

No. 06-36027

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JARED A. PECK, individually and on behalf of all the members of the class
of persons similarly situated,

Plaintiffs-Appellants,

v.

CINGULAR WIRELESS, LLC., a Delaware limited liability company, ,
d/b/a Cingular Wireless, NEW CINGULAR WIRELESS SERVICES, INC.,
a Delaware corporation, d/b/a AT&T Wireless, NEW CINGULAR
WIRELESS SERVICES PURCHASING COMPANY, L.P., a Delaware
limited partnership, d/b/a Cingular Wireless, and NEW CINGULAR
WIRELESS PCS, LLC, a Delaware limited liability company, d/b/a
Cingular Wireless,

Defendant-Appellees.

**BRIEF FOR AMICUS CURIAE, THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES, IN SUPPORT OF
APPELLANTS**

Christine A. Mailloux
Telecommunications Attorney
The Utility Reform Network
711 Van Ness Ave, Suite 350
San Francisco, CA 94102
(415) 929-8876

Patrick W. Pearlman
Deputy Consumer Advocate
Consumer Advocate Division
WV Public Service Commission
732 Kanawha Boulevard East
Charleston, WV 25301
(304) 558-0526

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA
Telecommunications Committee
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
(614) 466-8574

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DISTRICT COURT HAD NO AUTHORITY TO DISMISS THE APPELLANTS’ COMPLAINT BASED ON AN FCC ORDER VACATED BY THE ELEVENTH CIRCUIT UNDER THE HOBBS ACT.	3
A. CONGRESS EXPRESSLY PROVIDED FOR THE ORDERLY REVIEW OF FCC ORDERS IN THE CIRCUIT COURTS.....	4
B. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO DETERMINE THE VALIDITY OF FCC ORDERS REVIEWABLE UNDER THE HOBBS ACT.	6
C. THAT A PETITION FOR REHEARING <i>EN BANC</i> WAS PENDING IN THE ELEVENTH CIRCUIT DID NOT EXCUSE THE DISTRICT COURT’S ACTION.....	11
II. THE DISTRICT COURT FAILED TO PROPERLY APPLY <i>CHEVRON</i> IN ANY EVENT.....	12
A. THE DISTRICT COURT MISAPPLIED THE FIRST STEP OF <i>CHEVRON</i> ANALYSIS BY FAILING TO INDEPENDENTLY DETERMINE WHETHER CONGRESS HAD SPOKEN TO THE QUESTION AT ISSUE, DEFERRING INSTEAD TO THE FCC’S INTERPRETATION.....	12
B. THE FCC ORDER WAS NOT ENTITLED TO DEFERENCE UNDER <i>CHEVRON</i> ’S SECOND STEP IN ANY EVENT.....	19
1. The FCC Failed to Consider Important Aspects of the Question.....	20
2. The FCC Offered No Explanation for Inconsistencies Between Its New Interpretation and Prior Agency Statements.	23
3. The FCC Order Was Not Entitled to Deference Because of the Serious Constitutional Doubts It Raised.....	24
4. The District Court Overlooked Procedural Irregularities Precluding Deference to the FCC.....	28

CONCLUSION	30
-------------------------	-----------

TABLE OF AUTHORITIES

Cases

<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	27
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988).....	25
<i>Bywater Neighborhood Ass’n v. Tricarico</i> , 879 F.2d 168-69 (5th Cir. 1989) 6	
<i>Carlin Communications, Inc. v. FCC</i> , 787 F.2d 846 (2nd Cir. 1986)	9
<i>Cingular Wireless, LLC v. Rudolph</i> , Civil Action No. 05-81 (E. D. Ken., filed Nov. 18, 2005)	12
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992).....	19
<i>City of Rochester v. Bond</i> , 603 F.2d 927 (D.C. Cir. 1979).....	6
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council</i> , 485 U.S. 568 (1988).....	25
<i>FCC v Nextwave Personal Communs., Inc.</i> , 200 F.3d 43 (2nd Cir. 1999)	6
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	14
<i>Garrelts v. Smithkline Beecham Corp.</i> , 943 F. Supp. 1023 (N. D. Iowa 1996)	27
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	14, 21
<i>Hesse v. Sprint Spectrum, L.P.</i> , 2007 U.S. Dist. LEXIS 3885 (W. D. Wash., Jan. 18, 2007).....	11
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	14
<i>Louisiana Public Serv. Comm’n</i> , 476 U.S. 355 (1986).....	13
<i>MCI Telecomm’s Corp. v. AT&T</i> , 512 U.S. 218 (1994).....	14
<i>Medtronic v. Lohr</i> , 518 U.S. 470 (1996)	14, 19
<i>Mich. Bell Tel. Co. v. Lark</i> , 373 F. Supp.2d 694 (E. D. Mich. 2005).....	10
<i>Moser v. FCC</i> , 46 F.3d 970 (9th Cir. 1995).....	6
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.</i> , 463 U.S. 29 (1983)	20
<i>Muratore v. United States OPM</i> , 222 F.3d 918 (11th Cir. 2000)	20
<i>Nat’l Ass’n of State Utility Consumer Advocates v. FCC</i> , 457 F.3d 1238 (11th Cir. 2006)	passim
<i>Nat’l Ass’n of State Utility Consumer Advocates v. FCC</i> , 468 F.3d 1272 (11th Cir. 2006).....	10
<i>Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services</i> , 125 S.Ct. 2688 (2005).....	24
<i>Northpoint Tech., Ltd. v. FCC</i> , 412 F.3d 145 (D.C. Cir. 2005)	20
<i>Raygor v. Regents of University of Minnesota</i> , 534 U.S. 533 (2002).....	26

