

January 30, 2006

Thomas K. Kahn, Clerk
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St. N.W.
Atlanta, Georgia 30303

Appeal No.: 05-11682-DD and 05-12601-DD

Dear Mr. Kahn:

Enclosed for filing in the above-captioned action is an original and six (6) copies of the National Association of State Utility Consumer Advocates' ("NASUCA") Reply Brief.

Very truly yours,

PATRICK W. PEARLMAN
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PWP/s
Enclosures

cc: All counsel of record

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 05-11682-DD

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

No. 05-12601-DD

VERMONT PUBLIC SERVICE BOARD
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Final Order of
the Federal Communications Commission

**REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES**

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ARGUMENT

I. THE FCC'S PREEMPTION RULING SHOULD BE REJECTED.

A. The FCC's View Of Section 332(c)(3)(A)'s Preemptive Effect Is Not Entitled To Deference.

Respondents and the Wireless Industry Intervenors (“Carriers”) argue the Court must accord *Chevron*¹ deference to the *Order*'s² preemption ruling and assert that the Court's decision to rehear *BankWest*³ removed the sole authority for Petitioners' contention otherwise. Brief for Respondents, p.22 (“Resp. Br.”); Brief of Wireless Industry Intervenors, p.16 (“Car. Br.”). This is wrong.

BankWest hardly broke new ground in denying deference to an agency's view of its governing statute's preemptive scope. *BankWest* simply applied the law of the circuit in declining to defer to an agency's determination whether Congress has unambiguously expressed its preemptive intent. *See Bank of America, N.A. v. FDIC*, 244 F.3d 1309, 1320 (11th Cir. 2001); *Gulf Power Co. v. FCC*, 208 F.3d

¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

² *In re: Truth-in-Billing and Billing Format*, 20 F.C.C.R. 6448 (2005) (“*Order*”); *see* NASUCA Br. at 11, n.1.

³ *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir.), *reh'g, en banc, granted by, vacated by*, 2005 U.S. App. LEXIS 28778 (11th. Cir. 2005).

1263, 1272 (11th Cir. 2000); *Nat'l Mining Ass'n. v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998).⁴ Nor is such deference accorded under *Chevron*.

Under *Chevron*'s first step, the Court must ascertain whether Congress has unambiguously spoken "to the precise question at issue." *Southern Co. v. FCC*, 293 F.3d 1338, 1343 (11th Cir. 2002). That question here is whether state laws requiring or prohibiting commercial mobile radio service ("CMRS") carriers' use of regulatory line items regulate "rates charged by" CMRS, something Section 332(c)(3)(A) preempts states from doing (with some exceptions), or whether such restrictions regulate "other terms and conditions" of CMRS, something expressly reserved to states by the same section. *See* 47 U.S.C. §332(c)(3)(A). Answering the question requires consideration of all the statutory terms and Section 332(c)(3)'s legislative history and should adhere to the presumption against preemption absent a "clear statement" by Congress. NASUCA Br. 18-19; Vermont Br. 13-15, 16-19.

Respondents and the Carriers assert the FCC's preemption ruling is entitled to deference because the agency determined that such state laws regulate CMRS "rates," and once this determination is made Section 332(c)(3)(A) simply preempts

⁴ According *Chevron* deference to agencies' preemption determinations rightly has been questioned. *See, e.g.,* Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (Dec. 1990); *see also Garrelts v. Smithkline Beechan Corp.*, 943 F. Supp. 1023, 1049-1051 (D. Iowa 1996).

such laws.⁵ Resp. Br. 20-22; Car. Br. 15-16. The authorities cited, however, are not on point.⁶ Moreover, the notion that the FCC merely defined “rates” rather than defining Section 332(c)(3)(A)’s preemptive scope ignores what the agency plainly did.

Chevron does not obligate the Court to defer to an agency interpretation that is bereft of any substantive analysis of Congress’ preemptive intent. Agencies may not forego consideration of the tools of statutory interpretation in ascertaining the scope of preemption Congress intended. Yet this is precisely what the FCC did, skipping this analysis and instead simply equated regulatory “line items” with “rate

⁵ NASUCA’s petition was directed at “regulatory” line items, *i.e.*, charges imposed by government rather than charges associated with a carrier’s service (*e.g.*, charges for Caller ID, text messaging, usage-based charges). R. 7 ¶13; *see also* Intervenors Record Excerpts (“IRE”), Doc. 2, pp. vi-vii, 10-12. The preemption ruling expressly prohibited such laws. R. 17 ¶31 & n.87-88.

⁶ The Seventh and Tenth circuit decisions cited dealt with declaratory rulings issued *after* notice and comment, in response to petitions expressly seeking preemption. Moreover, both decisions turned on FCC determinations that Section 332(c)(3)(A) *did not* preempt the state laws in question. Similarly, in *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735 (1996), the Supreme Court noted that the agency interpretation to which deference was accorded was, unlike the preemption ruling, a “full-dress regulation . . . adopted pursuant to the notice-and-comment procedures of the [APA] designed to assure due deliberation,” and defined a term in a provision of the federal banking laws that was not preemptive. 517 U.S. at 741.

elements” (a subset of “rates”), based only on two prior agency statements taken from an entirely different regulatory context. R. 16 ¶30.⁷

NASUCA previously detailed how the FCC’s effort to ascertain Congress’ preemptive intent regarding such state laws was, to say the least, deficient. NASUCA discussed these deficiencies in its opening brief. NASUCA Br. 18-35. Those deficiencies show why deference is unwarranted here.

