No. 04-3198

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *ET AL.*,

Plaintiffs-Appellants,

v.

MIKE HATCH, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF MINNESOTA
AND NOT AS AN INDIVIDUAL,

Defendant-Appellee.

Appeal from the United States District Court
for the District Of Minnesota
Case No. CIV 04-2981 JRT/SRN

BRIEF FOR AMICI CURIAE AARP, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, AND THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT..... 5

I. CONGRESS DID NOT INTEND TO PREEMPT STATE CONSUMER PROTECTION LAWS LIKE ARTICLE 5. 5

II. ARTICLE 5 DOES NOT REGULATE THE "RATES CHARGED BY" WIRELESS CARRIERS..... 6

A. Article 5 Does Not "Directly Affect" Carriers' Rates.....10

B. Article 5 Applies Neutrally to All Wireless Carriers. 11

III. STATES NEED TO PROTECT WIRELESS CONSUMERS. 12

A. Complaint Data and Customer Surveys Demonstrate the Seriousness of Problems in the Wireless Industry. 12

B. States Have Begun to Take Action to Rein in Wireless Carriers. 13

C. The FCC Does Not Protect Wireless Consumers Or Address Wireless Carriers' Unreasonable Practices. 16

D. The CTIA's Consumer Code For Wireless Service Does Not Protect Consumers. 18

IV. THE WIRELESS INDUSTRY IS NOT SO UNIQUE THAT IT SHOULD BE EXEMPT FROM CONSUMER PROTECTION LAWS 19

A. Wireless Carriers Are No Different From Other Telecommunications Carriers 20

B. Wireless Carriers Are Already Subject to Differing State Laws 24

C. Other Nationally Competitive Industries Are Subject to State Regulation 26

D. Article 5 Does Not Undermine Federal Policy Detariffing The Wireless Industry. 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

AT&T Corp. v. FCC, 349 F.3d 693 (D.C. Cir. 2003) 20

Cearley v. General Am. Trasp. Corp., 186 F.3d 887 (8th Cir. 1999) 4

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47 U.S.C. §§

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214(e) & (e)(4).....22

254 25

271 21

332(c)(3).....*passim*

414 5

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39000 *et seq.* 27

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113700 *et seq.* 27

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24-6-6b. 25

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64.1100 – 1120 21

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INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization with more than 35 million members, with approximately 645,000 in Minnesota. As the largest membership organization representing the interests of Americans aged 50 and older, AARP is greatly concerned about widespread unfair and deceptive practices in marketplace transactions since older Americans are disproportionately victimized by many of these practices. AARP supports laws and public policies designed to protect its members.

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates all committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. NACA's membership is comprised of over 1,000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. Its advocacy includes conducting seminars, supporting consumer protection laws and filing amicus briefs in support of American consumers.

The National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary, national association of 44 consumer advocates in 42 states and the District of Columbia. NASUCA's members are designated by their

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

states' laws[2] to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's Order because the Minnesota Wireless Consumer Protection Act, 2004 Minn. Sess. Law Serv. 261 (West) ("Article 5"), does not regulate wireless carriers' rates and therefore is not preempted under Section 332(c)(3)(A) of the Federal Communications Act ("FCA").[3] Article 5 is a state consumer protection law that applies neutrally to the wireless industry by requiring all wireless carriers to: (1) give consumers adequate notice prior to a proposed substantive change in their contracts, and (2) obtain consumers' affirmative consent to the change before modifying those contracts. Article 5 is a legitimate, reasonable, and necessary exercise of Minnesota's police power to protect Minnesota consumers by regulating the terms or conditions of wireless service.

While the number of wireless subscribers grows, so do the number of complaints. Under their traditional police powers, states and state agencies have exercised the consumer protection authority reserved to them under Section

[2] *See, e.g.*, *Ohio Rev. Code Ann*. Ch. 4911; *W. Va. Code* § 24-1-1(f)(2); *Minn. Stat*. § 8.33.
[3] *Codified at* 47 U.S.C. §§ 151 *et seq.*

332(c)(3)(A) to address widespread complaints regarding wireless service while the Federal Communications Commission ("FCC") has adopted a "hands-off" approach. Article 5 is one such law. Further, the industry's reliance on its voluntary consumer code for wireless services is misplaced, as its "code" does not adequately protect consumers.

Article 5 does not set, fix or prescribe any particular rate or charge – the wireless carriers' contracts do – nor does it directly affect wireless carriers' rates. Article 5 merely deters carriers from unfairly modifying customers' contractual obligations under those contracts without notice and actual consent. Moreover, to enforce Article 5, a court would not consider the carrier's rate or make any determination about its reasonableness.