<i>Sable Communications of Cal., Inc. v. FCC</i> , 827 F.2d 640 (9th Cir. 1987) .	6, 10
<i>Wilson v. A.H. Belo Corp.</i> , 87 F.3d 393 (9th Cir. 1996)	6
<i>Solid Waste Agency v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001)	25
<i>South Cent. Bell Tel. Co. v Louisiana Public Service Com.</i> 570 F. Supp. 227 (M.D. La. 1983)	6
<i>Teper v. Miller</i> , 82 F.3d 989 (11th Cir. 1996)	27
<i>Tex. Coalition of Cities for Util. Issues v. FCC</i> , 324 F.3d 802 (5th Cir. 2003)	20
<i>U.S. West Comm. v. Hix</i> , 2000 U.S. Dist. LEXIS 21989 (D. Colo. 2000)....	10
<i>United States v. Any and All Radio Transmission Equip.</i> , 207 F.3d 458 (8th Cir. 2000).....	7
<i>United States v. Dunifer</i> , 219 F.3d 1004 (9th Cir. 2000)	7
<i>Wis. Bell v. Bie</i> , 216 F. Supp.2d 873 (W. D. Wis. 2002)	10

Statutes

28 U.S.C. §§2341 <i>et seq.</i>	8
28 U.S.C. §2342(1)	11
28 U.S.C. §2343.....	12
28 U.S.C. §2344.....	12
47 U.S.C. §§151 <i>et seq.</i>	8
47 U.S.C. §332(c)(3)(A)	passim
47 U.S.C. §332(c)(3)(A)(i) – (ii).....	23
47 U.S.C. §332(c)(3)(B)	23
47 U.S.C. §402(a)	11
47 U.S.C. §402(h).....	12
47 U.S.C. §402(j).....	12
47 U.S.C. §405(a)	11
5 U.S.C. §706	26
Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993)	23
<i>Rev. Code Wash.</i> §82.04.220.....	13, 19, 26
<i>Rev. Code Wash.</i> §82.04.500.....	13, 19

Administrative Materials

13 F.C.C.R. 1735 (1997).....	24
19 F.C.C.R. 9541 (2004).....	29
69 Fed. Reg. 33021 (June 14, 2004).....	29

In re Truth-in-Billing and Billing Format: National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448 (2005)
passim

Legislative History

H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in 1993 U.S. Code Cong. & Admin. News* 378.....18

Other Authorities

Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 *Cornell J.L. & Pub. Pol'y.* 203 (2004).....27
 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363 (1986).....28

INTEREST OF AMICUS CURIAE¹

The National Association of State Utility Consumer Advocates (“NASUCA”) is a non-profit corporation incorporated in the State of Florida. NASUCA is an association of advocate offices in more than 40 states and the District of Columbia. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA member offices operate independently from the regulatory commissions in their states. Some are separately established utility advocate organizations, while others are divisions of larger departments, such as the Office of Attorney General. NASUCA associate and affiliate member offices also serve utility consumers, but have not been created by state law or do not have statewide authority. As a party to the decision in *Nat’l Ass’n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) (“*NASUCA v. FCC*”), discussed in the District Court order under review, NASUCA has a particular interest in the outcome of this proceeding.

¹ In accordance with Fed. R. App. P. 29(a), *amicus* has obtained consent from all parties to file this brief.

SUMMARY OF ARGUMENT

This Court should reverse the District Court's Order because the District Court had no authority to dismiss the Appellants' complaint based on a March 18, 2005 Federal Communications Commission ("FCC") order² previously vacated by the Eleventh Circuit in *NASUCA v. FCC*. The United States Circuit Courts of Appeal have exclusive jurisdiction to determine the validity of FCC orders under both the Federal Communications Act ("FCA")³ and the Hobbs Act.⁴ Circuit Court determinations regarding the validity, or lack thereof, of FCC orders are binding on, and may not be collaterally challenged in inferior federal courts.

The District Court was without jurisdiction to determine the validity of the FCC Order, let alone rely on that order as the basis for determining that the State laws upon which the Appellants' complaint was based were preempted under Section 332(c)(3)(A) of the FCA.⁵ In so ruling, the District

² *In re Truth-in-Billing and Billing Format: National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448 (2005) ("FCC Order").

³ 47 U.S.C. §§151 *et seq.*

⁴ 28 U.S.C. §§2341 *et seq.*

⁵ 47 U.S.C. §332(c)(3)(A).

Court violated the carefully constructed framework Congress adopted for the judicial review of FCC orders.

Even if the District Court had jurisdiction to accord *Chevron*⁶ deference to the FCC Order, it failed to properly analyze either Section 332(c)(3)(A) or the FCC Order in accordance with *Chevron*. The District Court ignored traditional rules of statutory construction in concluding, under the first step of *Chevron*, that Congress had not clearly spoken to the issue whether State laws, such as those in question, were preempted under Section 332(c)(3)(A). Instead, the District Court improperly deferred to the FCC's interpretation. Under the second step of *Chevron*, the District Court inappropriately deferred to the FCC's arbitrary interpretation of Section 332(c)(3)(A), despite serious constitutional doubts raised by the FCC Order.

ARGUMENT

I. THE DISTRICT COURT HAD NO AUTHORITY TO DISMISS THE APPELLANTS' COMPLAINT BASED ON AN FCC ORDER VACATED BY THE ELEVENTH CIRCUIT UNDER THE HOBBS ACT.