First, the FCC focused entirely on the “rates charged by” clause of Section 332(c)(3)(A), ignoring every other provision of that section, particularly the broad reservation of state authority to regulate “other terms and conditions” of CMRS. In fact, the FCC did not even refer to the “other terms and conditions” clause of Section 332(c)(3)(A) in its preemption ruling. *See* R. 16-21. Likewise the FCC ignored the latter provisions of Section 332(c)(3) which further defined “rates” and, when coupled with Section 332(c)(3)(A)’s “other terms and conditions,” compelled a narrower reading of Congress’ preemptive intent. NASUCA Br. 32-34. Likewise, the FCC ignored every other provision of the Communications Act,

⁷ The FCC also suggested the state laws in question “directly affect CMRS carriers’ rates and rate structures.” R. 17 ¶31. The FCC’s suggestion, however, was inconsistent with prior agency statements describing “rate structures” to include such things as “whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls.” *See, e.g., Cellco P’ship v. Hatch*, 431 F.3d 1077, slip op. at *9 (8th Cir. 2005), *citing In re: Southwest Bell Mobile Systems*, 14 F.C.C.R. 19898, 19907 (1999). State taxes and regulatory fees are clearly not “rate structures.”

47 U.S.C. §§151 *et seq.* (“Act”), further reinforcing the conclusion that Congress did not intend to preempt the state laws prohibited by the FCC. *Id.* at 34-36.⁸ The FCC simply cannot correctly solve an equation if it ignores most of the variables.

Similarly, the FCC made no attempt to reconcile its interpretation of “rates” with standards of statutory construction, including the principle that statutes must be construed narrowly to avoid preemption.⁹ Nor did the FCC attempt to give the critical statutory terms their ordinary meaning.

Finally, the FCC completely ignored Section 332(c)(3)(A)’s legislative history. That history clearly expressed Congress’ intent that states’ authority to

⁸ Respondents and the Carriers wrongly assert that other provisions of the Act, such as the general and state tax authority savings clauses, 47 U.S.C. §§414 and 601, as well as 47 U.S.C. §§ 151 and 152(b), which delimit state and federal jurisdiction, should not be considered. Resp. Br. 49-50; Car. Br. 50-52. For example, both claim the tax savings clause in Section 601(c)(2) is inapplicable because it only applies to provisions of the Act amended in 1996. That claim is contradicted by the FCC’s assertion that its reading of Section 332(c)(3)(A) was “*consistent with section 601(c)(2) of the 1996 Act.*” R. 18 ¶32 (emphasis added). Likewise, the fact that Congress amended Section 152(b), to refer to Section 332(c)(3)(A), when it preempted state regulation of CMRS rates hardly suggests that Section 152(b) does not preserve state authority over intrastate CMRS other than “rates” and “entry.” Resp. Br. 33. These provisions make it clear that Congress intended the Act’s preemptive provisions to be construed narrowly. *See Louisiana Public Serv. Comm’n. v. FCC*, 476 U.S. 355 (1986).

⁹ NASUCA Br. 18, *citing, e.g., Gregory v. Ashcroft*, 501 U.S. 452 (1991). Another guiding principle is that statutes should be construed to avoid serious constitutional questions (such as interfering with state tax authority or traditional police powers). Vermont Br. 17-19, 60-63; *see also, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988).

regulate “other terms and conditions” of CMRS should be broadly construed. Moreover, the legislative history plainly extended states’ authority to various aspects of CMRS billing and other matters within states’ lawful authority. The FCC provided no explanation why the state laws at issue were not covered by broad range of matters expressly reserved to states by Congress. NASUCA Br. 27-29.

Respondents’ and the Carriers’ do little to improve upon the preemption ruling’s deficiencies.¹⁰ Like the FCC, they provide virtually no analysis of Section 332’s legislative history. Resp. Br. 33-34; Car. Br. 27, 35. Likewise, there is virtually no discussion of Section 332(c)(3)’s structure. Resp. Br. 22. As NASUCA noted, preemption occurs in the first clause of the first sentence while the remainder of the statute reserves state authority to regulate “other terms and conditions” of CMRS and even restores some authority over “rates.” NASUCA Br. 32-34. Even the discussion of critical statutory terms in Respondents’ and the Carriers’ briefs is basically circular, going something like this: any line item is a “rate element;” its inclusion on (or exclusion from) the carrier’s bill affects the carrier’s “rate structure;” thus any state law limiting that billing decision is “rate” regulation. Resp. Br. 29-32; Car. Br. 22, 26-29.

¹⁰ In any case, *post hoc* arguments regarding Congress’ preemptive intent have no legal significance in determining whether a statute is ambiguous under *Chevron*’s first step. *Bank of America*, 244 F.3d at 1319.