The Joint Appellants ("Carriers") wrongly assert that Article 5 is not neutrally applied because it "targets" the wireless industry and establishes special provisions to govern wireless contracts. The Carriers' interpretation of "neutral application" would nullify Section 332(c)(3)(A)'s reservation for state regulation of "other terms and conditions" of wireless service. "Neutral application" of state law occurs when state laws are neutral in their application across the industry being regulated. Unquestionably Article 5 applies neutrally to all wireless carriers.

The Carriers incorrectly contend that Article 5 is preempted because of its impact on wireless carriers' national or regional business plans. The fact that

wireless carriers have national or regional business plans hardly distinguishes them from other telecommunications providers, let alone other competitive industries. Moreover, wireless carriers' compliance with Article 5 would not be problematic because they already must comply with different state and local government regulations and programs that have a widely varying and disparate impact on their business operations.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREEMPT STATE CONSUMER PROTECTION LAWS LIKE ARTICLE 5.

The plain language of the Federal Communications Act ("FCA") and its legislative history[4] establish that Congress envisioned a distinct and vital role for the states' continued regulation of wireless carriers. *Cedar Rapids Telephone Co. v. Miller*, 280 F.3d 874 (8th Cir. 2002); *see also GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997) ("on its face, the preemptive reach of Section 332 is limited"). First, Section 332(c)(3)(A), which prohibits states from regulating "rates charged by" wireless carriers,[5] expressly reserves to states the power to regulate "other terms and conditions" of wireless service. Second, the FCA's general savings clause provides that "nothing in this chapter shall in any

[4] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News, 378, 588.
[5] *See Cearley v. General Am. Trasp. Corp*., 186 F.3d 887 (8th Cir. 1999).

way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414.

The Carriers do not cite any "clear and manifest" expression of Congress' intent to preempt laws like Article 5 in Section 332(c)(3)(A) of the FCA Instead, the Carriers improperly combine a narrow interpretation of permissible "terms and conditions" and state regulation of wireless service under Section 332(c)(3) with an overly broad interpretation of preempted "rate" regulation.

Courts are particularly reluctant to find federal statutes preempt state laws governing subjects traditionally regulated by states in order to avoid an unintended encroachment upon states' authority. *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246 (8th Cir. 1996). State laws prohibiting unfair business practices traditionally fall within a state's broad police powers to enact legislation to protect "the lives, limbs, health, comfort and quiet of all persons." *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d at 880. States have responded to growing problems associated with wireless service by adopting additional consumer protections relating to wireless service quality and wireless carriers' business practices. Article 5 is one such law.

II. ARTICLE 5 DOES NOT REGULATE THE "RATES CHARGED BY" WIRELESS CARRIERS.

The Carriers erroneously claim that Article 5: (1) regulates the "rates charged by" wireless carriers because it directly affects those rates;[6] and (2) is not "neutral in application" because it addresses only the wireless industry and certain changes to the terms and conditions of the customer's service contract.[7] These claims do not fit the facts or the law. Moreover, to accept the Carriers' claims would essentially turn the preference against preemption on its head.

Article 5 is clearly a consumer protection law not preempted *per se* by Section 332(c)(3)(A). Citizens' testimony and legislators' comments repeatedly referred to wireless carriers' widespread practice of unilaterally changing customers' terms and conditions of service without providing adequate notice to, or obtaining actual consent from, customers. The Minnesota legislature concluded that such unilateral changes were unreasonable and that a new consumer protection law (*i.e.*, Article 5) was needed to protect wireless consumers.[8]

Without doubt the Minnesota legislature had good reason to be concerned with the practices in question. The Carriers themselves estimate that sixty percent of wireless customers nationwide receive service pursuant to fixed-length

[6] Appellants Br. at 25-31.
[7] *Id.* at 34-35.
[8] Appellees Br. at 6-11.

contracts.[9] Some 2,677,472 Minnesotans have wireless service.[10] If the percentage of Minnesotans with fixed-length contracts approximates the national average, then Article 5 protects 1,606,423 citizens – roughly thirty-two percent of the state's population.[11]

Courts, and the FCC, have recognized that state consumer protection and contract laws may apply to wireless carriers without running afoul of Section 332(c)(3)'s preemption clause. For example, "state contract or consumer fraud laws governing disclosure of rates *or rate practices*" are not preempted.[12] Likewise, "billing information, practices and disputes" may be regulated by state contract or consumer fraud laws under the "other terms and conditions" reservation in Section 332(c)(3). Thus, "not all claims related to rates or billing are necessarily preempted" by Section 332(c)(3)(A).[13]

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[9] Appellants Br. at 24.

[10] *See In Re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Ninth Report, 2004 FCC LEXIS 5535, FCC 04-216, Table 2 (Sept. 28, 2004) ("*Ninth Competition Report*").

[11] *See* http://www.demography.state.mn.us/DownloadFiles/Estimates/2003Estimates.htm.