The District Court committed reversible error in dismissing the Appellants' class action lawsuit based on the declaratory ruling in the FCC

⁶ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Order that state laws requiring or prohibiting wireless carriers' use of line items⁷ on monthly bills regulate "rates" and are preempted by Section 332(c)(3)(A) of the FCA. 20 F.C.C.R. at 6462 ¶30.

Yet the FCC Order had been vacated nearly three months earlier by the United States Court of Appeals for the Eleventh Circuit in *NASUCA v. FCC*. 457 F.3d at 1238, 1258. The District Court was clearly aware of the Eleventh Circuit's ruling, and indeed briefly discussed aspects of it in its order. Excerpts of Record, Docket No. 61, pp. 36-37 ("ER36-37). Notwithstanding the Eleventh Circuit's *vacatur*, the District Court accorded *Chevron* deference to the FCC Order, concluded the FCC's interpretation of Section 332(c)(3)(A) was permissible and dismissed the Appellants' class action lawsuit on the grounds it was preempted.

A. CONGRESS EXPRESSLY PROVIDED FOR THE ORDERLY REVIEW OF FCC ORDERS IN THE CIRCUIT COURTS.

The District Court's decision violated Congress' carefully constructed framework for the orderly judicial review of FCC orders under both the FCA and the Hobbs Act. In both statutes, Congress expressly provided that such review was to be exclusively in the Circuit Courts.

⁷ Defined as "a discrete charge identified separately on an end user's bill." 20 F.C.C.R. at 6462 ¶30.

Section 402(a) of the FCA provides that “any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.” 47 U.S.C. §402(a). In turn, the Hobbs Act – which is in chapter 158 – provides that “the court of appeals . . . has *exclusive jurisdiction* to enjoin, set aside, suspend . . . or *determine the validity of* - (1) *all final orders of the [FCC]* made reviewable by [47 U.S.C. §402(a)].” 28 U.S.C. §2342(1) (emphasis added).

The FCA and Hobbs Act together represent a carefully crafted framework for orderly judicial review of FCC final orders. For example, only “parties” that participated in the FCC proceeding may appeal the agency’s order directly to the Circuit Courts; non-parties may appeal, but only after they have first petitioned the FCC to reconsider its decision. *See* 47 U.S.C. §405(a). FCC final orders may be reviewed only if an appeal is filed within 60 days. 28 U.S.C. §2344. Other provisions of the two statutes address the effect of remands on the FCC, provide for review by the Supreme Court upon *certiorari*, and specify the venue for such appeals. *See* 47 U.S.C. §402(h); 47 U.S.C. §402(j); 28 U.S.C. §2343.

The foregoing demonstrates Congress’ “specific and obvious intent to restrict to the circuit courts any appeals from rulings of the FCC.” *Bywater*

Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 168-69 (5th Cir. 1989).

That intent should not be lightly set aside. *See City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

B. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO DETERMINE THE VALIDITY OF FCC ORDERS REVIEWABLE UNDER THE HOBBS ACT.

Courts generally, and this Circuit in particular, have uniformly held that district courts have no jurisdiction to determine the validity of FCC orders subject to review under the Hobbs Act. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996) (“Together, [§§ 402(a) and 2342] vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings.”); *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (challenge to FCC regulations is outside the jurisdiction of the district court); *Sable Communications of Cal., Inc. v. FCC*, 827 F.2d 640, 642-43 (9th Cir. 1987) (district court lacked jurisdiction over claim FCC regulation unconstitutionally restricted sexually suggestive telephone services).⁸

⁸ Accord: *FCC v Nextwave Personal Communs., Inc.*, 200 F.3d 43 (2nd Cir. 1999) (Bankruptcy court and district court lacked jurisdiction to determine whether winning bidder for spectrum licenses satisfied FCC regulatory conditions to retain licenses or whether bidder's payment obligations were constructively fraudulent); *South Cent. Bell Tel. Co. v Louisiana Public Service Com.* 570 F.Supp 227 (M.D. La. 1983), *aff'd* 744 F.2d 1107 (5th Cir. 1984), *vacated on other grounds, remanded* 476 U.S. 1166 (1986) (District court has no power to review propriety or legality of FCC order since Congress has vested that jurisdiction only in Court of Appeals).

Moreover, “these jurisdictional limitations apply as much to affirmative defenses as to offensive claims” raised in district court. *United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000), *citing with approval*, *United States v. Any and All Radio Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000), *cert. denied sub nom. Fried v. United States*, 531 U.S. 1071 (2001). Defensive attacks on FCC regulations are as much an evasion of the exclusive jurisdiction of the Court of Appeals as are preemptive strikes for injunctive relief. *Dunifer*, 219 F.3d at 1007.