As noted in NASUCA's opening brief, Congress' intent is unambiguously contrary to the FCC's preemption ruling.

B. The Preemption Ruling Fails *Chevron's* Second Step.

Only if the Court finds Congress' intent regarding Section 332(c)(3)(A)'s preemptive scope to be ambiguous, will the Court apply the second step in *Chevron's* analysis, to determine whether the agency's was a "permissible construction" of the statute. *Chevron*, 467 U.S. at 842-43.¹¹ This analysis uses an "arbitrary and capricious" standard, similar to that set forth in 5 U.S.C. §706. See *Muratore v. United States OPM*, 222 F.3d 918, 922 (11th Cir. 2000); see also Vermont Br. 15-16.

An agency's rule is arbitrary and capricious 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).

"Unexplained inconsistency" with prior agency practice may be deemed arbitrary and capricious. *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005). Similarly, procedural irregularities or deficiencies in

¹¹ *But cf. Louisiana Public Serv. Comm'n*, 476 U.S. at 369-74 (declining to defer to the FCC's construction of the Act without referring to *Chevron*).

the agency's decision may make it arbitrary and capricious. *See, e.g., Maine v. Shalala*, 81 F.Supp.2d 91, 95-96 (D. Me. 1999).

Applying these factors, the FCC's preemption ruling flunks *Chevron*. NASUCA Br. 18-43. For one, the FCC relied on a factor Congress never indicated that it intended to be considered, namely "the federal policy of a uniform, national and deregulatory framework for CMRS," and more specifically CMRS providers' "flexibility to design national or regional rate plans." R. 20 ¶35. Neither the Act's provisions nor its legislative history express a Congressional goal of national or regional CMRS pricing. NASUCA Br. 43-49.

The national, deregulatory framework for CMRS rates and entry Congress intended simply is not synonymous with nationwide or regional pricing. The notion Congress sought nationwide pricing is simply inconsistent with the fact that Congress expressly allowed states to tax CMRS providers or impose other assessments on their service, undermining such a goal (if anyone in Congress actually had such a goal).

Likewise, contrary to *Motor Vehicle Mfrs.*, the FCC "failed entirely to consider an important aspect of the problem," namely the impact of its preemption ruling on states' power to tax and impose assessments pursuant to their police powers. Vermont and NARUC addressed this issue extensively in their briefs and

NASUCA has adopted that argument. *See* Vermont Br. 47-63; Vermont Reply Br. 14-20.

The FCC likewise failed to account for the numerous inconsistencies between its preemption ruling and prior agency statements. NASUCA cited numerous FCC orders contradicting the agency's suggestion in the preemption ruling that it had previously equated "line items" with "rate elements." NASUCA Br. 40-42 & n.27. The agency statements cited by NASUCA actually dealt with a similar regulatory context to the question presented in the *Order* (*i.e.*, carriers' recovery of regulatory assessments from customers), in contrast to the statements cited by the FCC, which were from a very different regulatory context (*i.e.*, carriers' recovery of regulatory costs from other carriers through FCC-tariffed access charges).

More importantly, NASUCA noted that the statements the FCC relied on in the *Order* were inconsistent with prior statements – *in the same docket* – which explained why regulatory line items were distinguishable from carriers' "rates." *Id.* at 21-22 & n.6; *id.* at 41. On this point, the FCC specifically noted:

Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce. For example, when a consumer purchases socks from the local department store, the consumer knows what item the bill refers to, whether it describes the product as socks, men's wear, hosiery, etc.

*In contrast, a consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill.*¹²

In re: Truth-in-Billing and Billing Format, 14 F.C.C.R. 7492, 7531 ¶61 (1999) (emphasis added) (“1999 TIB Order”). This passage refutes the Carriers’ suggestion that it would be “bizarre” to interpret a “rate” as referring to the price of a commodity. Car. Br. 28-29.

Similarly, NASUCA described the preemption ruling’s inconsistency with prior agency and judicial decisions upholding states’ authority to impose universal service assessments on CMRS providers. NASUCA Br. 29-32, 49, *discussing, e.g., In re: Pittencrief Communications*, 13 F.C.C.R. 1735 (1997); *CTIA v. FCC*, 168 F.3d. 1332 (D.C. Cir. 1999). Those decisions held that states’ authority to impose such assessments derived from their power to regulate “other terms and conditions” of CMRS service and rejected the notion that such assessments were preempted by Section 332(c)(3)(A) merely because they increased carriers’ operating costs.

Under the FCC’s reasoning, however, those “other terms and conditions” taxes and fees mutate into “rates” if the state dictates whether or how they are put on the CMRS bill. The FCC’s preemption ruling simply cannot be reconciled with

¹² It is clear from the *1999 TIB Order*’s context that “these line items” meant line items recovering federal regulatory assessments (*e.g.*, federal universal service charges).

Pittencrief, etc. The FCC’s preemption ruling is inherently arbitrary and capricious for failing to account for these inconsistent authorities, let alone explain why the agency was now departing from its prior determinations. *See Nat’l Treasury Employees Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457-58 (D.C. Cir. 2005) (agency’s “unexplained departure from prior agency determinations” is inherently arbitrary and capricious); *see also Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002) (agency cannot depart from prior interpretations upheld by courts without adequate explanation).

