

Nos. 05-1069, 05-1122, 05-3114, 05-3118

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MINNESOTA PUBLIC UTILITIES COMMISSION,
Petitioner,**

v.

**FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents,**

et al.

ON PETITION FOR REVIEW OF A DECISION OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF AND ADDENDUM OF PETITIONER
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES*

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*The National Association of State Utility Consumer Advocates joins the joint brief of petitioners Minnesota Public Utilities Commission *et al.* This separate brief presents an issue not presented in the joint brief.

CASE SUMMARY AND ORAL ARGUMENT REQUEST

The National Association of State Utility Consumer Advocates (NASUCA) joins the joint brief of petitioners Minnesota Public Utilities Commission and Public Utilities Commission of Ohio and intervenor National Association of Regulatory Utility Commissioners (Joint Brief). NASUCA adopts the case summary and oral argument request in the Joint Brief. This separate brief presents an important issue not presented in the Joint Brief regarding the scope of the decision below. NASUCA requests 5 minutes of oral argument on this issue.

CORPORATE DISCLOSURE STATEMENT

NASUCA is a non-profit corporation incorporated in the State of Florida. NASUCA is an association of 43 advocate offices in 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. NASUCA has no parent corporation and, because it issues no stock, no publicly held corporation owns ten percent or more of its stock.

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JURISDICTIONAL STATEMENT

NASUCA adopts the jurisdictional statement in the Joint Brief.

STATEMENT OF ISSUES

NASUCA adopts the statement of issues in the Joint Brief. NASUCA also presents the following issue:

Whether the decision below impinges upon the states' authority to protect consumers within their borders.

Most apposite authorities:

Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874 (8th Cir. 2002)

47 U.S.C. § 332(c)(3)(A)

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

STATEMENT OF THE CASE

NASUCA adopts the statement of the case in the Joint Brief.

STATEMENT OF FACTS

NASUCA adopts the statement of facts in the Joint Brief.

SUMMARY OF ARGUMENT

The decision below, preempting state regulation of Voice over Internet Protocol (“VoIP”) services, is not as limited as it claims to be. Although the decision claims to target “economic, public-utility type regulation,” it appears to

reach other types of state laws as well, including laws that protect consumers from abusive and fraudulent business practices.

There is no federal statute preempting state laws that regulate VoIP services. The decision below draws support for its conclusion from a claimed analogy to commercial mobile radio services (CMRS or wireless). It cites a federal statute providing limited preemption of state laws regulating CMRS. That statute, however, clearly preserves to the states the authority to protect consumers of CMRS. The Court should clarify that the states similarly retain authority to protect consumers of VoIP services.

ARGUMENT¹

The decision below impinges upon the states' authority to protect consumers within their borders.

On November 12, 2004, the Federal Communications Commission (FCC) issued its Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (“Order”). These proceedings seek review of the Order.

At first blush, the effect of the Order appears to be limited to the preemption of rate and other economic regulation. The Order claims to target “state-imposed

¹NASUCA adopts the argument on standard of review in the Joint Brief.

economic, public-utility type regulation.” Order, ¶ 34 n. 118. It references “traditional common carrier economic regulations.” Order, ¶ 35. It claims “economic regulation” of Vonage’s services would disserve the public interest “because the services lack the monopoly characteristics that led to such regulation of common carrier services historically.” Order, ¶ 21. It prohibits Minnesota from requiring Vonage to comply with the state’s “certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state.” Order, ¶ 46.

On the surface, then, the Order appears not to apply to other types of state laws. It “express[es] no opinion” on the applicability of Minnesota’s “general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising and other business practices.” Order, ¶ 1. It opines that the states “will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.” Order, ¶ 1. It claims these apparent limitations on the scope of the Order “add . . . regulatory certainty.” Order, ¶ 1.

In at least one respect, however, the claim to enhanced certainty is illusory. The Order fails to acknowledge that some state laws are neither traditional common carrier economic regulation nor laws of general applicability to all industries. Conversely stated, the Order fails to acknowledge there are important

state laws (i) not properly characterized as traditional common carrier economic regulation but nevertheless (ii) aimed at legitimate state concerns specific to the telecommunications industry. Among these laws are consumer protection laws designed to combat abusive or fraudulent practices in the industry.

This Court has noted the states have an important interest in enforcing their consumer protection statutes, an interest that has been recognized by the Supreme Court. *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002), citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980). This Court has also observed that Congress has given the states “some latitude to ‘protect the public safety’ and ‘safeguard the rights of consumers.’” *Cedar Rapids Cellular*, 280 F.3d at 800, citing 47 U.S.C. § 253(b). The FCC’s Order does not assure that these powers of the states are preserved from preemption. On the contrary, it casts doubt on their continuing vitality.