The Appellees’ reliance on the FCC Order as the basis for their motion to dismiss is yet another kind of attempt to evade the exclusive jurisdiction of the federal appeals courts. The crux of the Appellants’ complaint was that Appellees violated two Washington laws⁹ prohibiting the pass through of the State’s “Business & Occupation” (“B&O”) tax. ER34-35. The Appellees first removed the action to federal court, then moved to dismiss the complaint by arguing the Washington laws are, pursuant to the FCC Order, preempted by Section 332(c)(3)(A). ER35. The Appellees’ motion seeks to evade the exclusive jurisdiction of the Circuit Courts by having the district court accept the validity of the FCC Order previously

⁹ *Rev. Code Wash.* §82.04.220; *Rev. Code Wash.* §82.04.500.

vacated by the Eleventh Circuit, essentially asking the District Court to “enforce” the FCC Order vacated in *NASUCA v. FCC*.¹⁰

The Appellants properly note that the Eleventh Circuit’s *vacatur* rendered the FCC Order void and therefore of no precedential authority whatsoever. App’ts. Br., pp. 16-17. There can be no doubt the District Court was well acquainted with the Eleventh Circuit’s *vacatur*, since that court’s decision was issued nearly three months before the District Court’s dismissal order. *NASUCA*, 457 F.3d at 1242, 1258.¹¹ The District Court’s discussion of *NASUCA v. FCC* in its order, even noting that petitions for

¹⁰ With the exception of the District Court’s order under review – and one other decision issued by another judge within the same district (*Hesse v. Sprint Spectrum, L.P.*, *infra* n.16), *NASUCA* could find no other example of a district court seeking to enforce an agency order vacated or set aside by a Circuit Court under the Hobbs Act.

¹¹ Incidentally, the Eleventh Circuit’s decision not only resolved *NASUCA*’s appeal, but also an appeal filed with the United States Court of Appeals for the Second Circuit by the Vermont Public Service Board. *See Vermont Pub. Serv. Bd. v. FCC*, No. 05-12601-DD (notice of appeal filed March 28, 2005). On April 5, 2005, the Judicial Panel on Multidistrict Litigation ordered the two appeals to be consolidated in the Eleventh Circuit, pursuant to 28 U.S.C. §2112(a)(3). The National Association of Regulatory Utility Commissioners (“NARUC”) subsequently was granted leave to intervene in Vermont’s appeal. *NASUCA v. FCC* resolved both appeals. 457 F.3d at 1258.

rehearing had delayed issuance of the Eleventh Circuit’s mandate, deprived it of any benefit of the doubt. *See* ER36 n.3.¹²

The District Court erred not only in deferring to an FCC order entitled to no precedential weight whatsoever, it also erred in apparently concluding that it was not bound by the Eleventh Circuit’s ruling in *NASUCA v. FCC*, contrary to Congress’ expressed intent. The Eleventh Circuit’s decision “determine[d] the validity of” the FCC Order – in the negative – and was binding upon *all* co-equal and inferior federal courts. This Circuit, as well as other courts, endorse that proposition.

For example, in *Sable*, this Court rejected a plaintiff’s district court challenge to an FCC regulation restricting plaintiff’s sexually suggestive telephone services. The order adopting the regulation had been appealed to the Second Circuit in accordance with the Hobbs Act and remanded – but not vacated – by that court, meaning the regulation remained in effect (though the Second Circuit issued a stay of the regulation for the New York telephone system only). *See Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 847-48 (2nd Cir. 1986).

¹² Worse yet, the District Court apparently knew that the Eleventh Circuit had already denied the FCC’s and wireless intervenors’ petitions for panel rehearing, since it noted only that a petition for rehearing *en banc* was pending at the time of its decision. *See NASUCA v. FCC*, 468 F.3d 1272 (11th Cir. 2006). The District Court did not note that the *en banc* petition had not been filed by the FCC.

Noting that the plaintiff failed to either challenge the FCC regulation on its own, or to timely intervene in the Second Circuit appeal, this Court observed that, “[t]aken to its logical conclusion, Sable's argument would effectively obliterate the exclusive jurisdiction provision of section 2342.” 827 F.2d at 642-43.¹³ In other words, the Court in *Sable* recognized that the resolution of the Second Circuit appeal had preclusive effect on the plaintiff’s district court claim in California. Courts elsewhere have reached the same conclusion.¹⁴

The Court’s observation in *Sable* applies with equal – if not more – vigor to the District Court’s order. This Court must make clear that, in accordance with Congress’ intent, the Eleventh Circuit’s decision is binding

¹³ It should be noted that the Second Circuit in *Carlin* noted that its stay of the FCC regulation in question was granted only at the behest of the petitioners, “and not on behalf of any of their affiliates *or any other corporations located anywhere else in the United States.*” 787 F.2d at 848 (emphasis added).

¹⁴ See *Mich. Bell Tel. Co. v. Lark*, 373 F.Supp.2d 694, 702 (E. D. Mich. 2005) (“When the D.C. Circuit acts as a Hobbs Act reviewing court, its decision is binding on this court;” the “Court is not free to ignore the mandate issued by the circuit court, and it cannot condone the [state public service commission’s] decision to do so.); *Wis. Bell v. Bie*, 216 F.Supp.2d 873, 877-878 (W. D. Wis. 2002) (Agreeing that, if the D.C. Circuit overturned FCC order prohibiting state commission’s action, commission would no longer be bound by district court’s order enforcing FCC ruling); *U.S. West Comm. v. Hix*, 2000 U.S. Dist. LEXIS 21989, 24-25 (D. Colo. 2000) (observing that Eighth Circuit’s order vacating FCC rules does not prevent district court from addressing issues not subject to *vacatur*).

authority not only the FCC, and not only litigants in the federal courts, but on the federal courts themselves.¹⁵ A clear ruling from the Court on this point is particularly critical since another judge in the Western District of Washington has, based on the District Court's ruling, likewise dismissed a complaint similar to the Appellants based on the FCC Order.¹⁶

C. THAT A PETITION FOR REHEARING *EN BANC* WAS PENDING IN THE ELEVENTH CIRCUIT DID NOT EXCUSE THE DISTRICT COURT'S ACTION.