Confronted with these facts, Respondents and the Carriers ignore them.¹³ Instead they offer hypotheticals that purport to show how state laws requiring or prohibiting the use of line items to recover regulatory assessments and taxes constitutes rate regulation. However, rather than supporting the FCC’s preemption ruling, the hypotheticals serve to highlight the FCC’s flawed construction of Section 332(c)(3)(A). Consider this example offered by the Carriers: A state law prohibits a carrier from collecting a \$3 state tax through a line item; this directly affects the carrier’s rate structure “*by removing a rate element*”; and thus directly affects its rates. Carrier Br. 32 (emphasis added). The Carriers’ example bluntly drives the FCC’s flawed reasoning home: State taxes are rate elements, their

¹³ The Carriers merely refer to the same, inapposite FCC statements cited in the *Order*. Carrier Br. 29. Respondents do not take the trouble.

presence on a bill makes them part the carrier's rate structure, any state law that affects the tax's presentation on the bill is rate regulation.

The Carriers' reasoning, like the FCC's, is patently absurd and inconsistent with prior agency and court decisions. A state tax or regulatory assessment cannot be both a "rate" and an "other term and condition." If a state tax is a "rate," then a state cannot regulate it. The state cannot "set, fix or prescribe" the rate let alone dictate whether or how it is billed. If the tax or fee is an "other term and condition," then it cannot be a rate and the state can fix its amount and dictate how it may be billed.

Neither Respondents nor the Carriers articulate any way to reconcile this conflict.¹⁴ Instead, they assert Petitioners' construction of Section 332(c)(3)(A) is overly narrow or "crabbed." Resp. Br. 33-34; Car. Br. 20-21.¹⁵ On the contrary,

¹⁴ Retaining a common-sense distinction between regulatory line items and rates avoids the absurd results produced by the FCC's construction of Section 332(c)(3)(A). Under this distinction, states cannot regulate the amount CMRS providers charge for their service or the services for which customers are charged. However, states may regulate other terms and conditions of CMRS, including taxes and fees on the service and may dictate the manner in which they are listed and described on state citizens' bills. This is not a matter of choosing among several equally reasonable interpretations, it is the *only* reasonable interpretation.

¹⁵ Respondents and the Carriers cite *Cellco* as support for their overly broad interpretation of what constitutes prohibited rate regulation. Resp. Br. 34; Car. Br. 24-25, 35. However, the Eighth Circuit's decision was narrowly based on the facts before it. The Minnesota law vacated in *Cellco* expressly prohibited CMRS providers from unilaterally changing their contract-based, service rates (or other material terms of service), without first obtaining the customer's affirmative

the Petitioners' construction is consistent with judicial precedent commanding that preemptive statutes be construed narrowly, the structure of both Section 332 and more broadly the Act, the legislative history of Section 332, prior rulings by the FCC and courts, and finally prior agency statements. By contrast, Respondents' and the Carriers' construction of "other terms and conditions" of CMRS virtually reads the savings clause out of the Act.

For all the foregoing reasons, the preemption ruling must be vacated, reversed or set aside as arbitrary and capricious.

II. FAILURE TO PROVIDE NOTICE OF THE PREEMPTION DECISION VIOLATED THE APA OR, AT A MINIMUM, WAS AN ABUSE OF DISCRETION.

At first blush, the Respondents and Carriers seem to disavow any notion that the preemption ruling is a legally binding rule, suggesting it was an adjudication or, if a rule, only an interpretive rule exempt from the Administrative Procedure Act's ("APA") notice and comment requirements.¹⁶ Resp. Br. 42-45; Car. Br. 44. This

consent. 431 F.3d, slip op. at *12-15. This, the court concluded, amounted to "fixing" CMRS rates in violation of Section 332(c)(3)(A). Notably, the district court had excepted pass-through of changes in federally-assessed fees from the state law's operation. *Id.* at *3, n.1.

¹⁶ 5 U.S.C. §§ 551 *et seq.* This confuses the *form* of the proceeding with the *nature and effect* of the decision. The label that an agency puts on its exercise of power is not conclusive; it is what the agency does in fact that determines whether it is a rule or merely an adjudication. *See Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616,

notion is at odds with their observation that agencies may establish broad legal principles with prospective application in adjudications. Resp. Br. 40-42; Car. Br. 43-44. Similarly, the Carriers assert that if the preemption decision is a rule, it was the logical outgrowth of NASUCA's petition, exempt from the APA's notice requirement. Car. Br. 45-46.

Regardless of whether the preemption decision was adopted in an adjudication or a rulemaking, the FCC's failure to provide notice and comment violated the APA or was a clear abuse of discretion.

A. The FCC Cannot Amend, Modify Or Revise Its Truth-in-Billing Rules Or Interpretations Without Notice.

The suggestion that the *Order* merely "clarified" Section 332(c)(3)(A) is simply wrong. Resp. Br. 20-22; Car. Br. 16-17. In fact, the preemption ruling substantially modified, amended or revised prior FCC rules, and interpretations of those rules, adopted in a rulemaking in the very same docket.¹⁷

619 (5th Cir. 1994). This determination is a matter of construction and is reviewed *de novo*. *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001).