There is no federal statute preempting state laws that seek to regulate VoIP services. In the absence of such a statute, the Order relies heavily on a claimed analogy to CMRS. Order, ¶ 22. The FCC supports its conclusion regarding VoIP services with the observation: “CMRS . . . is expressly exempt from the type of state economic regulation Minnesota seeks to impose on DigitalVoice.” *Id.* It is

helpful, therefore, to consider the scope of the preemption prescribed by statute regarding CMRS.²

The statutory provision thus governing CMRS, and referenced in the Order, ¶ 22 n. 83, provides as follows:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate *the entry of or the rates charged by* any commercial mobile service or any private mobile service, except that this paragraph *shall not prohibit a State from regulating the other terms and conditions of commercial mobile services*

47 U.S.C. § 332(c)(3)(A) (emphasis added).³

²NASUCA does not agree with the FCC's extension of a statutory preemption from one segment of the telecommunications industry to another, but that is not the point of the argument here. The point of the argument here is that any such extension, if valid, would necessarily carry with it the limitations on scope of preemption that Congress wrote into the statute. In other words, the agency cannot properly use a statute with specifically limited preemption for one segment to craft a broader preemption in another.

³This statutory provision goes on to state that it shall not shall exempt wireless providers (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within a state) from requirements imposed by the state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. The statutory provision also states that a state may petition the FCC for authority to regulate the rates for any wireless service, and the FCC shall grant such petition if the state demonstrates that: (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within the state.

The House Committee responsible for the legislation explained this provision as follows:

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 requirements that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s 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 Cong., 1st Sess (1993) (“House Report”) 261, reprinted in 1993 U.S. Code Cong. & Admin. News 378, 599 (emphasis added).

With respect to CMRS services, therefore, the intent of Congress was to broadly preserve state authority and correspondingly to limit section 332(c)(3)(A)’s preemptive scope. The Sixth Circuit recognized this limitation:

On its face, the preemptive reach of section 332 is limited. The statute preempts states from regulating market entry and rates charged, but specifically allows states to regulate “other terms and conditions” of service. The House report provides a list of matters that fall within the phrase “other terms and conditions,” but specifies that the list is “illustrative only and not meant to preclude other matters as fall with a state’s lawful authority.”

GTE Mobilnet v. Johnson, 111 F.3d 469, 477 (6th Cir. 1997), citing House Report at 261.

The courts have accordingly held that state efforts to combat consumer fraud and other business practices injurious to consumers are not rate regulation, and hence are not preempted by section 332(c)(3)(A) as rate regulation, provided they do not enmesh the states in a determination of the reasonableness of the rates charged. *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004) (collecting cases). See also *State ex rel Nixon v. Nextel West Corp.*, 248 F. Supp. 2d 885, 892 (E.D. Mo. 2003).

The difficulties with the imprecise demarcation line drawn in the Order are illustrated by *Cellco Partnership v. Hatch*, 2004 WL 2065807 (D. Minn. 2004) (copy attached), *appeal pending*, No. 04-3198 (8th Cir.).⁴ That case arose under the Minnesota “Consumer Protections for Wireless Consumers” statute, a consumer protection statute of particular applicability to the CMRS segment of the telecommunications industry.

The key provision in the Minnesota statute is:

⁴The decision is unpublished. See Eighth Circuit Rule 28A(i). Despite the general rule there prescribed regarding citation of unpublished opinions, this decision should be considered here for two reasons. First, it is currently on appeal to this Court, and the decision of this Court on that appeal may have a bearing on the disposition of the issue presented here. Second, as explained in text, the decision contains a helpful illustration of a state consumer protection law in the

A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

In district court, the statute was unsuccessfully challenged on preemption grounds under section 332(c)(3)(A) by a group of national and regional wireless carriers.

In dissolving a temporary restraining order, the court described the concerns that prompted the state legislature to enact this law:

A review of the hearing transcript reveals . . . significant harm to consumers. . . . Minnesota consumers testified that they faced, at a minimum, frustration and stress in dealing with non-responsive consumer service representatives. Consumers also testified about the excessive time lost in attempting to correct billing and other errors. Testimony reflected the feelings of helplessness by consumers who were forced to attempt to “disprove” that they had agreed to what the consumer believed to be an adverse contract change. Legislators heard testimony that consumers felt they were deprived of the benefit of the bargain they had struck with the wireless provider. At least one wireless customer testified that she eventually gave up, and paid a disputed bill, in part because of fear of harm to her credit report. There was also testimony that wireless consumer service representatives inform consumers that the consumer may either pay the disputed fee to the wireless provider or pay it to a collection agency. The Minnesota legislature determined that these consumers faced significant harm, and the Court agrees

telecommunications industry and a helpful explanation of the concerns that led the state legislature to enact it.

Minnesota consumers can enforce contract rights through existing state common law and state statutes prohibiting unilateral changes in contracts. This is modern contract law at its most basic. It is therefore within the power of state legislatures to ensure that wireless providers honor existing contracts with consumers, without forcing consumers to go to court to enforce contracts against unilateral changes. Article 5 simply provides that assurance. . . . It is simply the state legislature doing what it has the power to do: protecting consumers from what it considers unlawful business practices.

2004 WL 2065807, attached at 5-6.

This passage well explains the need to preserve not only general consumer protection laws applicable to all industries but also consumer protection laws applicable to telecommunications services. The Court should provide this needed clarification.

CONCLUSION

The Court should clarify that state consumer protection laws are preserved from preemption.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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PROOF OF FILING AND SERVICE

This brief was duly filed in accordance with Fed. R. App. P. 25(a)(2)(B) by mailing 10 copies by First-Class Mail this 17th day of October, 2005 to:

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