The fact that the Eleventh Circuit's mandate had not yet issued, while a petition for rehearing en banc was pending, does not justify or excuse the District Court's decision. Rather than dismissing the Appellants' complaint, the District Court would have been better advised to simply stay its ruling on

¹⁵ On this issue, NASUCA notes that the FCC Order was, prior to the Eleventh Circuit's decision, nationally applicable. The FCC is bound by the Eleventh Circuit's *vacatur* and, short of seeking review from the Supreme Court, cannot challenge that decision in other federal courts. 47 U.S.C. §§402(h) & (j). NASUCA notes that the Appellees were also parties to the proceeding that led to the issuance of the FCC Order. *See* 20 F.C.C.R., Appendix D (List of Commenters and Reply Commenters). Moreover, the Appellees were intervenors, supporting the FCC Order, in the Eleventh Circuit appeal. *NASUCA v. FCC*, 457 F.3d 1238. Given their participation in the Eleventh Circuit proceeding, it seems particularly inappropriate for the Appellees to assert the FCC Order as a basis for dismissal of the Appellants' complaint below.

¹⁶ *See Hesse v. Sprint Spectrum, L.P.*, 2007 U.S. Dist. LEXIS 3885, slip op. at *7 n.2 (W. D. Wash., Jan. 18, 2007) ("This Court recognizes that the Eleventh Circuit came to a different conclusion, and respectfully disagrees with its opinion.").

the motion to dismiss pending a ruling on the rehearing petition and issuance of the Eleventh Circuit's mandate. This is what at least one other federal district court did when confronted with a challenge to the enforcement of State laws subject to the FCC's declaratory ruling. *See Cingular Wireless, LLC v. Rudolph*, Civil Action No. 05-81 (E. D. Ken., filed Nov. 18, 2005). In that proceeding, the parties agreed, by stipulation, to a stay of further proceedings pending the outcome of that appeal. *See id.*, Order Granting Preliminary Injunctive Relief on Consent, slip op. at 2 (Dec. 15, 2005).

II. THE DISTRICT COURT FAILED TO PROPERLY APPLY *CHEVRON* IN ANY EVENT.

Even if the District Court was not bound by *NASUCA v. FCC*, the degree of deference it accorded the FCC Order was entirely unwarranted and inconsistent with both *Chevron* and case law applying *Chevron*.

A. THE DISTRICT COURT MISAPPLIED THE FIRST STEP OF *CHEVRON* ANALYSIS BY FAILING TO INDEPENDENTLY DETERMINE WHETHER CONGRESS HAD SPOKEN TO THE QUESTION AT ISSUE, DEFERRING INSTEAD TO THE FCC'S INTERPRETATION.

Under *Chevron*, courts employ a two-step inquiry in reviewing agency interpretations of law. First, courts must determine, "employing traditional tools of statutory construction," whether Congress has "directly spoken to the precise question at issue." This requires an assessment of whether Congress' intent is "clear" and "unambiguously expressed." *Chevron*, 467

U.S. at 842-43. Only if a court determines that the statute in question is ambiguous does it proceed to the second step of analysis under *Chevron*. This step requires the court to determine whether the agency's interpretation was a "permissible construction" of the statute. *Id.*¹⁷

Under the first step of *Chevron*, the District Court was obliged to determine whether Congress unambiguously addressed the "precise question" at issue in the FCC Order. That question is whether state laws, such as Washington's statutes prohibiting businesses from passing the state's "Business & Occupations" tax through to customers as if it were a tax, regulate wireless carriers' "rates" (and therefore are preempted) or "other terms and conditions" of service (and therefore permitted). *See Rev. Code Wash.* §82.04.220; *Rev. Code Wash.* §82.04.500.

Courts are obliged to use traditional tools of statutory construction in seeking to ascertain Congress' intent under *Chevron*'s first step. Among other things, such tools include assigning the ordinary meaning to statutory terms, and a study of the statute's relevant legislative history if necessary. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *MCI Telecomm's. Corp. v. AT&T*, 512 U.S. 218, 229 (1994); *INS v.*

¹⁷ *But cf. Louisiana Public Serv. Comm'n*, 476 U.S. 355, 369-74 (1986)(declining to defer to the FCC's construction of the Act without referring to *Chevron*).

Cardoza-Fonseca, 480 U.S. 421, 446 (1987). Furthermore, where express preemption is involved – as with Section 332(c)(3)(A) of the FCA – the courts’ assessment under Chevron’s first step must be consistent with the traditional presumption against preemption absent Congress’ “clear statement” of preemptive intent. *See, e.g., Medtronic v. Lohr*, 518 U.S. 470, 485-86 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Courts do not accord deference to agencies’ assessment of Congress’ intent under the first step of *Chevron*. *Chevron*, 467 U.S. at 842-42; *see also Brown & Williamson*, 529 U.S. at 132 (2000). Yet this is precisely what the District Court did.

The only effort undertaken by the District Court to ascertain Congress’ intent was its observation that the “common meaning of ‘rate’ permits the FCC’s interpretation of ‘rate’ in [47 U.S.C. §332].” Specifically, the District Court, having looked up one dictionary’s definition of “rate,” determined that the statute was ambiguous “because ‘rate’ could mean only the carrier’s base rate, or it could refer to the total amount a customer pays for service.”¹⁸ ER37.

¹⁸ The District Court presumably would apply the latter meaning to extend “rates” to include any charge that appears on a customer’s bill, whether that charge is related to a particular service or commodity.

Such superficial analysis hardly comports with the requirements of *Chevron* because consideration of one dictionary definition, in isolation, is hardly consistent with statutory construction. A closer examination of the language, history and structure of 47 U.S.C. §332(c)(3)(A) could – and should – have informed the District Court whether Congress’ intent was not clearly expressed. However, the District Court did not bother with the effort.