¹⁷ *In re: Truth-in-Billing and Billing Format*, CC Docket No. 98-170. Although NASUCA's petition was filed in this docket, it was reassigned a new docket number (CG Docket No. 04-208). R. 7 ¶13; *see also* IRE Docs. 2 & 3. Although the FCC's Order was issued in both dockets, the preemption ruling clearly implicated the FCC's Truth-in-Billing proceedings. *See, e.g.*, R. 2, ¶1; *id.* at 12 ¶23; *id.* at 19 ¶33 & n.94.

Respondents and the Carriers claim notice was not required because the preemption ruling was issued in the context of an adjudication. Resp. Br. 40-42; Car. Br. 43-44. Each also offers an alternate argument to avoid the consequences of failing to provide public notice of the preemption ruling. If the FCC's decision was a rule, Respondents claim it was merely an interpretive rule not subject to the APA's notice requirements. Resp. Br. 42-44. The Carriers try a different approach, arguing notice was not required because the preemption ruling was a "logical outgrowth" of NASUCA's petition. Car. Br. 45-50. These arguments are without merit.

First, the FCC's preemption ruling was not a proper subject for an adjudication. The declaratory ruling portion of the *Order* terminated the "controversy or uncertainty" presented in NASUCA's petition by denying that petition. The ruling preempting state laws requiring or prohibiting CMRS providers' use of certain line items was an entirely different matter, separate from the issues raised by NASUCA's petition. The *Order* makes this clear. NASUCA's petition is denied in Section IV.B.1 & 2 of the *Order* while state preemption is addressed in Section IV.B.3. See R. 11-21. Not only is preemption in an entirely different part of the *Order*, it is entirely independent of the issues raised in NASUCA's petition. In fact, there is not one reference to NASUCA's petition in the preemption ruling portion of the *Order*.

Moreover, Respondents' claim that the preemption ruling was an adjudication because there was "substantial uncertainty" regarding state laws requiring or prohibiting CMRS providers' line items is specious. Resp. Br. at 40. Respondents cite nothing evidencing such uncertainty prior to NASUCA's petition and, as discussed below, prior FCC statements in the Truth-in-Billing docket suggested anything but uncertainty. *See infra*, at 19-21. Likewise, the FCC candidly admitted that the "broader issue of the role of states in regulating billing" was introduced only *after* the filing of NASUCA's petition, in reply comments and *ex parte* submissions, and received only cursory treatment in comments on the petition itself. R. 21 ¶37. The preemption ruling did not resolve the controversy or uncertainty that was the subject of NASUCA's petition, nor was it necessary for that resolution. Thus it cannot be properly considered an adjudication.

The cases cited by Respondents and the Carriers in which FCC declaratory rulings preempting aspects of state jurisdiction have been upheld by courts do not contradict NASUCA's argument that notice was required; they support it. Resp. Br. 41; Car. Br. 44. In each case, the court held that the FCC's choice of proceeding was not an abuse of discretion because the agency provided adequate public notice of the preemption issue, which in turn generated numerous comments in response to that notice. *See, e.g., New York State Cable Comm'n v. FCC*, 749

F.2d 804, 806-07 (D.C. Cir. 1984) (discussing Respondents' and the Carriers' other authorities).

While the decision whether to proceed by adjudication or rulemaking is a matter within the agency's discretion,¹⁸ this discretion is not unfettered. There are clearly circumstances where adopting a rule in an adjudication amounts to an abuse of discretion or a violation of the APA. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Those circumstances exist here.

Agencies may not use adjudication to circumvent the APA's rulemaking procedures, such as by "amending a recently adopted rule . . . or to supplant a pending rulemaking proceeding" *Cities of Anaheim, Riverside, et al. v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969); *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982).¹⁹

More importantly, agencies must proceed via notice-and-comment rulemaking if they seek to change the law and establish rules of widespread application. *Ford Motor*, 673 F.2d at 1009-10. APA notice-and-comment requirements also apply if agency interpretations significantly amend, modify or

¹⁸ *See SEC v. Chenery*, 332 U.S. 194, 201 (1947).

¹⁹ Both circumstances apply here. First, the preemption ruling amended or revised its Truth-in-Billing rules adopted five years earlier. Second, the preemption ruling was coupled with the FCC's adoption of rules applicable to CMRS providers that had been proposed in 1999 but which were still pending.

revise prior rules or interpretations of those rules. See *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001); *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1036 (D.C. Cir. 1999); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997). Accord: *U.S. v. Alabama Power Co.*, 372 F.Supp.2d 1283, 1318-19 (D. Ala. 2005).

Even if the FCC’s ruling merely interpreted Section 332(c)(3)(A) or was an interpretive rule, it significantly amended or revised interpretations the agency had previously given to its Truth-in-Billing rules, if not the rules themselves. This is clear from the FCC’s orders in the Truth-in-Billing proceeding.