[12] *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1072 (7th Cir. 2004), *citing In re Southwestern Bell Mobile Systems, Inc*., Memorandum Opinion and Order, 14 FCC Rcd 19898, 19908, FCC 99-356, ¶ 23 (Nov. 24, 1999)("*SBMS*"); *and In re Wireless Consumers Alliance, Inc*., Memorandum Opinion and Order, 15 FCC Rcd 17021, FCC 00-292, ¶¶ 23-24 (Aug. 14, 2000) ("*WCA*").

[13] *Id.* at 1073, *citing SBMS*, 14 FCC Rcd at 19901, ¶ 7.

In addition, Section 332(c)(3) does not preempt damages claims against wireless carriers for violating state laws unless "they involve the court in ratemaking."[14] Only where "the court must determine whether the price charged for a service is unreasonable or where the court must set a prospective price for a service," have the courts or the FCC found state law claims preempted.[15] Where a case involves whether the wireless carrier provided service in accordance with the terms and conditions of its contract or the promises included in its advertising, "a court need not rule on the reasonableness" of the carrier's charge in order to provide relief under state law claims, "even though it could be appropriate to take the price charged into consideration."[16]

In *Fedor v. Cingular Wireless Corp.*, the court succinctly summarized preemption under Section 332(c)(3): "[T]he FCC distinguished between claims that would enmesh the courts in a determination of the reasonableness of a rate charged and those that would require examination of rates in the context of assessing damages, but would not involve the court in such a reasonableness inquiry."[17] The former claims are preempted, but the latter are not. Thus, the

[14] *Id.*, *citing WCA*, 15 FCC Rcd. at 17034, ¶¶ 23-24.
[15] *Id.*, *citing WCA*, 15 FCC Rcd at 17035, ¶ 25.
[16] *Id.*, *citing WCA*, 15 FCC Rcd. at 17035, ¶ 26.
[17] *Id.* at 1073.

Carriers' suggestion that "any claims related to the billing amount are automatically preempted" has been roundly rejected.[18]

Under Article 5, wireless carriers' contracts still establish the rates for, and other terms and conditions of, wireless service. Article 5 does not determine any particular rate or charge for wireless service, nor did the Minnesota legislature determine that a particular price or a particular means of charging for the carrier's service was unreasonable. Moreover, a court would not consider a wireless carrier's rate or its reasonableness in order to enforce Article 5 but would only look at whether the carrier made a substantive change in the contract's terms and conditions without the customer's affirmative consent.[19] As the *Fedor* court noted, "this is precisely the type of state law contract and tort claims that are preserved for the states under [Section] 332 as the 'terms and conditions' of commercial mobile services."[20] Since state courts are not preempted from rejecting wireless contract provisions that are unconscionable, unreasonable, illusory or adhesionary under state contract law,[21] state legislatures should not be preempted from enacting laws prohibiting specific practices by wireless carriers under their contracts.

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[18] *Id.* at 1074.
[19] Under Article 5, a carrier's rate could be patently unreasonable. *See GTE Mobilnet*, 111 F.3d at 477.
[20] *Fedor*, 355 F.3d at 1074.
[21] *See Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 168-74 (5th Cir. 2004)(dealing with wireless carriers' arbitration and change-of-law provisions in service contracts).

A. Article 5 Does Not "Directly Affect" Carriers' Rates.

The Carriers mistakenly argue that Article 5 is preempted because it "directly affects" their rates or rate structures, first by allegedly freezing rate increases for at least sixty days or more,[22] and second, by "capping" their rates for the term of the service contract.

However, there is no automatic, fixed sixty-day period during which rates or other contract terms are frozen under Article 5. As soon as customers consent to a wireless carrier's proposed change in the affected contract term or condition, the change becomes effective.

Similarly, the Carriers' assertion that Article 5 effectively "caps" their rates for the entire term of the contract rests on the flawed premise that requiring actual consent virtually guarantees that proposed rate increases will never be accepted.[23] In fact, if a carrier offers something of value in consideration for the substantive change in the contract's terms and conditions (such as expanded calling areas, increased free minutes, more vertical features, or discounts on additional phones), then customers may have good reason to accept the proposed change. But if a carrier wants to add to the customer's contractual obligations without offering anything in exchange, then customers should be entitled to withhold consent. To

[22] Appellants Br. at 26-30.
[23] Appellants Br. at 26-27; *see also* CTIA Br. at 22-23.

amici, that sounds like providing mutuality to the wireless contract – something that is hardly detrimental to consumers or a competitive wireless market.

B. Article 5 Applies Neutrally to All Wireless Carriers.

The Carriers wrongly assert that Article 5 is preempted because it targets the wireless industry and establishes special provisions to govern wireless contracts that differ from general state contract or consumer protection laws.[24] The carriers' interpretation of "neutral application" would effectively nullify Section 332(c)(3)'s reservation for state regulation of "other terms and conditions" of wireless service. "Neutral application" of state law occurs when state laws are neutral in their application across the industry being regulated. In other words, similar persons or entities are treated similarly.