Conspicuously absent from the District Court’s opinion, for example, is any consideration of the other half of Section 332(c)(3)(A)’s first sentence, the half that expressly preserves state regulation of “other terms and conditions” of wireless service. That reservation clearly implies limits on the scope of preemption in Section 332(c)(3)(A), and indicates that some bounds were placed on the meaning of “rates.” Those bounds could have been gleaned from a review of the rest of Section 332(c)(3), which the District Court again did not consider.

Section 332(c)(3)’s later provisions further limit the scope of state preemption of regulation of “rates charged by” wireless service in the first sentence of Section 332(c)(3)(A). For example, the second sentence of Section 332(c)(3)(A) provides:

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a

substitute for land line telephone exchange service for a substantial portion of the communications within such State) *from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.*

47 U.S.C. §332(c)(3)(A) (emphasis added). “Affordability” here refers to the amount consumers can bear to pay for wireless carriers’ commodities or services. The FCC interpretation of “rates” accepted by the District Court, *i.e.*, “rates” include the total amount customers pay for service, begins to collapse when concepts like “affordability” or state efforts to ensure “universal service at affordable rates” are applied to many line items, such as taxes or state universal service and other regulatory assessments.

The last sentence of Section 332(c)(3)(A), together with Section 332(c)(3)(B), provide further clarity on the limited meaning of “rates” used in the first sentence of Section 332(c)(3)(A). These provisions allow states – with FCC approval – to regulate wireless rates if: (1) market conditions fail to protect consumers from unjust, unreasonable or discriminatory rates; or (2) such market conditions exist and wireless service is a replacement for a substantial portion of land line telephone exchange service within the State. *See* 47 U.S.C. §332(c)(3)(A)(i) – (ii); 47 U.S.C. §332(c)(3)(B). Again, the broad interpretation of “rates” to include charges for things other than a wireless carrier’s services or commodities, such as taxes or regulatory

assessments, does not dovetail with the reasons for state resumption of rate regulation (*i.e.*, to respond to market failures producing unjust, unreasonable or discriminatory rates).

Not only did the District Court dispense with any analysis of the foregoing provisions of Section 332(c)(3), it also dispensed with any consideration of the legislative history of the statute in seeking to resolve the “ambiguities” it perceived in the statute’s terms. Had the District Court reviewed the legislative history of Section 332(c)(3)(A), it would have discovered that Congress expressly, and broadly, defined the scope of “other terms and conditions” States continue to regulate, consequently narrowing the scope of matters included within the scope of preempted “rate regulation.”

The statutory provisions in question were added to the FCA in 1993. *See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993).* The legislative history of those amendments made clear Congress’ intent that “other terms and conditions” were to be construed very broadly:

Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. It is the intent of the Committee that the states would

still be able to regulate the terms and conditions of these services. *By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (i.e., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”*

H.R. Rep. No. 103-111, 103rd Con., 1st Sess. (1993) *reprinted in 1993 U.S. Code Cong. & Admin. News* 378, 588 (emphasis added).

Thus Congress intended that states could continue regulating “such matters as” “billing information and practices” – which logically includes the presentation (*i.e.*, inclusion) of line items on bills. Likewise, Congress allowed states to regulate “other consumer protection matters,” “other matters as fall within a states lawful authority,” and “other matters generally understood to fall under ‘terms and conditions.’” *Id.* The broad scope of “other terms and conditions of” wireless service that states may regulate correspondingly limits the scope of preempted “rates charged” regulation.

Finally, the District Court’s conclusion that the term “rates” is susceptible of several definitions – including a definition allowing broad preemption of state authority – clearly violated traditional jurisprudential principles associated with preemption analysis. Under these principles,

where words in preemptive statutes are capable of several meanings, courts must adopt the narrower meaning in order to limit the scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 & 523 (1992). The District Court gave no heed to such principles in concluding that a more broadly preemptive meaning should be ascribed to “rates” than the narrower meaning found by the Eleventh Circuit.

B. THE FCC ORDER WAS NOT ENTITLED TO DEFERENCE UNDER *CHEVRON*’S SECOND STEP IN ANY EVENT.

The District Court not only failed to conduct the appropriate analysis required under *Chevron*’s first step, it also erred in failing to consider a multitude of reasons why the FCC’s interpretation of the statute was not entitled to deference under *Chevron*’s second step.

Under the second step of *Chevron* analysis, an agency’s interpretation of a statute is generally “permissible” if it is not “arbitrary.” *Chevron*, 467 U.S. at 843-44. This consideration uses an “arbitrary and capricious” standard similar to that in 5 U.S.C. §706. *See, e.g., Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005); *Tex. Coalition of Cities for Util. Issues v. FCC*, 324 F.3d 802, 809 (5th Cir. 2003); *Muratore v. United States OPM*, 222 F.3d 918, 922 (11th Cir. 2000).

Agency interpretations are arbitrary, and therefore not “permissible” under *Chevron’s* second step if:

[T]he agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered no explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). The District Court failed to consider any of these factors before deferring to the FCC Order.

1. The FCC Failed to Consider Important Aspects of the Question.

Under *Chevron’s* second step, the District Court should have concluded that the FCC acted arbitrarily because it “failed to consider an important aspect of the problem,” namely what traditional tools of statutory construction, including legislative history, revealed about Congress’ intent.

