--to achieve the same end, since the FCC did not invoke those powers in the order under review. What is certain is that the court's decision raises the stakes in the wireless preemption debate that has been playing out on the Hill this summer, most dramatically in the Stevens Bill (S. 2686)--the current iteration of which would both preempt state regulation of "other terms and conditions" of wireless service and establish national line-item billing rules.

In addition, one procedural aspect of the Eleventh Circuit's opinion deserves note by any entity hoping to challenge FCC actions in federal court. The court held that it lacked subject matter jurisdiction to hear a petition for review filed by the Vermont Public Service Board because the Board had not participated in the round of agency proceeding that led to the Second Truth-in-Billing Order, and thus did not qualify as a "party aggrieved" under the Hobbs Act (Opinion at 16-23). This was the case even though the Board had filed comments in an earlier round of the same docket, and had filed (albeit late) an ex parte submission in the round leading to the order under review. The court emphasized that "the Hobbs Act confers party status on [only] those who participated in the proceedings that led to the Order under review" (*Id.* at 18). The court's opinion is a strong reminder to companies that in order to preserve their ability to challenge the FCC's decisions they must participate actively in the rounds of FCC proceedings leading up to those decisions.