Unquestionably Article 5 applies neutrally to all wireless carriers. No one carrier is singled out, no particular type of wireless service (such as analog vs. digital) is targeted, nor is any particular type of wireless offering proscribed. As noted above, the legislature targeted only the oppressive practices wireless carriers employ under their service contracts in Minnesota, consistent with existing state authority.

[24] CTIA Br. at 25.

III. STATES NEED TO PROTECT WIRELESS CONSUMERS.

In its brief, the Cellular Telecommunications and Internet Association ("CTIA") suggests that the Court should not look at this case in isolation.[25] *Amici* agree. The problems that the Minnesota legislature addressed are but one part of the larger problem in the wireless industry. Consumers are subjected to wireless carriers' unfair, misleading, and unscrupulous business practices every day. It is in this context that state laws like Article 5 are enacted – and needed.

A. Complaint Data and Customer Surveys Demonstrate the Seriousness of Problems in the Wireless Industry.

Over the past four years, *amicus* AARP has conducted three surveys, each of which concluded that consumers are dissatisfied with their wireless service. For example, in a recent survey of New York residents, AARP found that consumers overwhelmingly support state government action addressing widespread problems in the wireless market.[26] AARP found that "as more people come to rely on their cell phones as their primary phone and with older persons' reliance on wireless communications as a safety device, providing consumer protection to this industry has become a significant consumer issue." [27] AARP also conducted two larger

[25] CTIA Br. at 32.
[26] *Id.* at 3-4.
[27] Dinger, "The Need for Wireless Telephone Consumer Protections: A Survey of New York Residents," *AARP Knowledge Management*, at 6 (June 2004).

nationwide surveys and in both surveys found that consumers who use their phone more frequently are less satisfied generally.[28]

Surveys conducted by other consumer groups have yielded similar results and conclusions. For example, a recent report by the Better Business Bureau's ("BBB") notes that the wireless industry trails only automobile dealers in consumer dissatisfaction, with wireless complaints up 263 percent (from 5,928 to 21,524) between 2001 and 2002.[30]

B. States Have Begun to Take Action to Rein in Wireless Carriers.

States have begun to take action to rein in some of the wireless carriers' business practices. Earlier this year, the California Public Utilities Commission

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[28] *See* Baker & McLarty-Jackson, "Understanding Consumer Use of Wireless Telephone Service, Findings from an AARP Survey" *AARP Public Policy Institute* (Dec. 2000) ("*2000 Wireless Survey*"), available at http://research.aarp.org/consume/d17328_wireless.html; Baker & Kim-Sun, Understanding Consumer Concerns About the Quality of Wireless Telephone Service" *AARP Public Policy Institute* (June 2003) ("*2003 Wireless Survey*"), available at http://research.aarp.org/consume/dd89_wireless.html.

[29] Dinger, "The Need for Wireless Telephone Consumer Protections: A Survey of New York Residents," *AARP Knowledge Management*, at 6 (June 2004).

[30] Better Business Bureau, "Better Business Bureau Analysis of Cell Phone Complaints Reveals Root Causes of Customer Dissatisfaction," Press Release (May 4, 2004) http://www.bbb.org/alerts/article.asp?ID=511. A December 2003 survey by Consumers Union, publisher of the magazine Consumer Reports, found similar results. Telecomweb, "Consumers Union Intensifies Pressure on Wireless Service Providers" (Jan. 20, 2004), available at http://www.telecomweb.com/news/1073596741.htm.

("CPUC") adopted a Telecommunications Bill of Rights[31] to protect telecommunications consumers.[32] After four years, eighteen rounds of comments showing high levels of consumer dissatisfaction with wireless service,[33] multiple public hearings and workshops, extensive *ex parte* contacts and informal negotiations, the CPUC promulgated a comprehensive set of rules. Many of the appellants here participated in the CPUC rulemaking.[34]

The CPUC also fined Cingular $12.4 million in September 2004 for unfair business practices occurring from January 2000 to April 2002.[35] The CPUC

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[31] *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules,* R. 00-02-04, Interim Decision Issuing General Order 168, Rules Governing Telecommunications Consumer Protection, Decision 04-05-057, 2004 Cal. PUC LEXIS 240 (May 27, 2004); *upheld on reconsideration*, Decision 04-10-13 (Oct. 7, 2004).

[32] All carriers – local exchange carriers, pre-paid carriers, intrastate long distance carriers and wireless carriers – are subject to these requirements. *Id*. at *273.