For example, the FCC made no attempt to reconcile its interpretation of “rates” with standards of statutory construction, including giving statutory terms their ordinary meaning, or construing statutes narrowly to avoid preemption.¹⁹ Instead, the FCC’s interpretation of “rates” was distilled from

¹⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

a handful of agency statements purportedly equating “rates” with “line items.” 20 F.C.C.R. at 6463 ¶30 n.82 & 83.

Even if it were proper for the FCC to “bootstrap” earlier agency statements to obtain the interpretation of “rates” adopted in the FCC Order, the Eleventh Circuit properly concluded that those statements did not support the interpretation of “rates” adopted in the FCC Order. *See NASUCA*, 457 F.3d at 1256-57.

Likewise, the District Court ignored the fact that the FCC Order was bereft of any consideration of the other provisions of Section §332(c)(3). There is no indication in the FCC Order that the agency made any attempt to interpret the “other terms and conditions” of wireless service reserved to state regulation in Section 332(c)(3)(A). That omission alone reflects a fundamental failure of the FCC to seriously seek to glean an objective understanding of Congress’ intent.

Nor did the FCC consider the latter provisions in Section 332(c)(3)(A) and (B), which allow for limited state regulation of wireless rates under some circumstances. Again, the meaning of “rates” intended by Congress becomes clearer in the context of these provisions.

The District Court also overlooked the fact that the FCC failed to consider the legislative history of Section 332(c)(3)(A). Instead, the FCC

only alluded to Congress’ intent, obliquely, by noting that “Congress did not specifically define ‘rates,’ ‘entry’ or ‘other key terms’” in Section 332(c)(3)(A). 20 F.C.C.R. at 6462 ¶30.²⁰ The disingenuousness of the FCC’s assertion would have been obvious to the District Court if it had not failed to consider the legislative history of Section 332(c)(3)(A). Contrary to the FCC’s assertion, that history clearly and broadly defined “other key terms” in Section 332(c)(3)(A) – namely the “other terms and conditions” portion of the statute.

²⁰ In fact, the *only* reference to the legislative history of Section 332(c)(3)(A) in the FCC Order was contained in the separate statement of Commissioner Michael J. Copps, who – together with Commissioner Jonathan S. Adelstein – *strongly dissented from the preemption ruling*. Commissioner Copps wrote:

The majority says preemption is compelled by the law. This is an incredibly cramped interpretation that ignores the plain meaning of the statute. Congress specifically prohibited states from regulating wireless “rates” but reserved for states the ability to regulate “other terms and conditions.” State efforts to curtail or require line item explanations are *not* exercises in ratemaking. The legislative history bears me out. It describes the “other terms and conditions” reserved for the states as “such matters as customer billing information and practices.” The majority blows breezily by the will of Congress in pursuit of its fixation – or at least its present curious flirtation – with federal preemption.

20 F.C.C.R. at 6498 (emphasis in original).

2. The FCC Offered No Explanation for Inconsistencies Between Its New Interpretation and Prior Agency Statements.

The District Court overlooked another aspect of the FCC Order that indicated the agency's interpretation of "rates" was arbitrary and therefore not entitled to deference under *Chevron*. This was the unexplained inconsistencies between the interpretation of "rates" in the FCC Order and prior agency interpretations of the term noted by the Eleventh Circuit but which the District Court apparently did not consider.

As the Eleventh Circuit observed, the interpretation adopted in the FCC Order, equating "rates" with "line items," was contrary to earlier agency interpretations drawing a clear distinction between "rates" and "line items," issued in the very same docket in which the FCC Order was issued. *See NASUCA*, 457 F.3d at 1254-57, *citing, e.g.*, 13 F.C.C.R. 7492, 7531 ¶61 (1999) ("Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce."). Likewise, the Eleventh Circuit noted that the FCC's conclusion that state laws regulating wireless line items had a "direct effect" on rates was inconsistent with earlier rulings that suggested such regulation has only an indirect effect on carriers' rates. *Id.* at 1255-56, *citing, e.g.*, 13 F.C.C.R. 1735, 1742 ¶¶42-43 (1997) (State laws requiring wireless carriers to

contribute fixed sums to universal service funds have only an indirect on rates and therefore fall within “other terms and conditions”).

The Supreme Court has explained that, while “[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework,” unexplained inconsistency is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005). As the Eleventh Circuit noted, the FCC offered no explanation for its abandonment of the distinction between “rates” and “line items” it previously drew. *NASUCA v. FCC*, 457 F.3d at 1255-56. The District Court, however, took no notice of these inconsistencies in deferring to the FCC’s ruling.

3. The FCC Order Was Not Entitled to Deference Because of the Serious Constitutional Doubts It Raised.

In some circumstances, well-established jurisprudential principles operate to “trump” *Chevron* and preclude courts from deferring to agency interpretations of even ambiguous statutes. These non-delegation canons require legislative, rather than merely executive, deliberation on the issue in question, and include the notion that an agency cannot construe an ambiguous statute so as to raise serious constitutional doubts. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Edward J. DeBartolo*

Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988); *see also Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (Court assumes “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

By conflating “line items” with “rates,” the FCC Order raised such constitutional doubts because of its obvious impact on States’ taxing powers. This impact was clearly highlighted in the FCC’s discussion of four examples of state laws explicitly preempted under its interpretation of Section 332(c)(3)(A). *See* 20 F.C.C.R. at 6464 ¶31. Two of the state laws singled out by the FCC prohibited utilities from passing state-imposed taxes through to customers directly. *Id.*, n.87 (discussing Vermont law prohibiting carriers from itemizing a separate charge to recover the state’s gross receipts tax, and Indiana law prohibiting carriers from placing a line item on bills to recover the state’s utility receipts tax).