The FCC’s Truth-in-Billing rules were promulgated in a rulemaking the agency initiated in 1998. Nothing in the initial notice of proposed rulemaking (“1998 TIB NPRM”)²⁰ suggested limiting state authority over carrier billing practices or line items. To the contrary, the 1998 TIB NPRM sought comment on “how the agency’s jurisdiction should *complement* that of states.” 13 F.C.C.R. at 18183 ¶14 (1998) (emphasis added). The 1998 TIB NPRM included CMRS for consideration by specifically seeking comments regarding CMRS billing practices, including the manner in which CMRS providers pass certain regulatory costs on to customers in monthly bills. 13 F.C.C.R. at 18179 ¶6; *id.* at 18189 ¶26.

²⁰ *In re: Truth-in-Billing and Billing Format*, 13 F.C.C.R. 18176 (1998).

Nor did the *1999 TIB Order* adopting Truth-in-Billing principles and rules suggest any change in the agency’s outlook. None of the comments received in response to the *1998 TIB NPRM* suggested states should be preempted from requiring or prohibiting CMRS providers from placing regulatory line items on customers’ bills and the FCC did not raise the issue. The FCC did refer to Section 332 in the *1999 TIB Order* but only to note the section provided the FCC with, at minimum, *concurrent jurisdiction* to enact rules concerning CMRS carriers – hardly suggesting states had none. 14 F.C.C.R. at 7503 ¶21 (emphasis added).

Most significantly, the FCC adopted the following rule entitled “Preemptive effect of rules”: “The requirements contained in this subpart *are not intended to preempt the adoption or enforcement of consistent truth-in-billing requirements by the states.*” 47 C.F.R. §64.2400(c) (emphasis added). This rule codified the FCC’s prior thinking regarding state authority to regulate carriers’ billing practices, including CMRS carriers. It also codified the agency’s current thinking expressed elsewhere in the *1999 Order*. *See id.* at 7507 ¶26 (“states . . . free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, *including rules that are more specific than the general guidelines we adopt today*”); *id.* at 7521 ¶46 (“whether a charge is or is not ‘deniable’ varies according to state law;” “[o]ur requirement is not meant to preempt states”).

Subsequent orders in the Truth-in-Billing docket did not suggest movement toward preemption. The further notice of proposed rulemaking attached to the *1999 Order* (“*1999 TIB FNPRM*”), for example, sought additional comment whether the agency’s rules should be extended to CMRS providers. 14 F.C.C.R. at 7535-36 ¶¶68-70. Extension of those rules was not linked to preemption of state laws governing CMRS carriers’ billing practices. Nor did comments submitted to the FCC in response to the *1999 TIB FNPRM* mention state preemption.

Rather than limiting state authority over CMRS carriers’ billing practices, the FCC’s Truth-in-Billing rules and interpretations of those rules specifically provided that consistent state billing laws were not preempted. That state of affairs abruptly ended with the *Order*.²¹

Accordingly, the FCC’s failure to provide notice-and-comment of its ruling modifying, amending or revising its Truth-in-Billing rules and interpretations of those rules violated the APA.

Finally, the FCC’s choice of an adjudication (if such it is) for a sweeping preemption of laws adopted by states pursuant to their traditional taxing and police

²¹ This is not just one litigant’s hyperbole. The same view was expressed by two of the FCC’s commissioners. *See* R. 54(separate statement of Commissioner Michael J. Copps) (“It will take some time for states to survey the debris from this erosion of cooperative federalism.”); R. 56 (separate statement of Commissioner Jonathan S. Adelstein) (“[T]he Commission’s existing Truth-in-Billing rules preserved States’ ability to adopt consistent requirements, until now.”).

powers, coupled with its decision to forego notice, was an abuse of discretion even if it was not a violation of the APA. Courts recognize that adjudication has distinct advantages over rulemaking “when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule,” while “other problems are so specialized and variable as to defy accommodation in a rule.” *Chenery*, 332 U.S. at 202-03; *see also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). On the other hand:

The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it. *Adjudication is best suited to incremental developments to the law, rather than great leaps forward. The APA contains numerous mechanisms, such as the notice and comment rulemaking procedure, by which the public is given notice of proposed changes before they occur. See generally APA §§ 552, 553, 557.* For this reason, the Supreme Court has concluded that “*rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication.*”

Pfaff v. HUD, 88 F.3d 739, 748 (9th Cir. 1996), *quoting Community Television of So. Cal. v. Gottfried*, 459 U.S. 498, 511 (1983). Accord: *Curry v. Block*, 738 F.2d 1556, 1563-64 (11th Cir. 1984).

The FCC itself has recognized the same principles on numerous occasions, and has acted in accordance with them. *See In re: NOS Communications, Inc.*, 16 F.C.C.R. 8133, at **31-37 (2001)(dissenting statement of Commissioner Harold

Furchtgott-Roth) (collecting cases and FCC rulings); *see also In re: AT&T v. MCI*, 7 F.C.C.R. 807, 809 (1992). When it comes to preemption rulings, the FCC has consistently provided public notice and sought comment first.²² The agency's departure from past practice here was a clear abuse of discretion,²³ especially in light of the FCC's use of rulemaking to seek comment on other preemption issues in the *Order's* Second Further Notice of Proposed Rulemaking.