[33] The CPUC received 3,200 contacts from consumers during the course of the rulemaking. *Id*. at *245. The CPUC received 5,698 wireless complaints in 2003 alone. *See Initial Comments of the Cellular Carriers Association of California on Issues Other Than Economic Impact*, CPUC Docket No. R.00-02-004, at 5 (Filed March 23, 2004) (on file with *amici*).

[34] In July 2002, the National Association of Regulatory Utility Commissioners ("NARUC"), an association of governmental agencies that regulate utilities adopted a resolution endorsing the CPUC's Bill of Rights and encouraging the FCC and other states to enact similar consumer protections. NARUC Resolution (July 2002), at http://www.naruc.org/associations/1773/files/bill_of_rights.pdf.

[35] *Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Wireless, U-3060, U-4135, and U4314, to Determine Whether Cingular Has Violated the Laws, Rules and Regulations of this State in Its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers*, 2004 Cal. PUC LEXIS 453 (2004).

determined that Cingular had aggressively marketed its service in areas where it knew it could provide little or no service and that, when customers complained and sought to terminate their contracts, Cingular refused to release the customers unless they paid early termination fees.

Consumer complaints regarding the wireless industry also attracted the attention of 32 states' attorneys general, who investigated the business practices of three major national wireless carriers (Verizon Wireless, Cingular and Sprint PCS)[36] and negotiated Assurance of Voluntary Compliance ("AVC") agreements with each in July 2004.[37] Under the AVCs' terms, each carrier must provide detailed information to consumers before the consumer purchases a cell phone and must offer a comprehensive return policy, including a three-day right to cancel with no penalties or activation charges and at least a fourteen-day right to cancel without incurring early termination fees. This multi-state action underscores the vital role state agencies must play to protect wireless consumers. Like the CPUC and the Minnesota legislature, the state attorneys general exercised their existing state authority to address wireless service problems.

C. The FCC Does Not Protect Wireless Consumers Or Address Wireless Carriers' Unreasonable Practices.

[36] The investigation focused on misleading advertisements and unclear or ambiguous disclosures of service terms and coverage areas.
[37] Each AVC is available at http://www.nasuca.org/AVC%20Documents.htm.

The record below, particularly the legislative history of Article 5, is replete with examples of the complaints consumers raised regarding wireless carriers' unilateral changes to their contracts. The complaints cited are not unique to Minnesota but have yet to be addressed by federal regulators.

Although the FCC has had jurisdiction over wireless carriers' rates and market entry since 1993, it kept no records regarding wireless customers' complaints until late 2001. Since the third quarter of 2001, the FCC has tracked the number of wireless complaints it receives on a quarterly basis. According to its quarterly reports,[38] the FCC received nearly 9,000 billing and rates-related complaints in 2002, and another 10,600 in 2003. The FCC received nearly 1,558 complaints regarding early termination actions under wireless carriers' contracts in 2002, and another 2,386 in 2003.[39]

The FCC's reports, and even the Minnesota Attorney General's experience,[40] substantially understate the number of consumers with complaints about these issues. According to a nationwide survey of wireless customers,

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[38] Available at http://www.fcc.gov/cgb/. There are no quarterly reports posted for 2004. The statistics cited by *amici* exclude inquiries the FCC receives.

[39] While the wireless industry may assert that twelve or thirteen thousand complaints a year is *de minimis* considering the numbers of wireless customers nationally, *amici* disagree. It is hard to imagine the Food & Drug Administration ignoring 10,000 complaints a year concerning adverse side effects from a widely used, FDA-approved drug, or the Consumer Product Safety Commission paying no heed to injuries involving a popular child's toy because it only received 12,000 reports.

[40] *See* Appellees Br. at 14.

nearly half (forty-six percent) did not know who to contact in case their carrier could not resolve a billing or service problem to their satisfaction.[41] Only four percent of the survey respondents indicated that they would contact the FCC and roughly the same number – five percent – indicated that they would contact state regulators. It is clear that a substantial number of wireless customers' complaints never reach the FCC or state regulators and consumer advocates. [42]

More significant is the total lack of any information regarding how, or even whether, complaints are resolved. The FCC's quarterly reports fail to identify the number of complaints attributable to any specific wireless carrier.[43] Based on their experience, *amici* believe that the vast majority of customer complaints produce no tangible remedies from the FCC, a natural by-product of the FCC's hands-off approach to the wireless industry.

D. The CTIA's Consumer Code For Wireless Service Does Not Protect Consumers.

The rising tide of consumer dissatisfaction with wireless carriers' practices and state regulatory scrutiny finally prodded the industry to take action to forestall more aggressive action by state regulators and consumer advocates, leading to the adoption of CTIA's voluntary "Consumer Code for Wireless Service" in 2003. In

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[41] AARP Wireless Telephone Service at 4.
[42] Research shows that consumers rarely complain. Best, Arthur, *When Consumers Complain*, at 118 (Columbia University Press, 1981).
[43] *Id.*, n. 14.

its brief, CTIA suggests that its code addresses the consumer concerns underlying Article 5's enactment.[44] CTIA's claim is overblown. Far from being an effective check on the wireless practices that prompted the Minnesota legislature to adopt Article 5, CTIA's code is little more than window dressing. As either a deterrent or an enforcement tool, it is both ineffective and toothless.