Significantly, the FCC Order’s impact on state tax powers was squarely presented to the District Court because the FCC Order was asserted by the Appellees below to defeat *Rev. Wash. Code* §84.04.220’s prohibition on the pass-through of the state’s B&O tax. The District Court should have

refused to accord deference to the FCC's declaratory ruling in light of its clear impact on States' taxing power.

The power to tax is basic to the financial integrity of the States and obviously is one of States' core powers. Any claim of preemption that interferes with that power deserves particularly careful scrutiny. *See, e.g., Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002).²¹ The District Court, however, clearly avoided carefully scrutinizing the impact of the FCC's interpretation of "rates" on such core State powers.

Even absent the serious constitutional doubts raised by FCC Order regarding preemption, other aspects of the agency's ruling militate against according deference to the FCC's interpretation. Legal authorities and some courts have expressed doubts about the wisdom of according *Chevron* deference to interpretations that expand the agency's power or jurisdiction, where the agency's self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power. *See, e.g.,* Timothy K. Armstrong, *Chevron Deference and Agency Self-*

²¹ The FCC Order similarly interferes with traditional State police powers, pursuant to which they regulate utilities and protect consumers. For example, the Washington statute prohibiting businesses from passing the State's B&O taxes through to customers clearly has a consumer protection component. *See Wash. Rev. Code* §82.04.500. The same reluctance with which courts should find Congressional intent to interfere with State tax powers applies to these core powers as well.

Interest, 13 Cornell J.L. & Pub. Pol’y. 203, 206-07 (2004); *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996); *Garrelts v. Smithkline Beecham Corp.*, 943 F. Supp. 1023, 1049-1051 (N. D. Iowa 1996).

Likewise, courts have suggested that a greater degree of independent review is appropriate where the question addressed by the agency does not involve everyday administration of its statute but instead addresses central aspects of the statutory scheme. For example, the Supreme Court has indicated that *Chevron* deference would depend on “the interpretive method used and the nature of the question at issue.” *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Writing for the majority in *Barnhart*, Justice Breyer wrote:

The interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id.

The Court’s ruling in *Barnhart* echoed, and incorporated, Justice Breyer’s 1986 recommendation that, under *Chevron*, where major policy questions are involved (*i.e.*, where the answer to the legal question will “clarify, illuminate or stabilize a broad area of the law”), in contrast to interstitial questions, an independent judicial approach to the agency’s

decision is preferable. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370 (1986).

The FCC Order, by conflating “line items” with “rates” and thereby preempting a myriad of state laws, was just the sort of major policy question that courts should review independently rather than under *Chevron’s* deferential standard. This was precisely the review eschewed by the District Court.

4. The District Court Overlooked Procedural Irregularities Precluding Deference to the FCC.

The District Court’s deference to the FCC Order was inappropriate in one other respect, namely the fact that the agency broadly preempted any state law requiring or prohibiting wireless carriers’ use of “line items” regulated “rates” without providing any public notice in advance of its ruling.

Two public notices were issued by the FCC in response to the petition for declaratory ruling filed by NASUCA that ultimately led to the FCC Order. *See* 69 Fed. Reg. 33021 (June 14, 2004); *see also* 19 F.C.C.R. 9541 (2004). Neither identified preemption of state laws as an issue in the proceeding. *See NASUCA v. FCC*, 457 F.3d at 1243. The FCC itself confirmed that preemption was raised “primarily” in parties’ reply

comments and *ex parte* submissions after the close of comment on NASUCA's petition. 20 F.C.C.R. at 6473 ¶¶49 n.147-48.²²

The agency offered no explanation for its departure from past practice regarding public notice, as Commissioner Jonathan S. Adelstein noted in his dissent from the FCC Order.²³ The lack of notice on the preemption issue was particularly problematic in light of the fact the FCC issued notice seeking comment on other preemption issues in the rulemaking component of the FCC Order. *See* 20 F.C.C.R. at 6474 ¶¶50-51. The “stealth” nature of the FCC’s preemption ruling is yet one more indicator of agency arbitrariness that the District Court ignored in according *Chevron* deference to the FCC Order.

²² Although this portion of the *Order* addressed broader preemption of CMRS carriers’ and interstate wireline carriers’ billing practices, the comments and *ex parte* submissions the FCC cites are the same as those it cited as examples of state laws preempted by Section 332(c)(3)(A). *Cf.* 20 F.C.C.R. 6473 ¶¶49 n.147-48 *with id.* at 6464 ¶¶31 n.87-88.

²³ 20 F.C.C.R. at 6500 (“Similarly, the Commission's existing Truth-in-Billing rules preserved States' ability to adopt consistent requirements, until now. Yet, the Commission reverses course here without even putting this proposal out for comment.”).

CONCLUSION

For the reasons set forth in the Appellants' brief and herein, the district court's October 24, 2006 order should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Christine A. Mailloux
Telecommunications Attorney
The Utility Reform Network
711 Van Ness Ave, Suite 350
San Francisco, CA 94102
(415) 929-8876

Patrick W. Pearlman, Esq.
Deputy Consumer Advocate
Consumer Advocate Division
WV Public Service Commission
700 Union Building
723 Kanawha Boulevard East
Charleston, WV 25301
(304) 558-0526

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 180
Columbus, OH 43215-3485
(614) 466-8574

Counsel for National Association of
State Utility Consumer Advocates

February 2, 2007