B. The Carriers' "Logical Outgrowth" Claims Are Without Merit.

The Carriers try to downplay the lack of notice regarding preemption by asserting two distinct but interrelated arguments. First, they claim no notice was necessary because NASUCA's petition "squarely placed the issue of carrier line items" before the FCC and thus, "logically implicated the interplay between federal and state regulation of line items." Car. Br. 45-46. Alternately, they claim preemption was a "logical outgrowth" of the proceeding because NASUCA and others could have "reasonably anticipated" the need to address the issue based on parties' comments. *Id.* at 46-47. Both arguments are without merit.

²² *See supra* at 17-18. NASUCA could find no instance in which the FCC preempted state jurisdiction without first providing public notice of its proposed action.

²³ The FCC certainly offered no explanation for its failure to provide notice in the *Order*, and Respondents' merely suggest that the agency's discretion is, in essence, boundless. Resp. Br. 44-45.

To even present the “logically implicated” argument the Carriers must mischaracterize NASUCA’s petition and the ruling it sought. The issue “squarely placed” before the FCC by NASUCA was whether the “regulatory” line items placed on consumers’ telephone bills were contrary to either the FCC’s Truth-in-Billing principles or other FCC rules. R. 7 ¶ 13.

Moreover, the “federal-state interpla ” is a red-herring, made clear by the Carriers’ need to further mischaracterize the issues below. For example, they suggest preemption was implicated because of the “conflicting federal and state authority . . . if the FCC agreed with NASUCA and prohibited line items that were otherwise permitted by state law,” or vice versa. Car. Br. 46. As the Carriers candidly admit,²⁴ NASUCA sought a ruling prohibiting regulatory line items that were not authorized by federal, state or local law; prohibiting line items allowed by state law would hardly be “agreement” with NASUCA’s petition.

The Carriers also suggest preemption was implicated if the FCC permitted a line item that state law prohibited. *Id.* It should not be shocking, in light of the dual federal-state regulatory structure established in the Act,²⁵ but the FCC has not previously dictated to states what regulatory assessments and taxes they can

²⁴ Car. Br. 4.

²⁵ See 47 U.S.C. §§151 & 152(b); see, generally, *Louisiana Public Serv. Comm’n*, 476 U.S. 355.

impose or limited the manner in which those assessments are reflected on the carriers' bills. Such authority is denied the FCC under various provisions of the Act. If a state prohibited a carrier from using a line item to recover state taxes or regulatory assessments, it is hard to see where this would present a conflict with federal law.²⁶

The FCC provides the best evidence that the Carriers' "logically implicated" argument is unfounded. If NASUCA's petition had implicated the interplay between federal and state jurisdiction, then the FCC would have signaled this in its public notice regarding NASUCA's petition. IRE Doc. 3. Preemption's absence shows it was not a consideration until wireless carriers made it an issue, "primarily in *ex parte* submissions." R. 21 ¶37.

As for the Carriers' claim that the preemption ruling was a "logical outgrowth" of NASUCA's petition because the public should have anticipated preemption based on other parties' comments,²⁷ this assertion is contrary to settled

²⁶ If a state prohibited a carrier from placing a federal line item on the consumer's bill, that is clearly another matter, but the Carriers' suggestion that NASUCA's petition raised this issue petition is false. Car. Br. at 46, *citing* IRE Doc. 2 at 65, n.170. NASUCA merely observed that a state could prohibit line items recovering contributions to the *state's* universal service fund even though the FCC authorized carriers' recovery of contributions to the *federal* fund via a line item.

²⁷ Here too the Carriers mischaracterize the content and import of other parties' comments. For example, they claim "*both state and industry parties . . . filed comments that recognized that Section 332(c)(3)(A)'s ban on state rate regulation was at issue.*" Carrier Br. at 47 (emphasis added). It is false to suggest that states

law. Courts addressing “logical outgrowth” have *never* considered the comments of interested parties alone sufficient to provide the public with the notice required by the APA. Rather notice “necessarily must come – if at all – from the Agency.” NASUCA Br. at 62-63, *quoting, e.g., Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). The cases cited by the Carriers are clearly inapposite. Car. Br. 47, n.18. In each case, the agency provided adequate notice of its proposals and the action ultimately adopted was consistent with, and informed by, comments received in response to the proposals noticed.

A decision rendered after NASUCA filed its opening brief is fatal to the Carriers’ “logical outgrowth” argument. In *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005), the EPA “reinterpreted” the unrevised text of a rule it had proposed to amend but claimed its action was the “logical outgrowth” of comments received on the proposal. The court roundly rejected EPA’s argument:

This flip-flop complies with the APA only if preceded by adequate notice and opportunity for public comment.

* * *

If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject

recognized that preemption was at stake. California’s comments merely referenced the *1999 Order*’s recognition that states may adopt and enforce their own truth-in-billing laws; Section 332(c)(3)(A) is nowhere mentioned. IRE Doc. 15 at 4, n.1. Likewise, the Minnesota Department of Commerce suggested only that the FCC could prohibit misleading charges where the states lack jurisdiction, without mentioning Section 332(c)(3)(A),. IRE Doc. 16 at 3-4.

innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy “notice.” Such an exercise in “looking over a crowd and picking out your friends,” does not advise interested parties how to direct their comments and does not comprise adequate notice under APA § 553(c).