For example, CTIA's code sets 10 *aspirational* goals that all wireless carriers are *encouraged* to meet voluntarily. CTIA claims that "every wireless carrier that signs the [code] is committing to all 10 points" in the code.[45] Unfortunately, the ambiguous and equivocal language of the "10 points" offers no protection to consumers.

Competition, CTIA claims, is the real guarantor of compliance: "CTIA expects wireless carriers to ensure that their competitors are in compliance . . . if they are displaying the CTIA seal of compliance with the Code."[46] Relying on industry competition, however, to ensure code compliance, is illusory. Competition to date has not deterred wireless carriers from engaging in practices that mislead, frustrate and ultimately harm consumers. Moreover, there is no rigorous examination of wireless carriers' advertising campaigns, their marketing materials, or the terms and conditions of their customer contracts. There is no

[44] CTIA Br. at 11-12.
[45] CTIA, *Consumer Code for Wireless Service*, "Questions and Answers," at http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.
[46] CTIA Br. at 11 fn 4.

provision for disciplinary action against non-complying carriers – other than not allowing them to advertise CTIA's seal. Nor does it appear that CTIA will publish the names of carriers whose right to display the seal has been withdrawn. Furthermore, as a voluntary, industry effort, CTIA's members can change its code at any time.

The Court should recognize CTIA's code for what it is: "damage control" by an industry that desperately fears accountability to consumers. CTIA's code is no substitute for meaningful consumer protection laws like Article 5.

IV. THE WIRELESS INDUSTRY IS NOT SO UNIQUE THAT IT SHOULD BE EXEMPT FROM CONSUMER PROTECTION LAWS.

The Carriers assert that Article 5 must be preempted because of its impact on wireless carriers' national or regional business plans, including rates and service offerings. By this, the Carriers, suggest that the wireless industry is somehow uniquely ill-suited to state regulation.[47] This suggestion is wrong as a matter of law since the Carriers' suggestion flies in the face of Section 332(c)(3)(A)'s reservation to the states regarding "other terms and conditions" of wireless carriers' service. It is also factually incorrect.

A. Wireless Carriers Are No Different From Other Telecommunications Carriers.

[47] Appellants Br. at 22; CTIA Br. at 32-33.

The fact that wireless carriers have national or regional business plans hardly distinguishes them from other telecommunications markets. For years now, wireline interexchange carriers ("IXCs") (*i.e.,* long distance carriers), have offered regional or nationwide calling plans together with national interstate rates.[48] States regulate intrastate aspects of their services, including the access charges IXCs pay to local carriers or perhaps to wireless carriers,[49] yet IXCs compete vigorously from state to state, despite the fact that federal and state regulations and regulatory policies impact their intrastate operations differently.

For example, the FCC and many states allow subscribers, including those acting as the subscriber's agent, to authorize changes in the subscriber's interstate carrier or service.[50] For intrastate service, however, some states define the categories of persons able to authorize changes in a subscriber's service or carrier much more narrowly.[51] Similarly, states impose different requirements regarding:

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[48] *See, e.g.,* AT&T long distance plans, at http://serviceguide.att.com/ACS/ext/osg.cfm;

[49] *See AT&T Corp. v. FCC*, 349 F.3d 693 (D.C. Cir. 2003) (Sprint PCS filed state court action seeking to compel AT&T to pay for Sprint's termination of interexchange traffic).

[50] *See* 47 C.F.R. §§ 64.1100 – 1120. According to the FCC, at least 38 states have opted into its slamming regime for interstate service. http://www.fcc.gov/slamming/.

[51] For example, in West Virginia, only the "customer of record" (*i.e.,* the billed party) can authorize changes in service. *See W. Va. Code State Reg*. § 150-6-2.8.b. Similarly, in Maine and Texas, either the customer of record or his/her spouse can authorize changes in service. *See* 16 *Tex. Admin. Code* § 26.130(b)(2); *Rules of Maine P.U.C*., Ch. 296, § 1B.2.

the provision of disconnection notices to customers, billing format and appearance, or delinquent or unpaid accounts.

More recently, as regional Bell operating companies ("RBOCs") have obtained FCC authority to provide in-region long distance services,[52] they too have begun to introduce regional or national service offerings. These plans provide local, in-state and interstate long distance and other services, with rates that are uniform across regions of the country or even across the nation. For example, Verizon's local operating companies offer the "Freedom" package of "bundled" services to their customers.[53] In most Verizon states,[54] the monthly charge for the company's "Freedom Unlimited" package is $49.95, with an additional $29.95 if the customer wants "Freedom Unlimited with DSL. Despite the RBOCs' movement toward regionally- and nationally-priced service offerings, these local companies remain subject to intense, often varying, state and local regulation.

Wireless carriers themselves diminish their alleged uniqueness by holding themselves out as substitutes for incumbent local carriers. In recent years, wireless

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[52] *See* 47 U.S.C. § 271.

[53] *See* Verizon "Freedom Plan," http://www22.verizon.com/foryourhome/sas/VZ_varStateSelector.asp?ID=PKGFLD&validQ=&VNPA=&VNXX=&ID2=&LOBCode=&PromoTCode=&PromoSrcCode=&POEId=.

[54] *E.g.*, Connecticut, District of Columbia, Florida, Maryland, Massachusetts, In several other states (Delaware, Maine for example), Verizon's "Freedom Unlimited" Package is $54.95 per month (the DSL add-on is the same). In other states, the "Freedom Package" is $59.95, with the standard $29.95 for DSL (West Virginia, Michigan,).

carriers have increasingly sought, and received, designation as eligible telecommunications carriers ("ETCs") under Section 214(e) of the FCA.[55] ETCs are obligated to provide the equivalent of basic, voice-grade local telephone service and cannot relinquish their obligations unless other ETCs in the area ensure that affected customers continue to receive service.[56] In exchange for assuming these obligations, ETCs receive subsidies from the federal universal service fund.

More importantly, wireless ETCs' rates are already subject to some state review. For example, all ETCs must offer Lifeline service to qualifying low-income customers. Lifeline service, which is one of the supported services that state commissions consider in their annual ETC eligibility certifications to the FCC, prohibits carriers from imposing certain charges on participating customers.[57] In addition, in West Virginia, any carrier that has been designated an ETC is

[55] 47 U.S.C. § 214(e); *see, e.g., In re Federal-State Joint Board on Universal Service: Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd. 15168, FCC 00-248 (Aug. 10, 2000). In Minnesota, for example, seven wireless carriers – including three of the appellants – have apparently been designated ETCs. *See* Universal Service Administrative Company, "High Cost Support Projected by State by Study Area - 1Q2005," Appendix HC01, available at http://www.universalservice.org/overview/filings/2005/Q1/default.asp.
[56] *See* 47 U.S.C. § 214(e)(4).
[57] *See* 47 C.F.R. §§ 54.401 - .405.

required to offer "Tel-assistance" service to qualifying customers. The Tel-assistance rate is fixed by state statute and enforced by the state commission.[58]

The FCC itself established a significant state role in reviewing wireless ETCs' rates. Under the FCC's universal service rules, states are required to annually certify to the FCC, and the fund's administrator, those carriers that are eligible to receive such subsidies.[59] In 2003, the FCC amended its rules to require states to include in their annual certifications a statement certifying that the *rates* charged by all ETCs – including wireless carriers – in rural areas are reasonably comparable to a nationwide urban rate benchmark established by the FCC.[60]

Wireless carriers thus are willing to assume ETC obligations and commit themselves to a level of service heretofore provided by incumbent local carriers in order to receive federal universal service subsidies. But the Carriers want to avoid complying with consumer protection laws that would regulate the terms and conditions of their service. This is simply inappropriate.

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[58] *See W. Va. Code* §§ 24-2C-1 to -5. By statute, the Tel-assistance rate is to be set by the state commission at either the lowest rate offered by the carrier at the time the customer applies for service or $7.50, whichever is lower. *W. Va. Code* § 24-2C-3. Several wireless carriers have been designated as ETCs in West Virginia and are therefore subject to the Tel-assistance requirement.

[59] *See* 47 C.F.R. §§ 54.313 -.316.

[60] *See In re Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC Docket No. 96-45, FCC 03-249, ¶¶ 88-89 (Oct. 27, 2003.

Like the wireless carriers, IXCs and RBOCs have often decried dual regulation by the FCC and states. Indeed, the Carriers' claim that their particular technology is "borderless" and that state regulation will interfere with their nationwide operations is not novel. More than a century ago, the U.S. Supreme Court rejected a similar argument, writing: "[I]s [the telegraph] of such a nature, so extensive and national in character, that it could only be dealt with by congress? We do not think [so]."[61] Today, this Court has the same opportunity to reject such self-serving and baseless arguments.

B. Wireless Carriers Are Already Subject to Differing State Laws.

Like other types of telecommunications carriers, wireless carriers are already subject to a multitude of state-specific regulations. This fact too undercuts the Carriers' arguments that Article 5 poses a threat to their uniquely nationwide business plans.

For example, many states have established state-specific universal service funds that wireless carriers contribute to,[62] in addition to the federal fund

[61] *Western Union Tel. Co. v. James* 162 U.S. 650, 660 (1896) (state may regulate messages delivered in the state, whether or not the transmission originates beyond the state's borders).