Id. at 997-98 (emphasis original; internal citations omitted).

III. NASUCA’S APPEAL IS NOT PROCEDURALLY BARRED.

Section 405(a) of the Act does not bar NASUCA’s APA challenges to the *Order*. Resp. Br. 36-39; Car. Br. 40-43. Section 405(a) provides, in pertinent part:

The filing of a petition for reconsideration shall not be a condition precedent to judicial review . . . except where the party seeking such review . . . relies on questions of fact or law upon which the [FCC] has been afforded no opportunity to pass.²⁸

47 U.S.C. §405(a). Although Section 405(a) generally codifies the administrative exhaustion doctrine, courts construe its wording such that “it is not necessary that the issue of fact or law be presented to the [FCC] by the petitioner itself,” nor is there any requirement that the agency’s opportunity to pass be afforded in any particular manner or by any particular party. *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79-80 (D.C. Cir. 1998). Moreover, since aggrieved parties ordinarily are not required to seek reconsideration before challenging FCC orders, exceptions to the general rule are construed narrowly. *Nat’l Ass’n for Better Broadcasting v. FCC*, 830 F.2d 270, 274-75 (D.C. Cir. 1987).

²⁸ No one has suggested NASUCA was not a party below, the other condition that would require filing a petition for reconsideration.

Respondents' and the Carriers' arguments that the FCC had no opportunity to pass on NASUCA's APA challenge can be rejected out of hand. The need for, and failure to provide, prior notice regarding the FCC's preemption ruling was addressed specifically in a commissioner's dissent:

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.*

R. 56 (emphasis added) (separate statement of Commissioner Jonathan S. Adelstein).

Commissioner Adelstein's comments are proof positive that the FCC indeed had an opportunity to pass on the APA arguments asserted by NASUCA. *See Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519, 523-24 (D.C. Cir. 1972) (where dissenting commissioners raise the very argument pressed on appeal, it "would be blindly ignoring the realities of administrative decision-making to say that the majority had no opportunity to consider the objections raised by the dissenters"); *see also ICO Global Communications (Holding) Ltd. v. FCC*, 428 F.3d 264, 269 (D.C. Cir. 2005). Parsing the parties' comments and *ex partes* is unnecessary.²⁹

²⁹ Respondents dismiss Commissioner Adelstein's dissent out of hand, without even addressing *Church of Christ* or *ICO Global*. *See* Resp. Br. 37, n.67.

In any case, the FCC clearly was aware of parties' concerns regarding lack of, and the need for, public notice. Such concerns were raised by NASUCA and others shortly before the *Order* issued. Moreover, contrary to the Carriers' claim otherwise, NASUCA *did* address the issue in its reply comments, arguing "Nextel's effort to persuade the Commission to pre-empt state consumer protection laws should be submitted as a Nextel petition for rulemaking." IRE Doc. 3 at 56, n.203; *cf.* Car. Br. 42. Likewise, NASUCA, NARUC and AARP complained that the lack of notice deprived them and others of an opportunity to adequately comment on preemption. IRE Docs. 12, 14, 19-21.³⁰ Moreover, Verizon Wireless' *ex parte* suggesting the APA did not prohibit the FCC's interpretation "logically implicated" the question whether notice was required. Resp. Br. 38; Car. Br. 42; *see Church of Christ*, 465 F.2d at 523-24.

Finally, the futility exception to Section 405(a) applies. *See, e.g., Ominpoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996). The record plainly shows that the FCC was committed to issuing its ruling despite parties' concerns over lack of notice and requests to postpone ruling in order to allow comment on the preemption issue. *See, e.g.,* IRE Docs. 19-21.

³⁰ The final page of AARP's March 5, 2005 *ex parte* submission to the FCC is missing from IRE Doc. 20. A complete copy of the document is attached. It is also available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518180326.

CONCLUSION

For the foregoing reasons, the “Declaratory Ruling” set forth in the *Order* should be vacated, set aside and invalidated as contrary to law, arbitrary and capricious, and in violation of the requirements of the APA.

Respectfully submitted,

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January 30, 2006

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that the foregoing Reply Brief of Petitioner National Association of State Utility Consumer Advocates complies with the type-volume limitation set forth in 11th Cir. R. 32-4. Said brief contains 6,976 words, exclusive of matters required by 11th Cir. R. 28-1(a)-(g) & (m)-(n). Counsel further certifies that an electronic copy of said Reply Brief, in Adobe Acrobat® PDF file format, has been provided to the Court contemporaneously herewith, in accordance with 11th Cir. R. 31-5.

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CERTIFICATE OF SERVICE

I, Patrick Pearlman, hereby certify that on this 30th day of January, 2006, I caused a copy of the foregoing Reply Brief of Petitioner National Association of State Utility Consumer Advocates to be filed, via first-class United States mail, postage prepaid, upon the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit, and caused a copy to be served by first-class United States mail, postage prepaid mail upon all parties listed on the attached service list on the same day:

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