[62] *See, e.g., Cellular Telephone Industry Ass'n. v. FCC*, 168 F.3d 1332, 1336-37 (D.C. Cir. 1999).

established in Section 254 of the FCA.[63] Similarly, wireless carriers are obliged to collect various state and local taxes or fees (*e.g.*, enhanced 911 fees).[64] In proceedings before the FCC, CTIA noted that wireless carriers are subject to approximately 14,412 federal, state and local taxing jurisdictions.[65] Despite the multitude of federal, state and local taxes, wireless carriers apparently manage to collect the required taxes through individual line item charges on consumers' monthly bills while maintaining their national business operations. In addition, wireless carriers find themselves subject to all manner of local zoning requirements affecting wireless cell towers' siting, construction and operation.

Curiously, the Carriers admit they are subject to the "neutral" application of state unfair business practices laws but overlook the fact that these laws subject them to different state prohibitions and remedies.[66] Indeed, the same business practice by one wireless carrier could be the subject of multiple state court actions, creating the risk that the remedies for each case will differ. Public policy and legal precedent support this type of federalism, which the Carriers decry as

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[63] 47 U.S.C. § 254; *see also Cal. Pub. Util. Code* § 871(universal lifeline telephone).

[64] *See, e.g., W. Va. Code* § 24-6-6b; *Cal. Pub. Util. Code* §§ 2881 (deaf and disabled telecommunications Program) *and* § 2892 (wireless 911); *Minn. Stat*. § 403.11 (emergency telecommunications fee).

[65] *See In re National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers*, Opposition of CTIA – The Wireless Association, CG Docket No. 04-208, at 4 (Filed July 14, 2004).

[66] Appellants Br. at 34; CTIA Br. at 10.

"balkanization." State-specific laws that prevent or remedy harms to wireless consumers under the "other terms and conditions" clause of Section 332(c)(3)(A) should not be treated differently.

C. Other Nationally Competitive Industries Are Subject to State Regulation.

CTIA argues that "any construction of the phrase, 'other terms and conditions' that permits substantial regulation *beyond what applies to other competitive industries* would conflict with Congress' goal of deregulating the wireless industry as competition develops."[67] CTIA fails to acknowledge that many different competitive industries are similarly subject to dual state and federal regulation.

For example, national employers must comply with state employment and labor laws in addition to extensive federal labor laws.[68] Similarly, many competitive industries (*e.g.*, automobile manufacturers, oil and gas producers and refiners, and other manufacturers) must comply with state environmental protection laws and adjust their business operations accordingly.[69] The restaurant industry and other food services are also subject to scores of state, county or city

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[67] CTIA Br. at 32 (emphasis added).

[68] *See e.g., Cal. Lab. Code* §§ 510 *et seq.*; *Or. Rev. Stat*. §§ 652.010 - .990; *Minn. Stat*. §§ 177.21-177.35.

[69] *See, e.g.*, *Cal. Gov't Code* §§ 65800 *et seq*. (county and city zoning); *Cal. Health & Safety Code* §§ 39000 *et seq*. (clean air laws); *Minn. Stat*. § 116.07 (air pollution standards).

food safety and public health statutes and regulations.[70] Insurers and lending institutions are also heavily competitive, and heavily regulated through disclosure laws, agent licensing, bond requirements and other state-specific requirements.[71]

In each of these cases, the federal government has taken steps to regulate aspects of the industry but has left room for state and even local regulation. While these industries might prefer answering to only one centralized regulatory authority, they rarely object to the current situation and instead recognize it as the cost of doing business on a national or regional scale.

Even so-called "borderless" industries serve as examples of dual state-federal regulation. Telemarketing and mail order houses must comply with varying state regulations on the time, place and manner of their contacts with consumers.[72] Likewise the Internet is subject to dual state-federal regulation. Minnesota, for example, has enacted laws regulating Internet service providers,

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[70] *See, e.g.*, *Cal. Health & Safety Code* §§ 110425 *et seq*. (food safety); i*d.*, §§ 113700 *et seq*. (uniform retail food facilities law); *N.Y. Pub. Health Law* §§ 1350-1355 (Consol.) (food handling laws); 410 *Ill. Comp. Stat.* 650/0.01 -3.1 (sanitary food preparation); *Minn. Stat*. § 157.16 (food establishment licensure).

[71] *See*, *e.g.*, *Cal. Ins.Code* §§ 1631 *et seq*. (agent licensing requirement); i*d. at* §§ 12420 *et seq*. (mortgage insurance regulations); *Cal. Fin. Code* § 17000 *et seq*. (escrow agent regulations); *Ohio Rev. Code* §§ 3905.01 to .99 (insurance producers licensing).

[72] *See, e.g., California Bus. & Prof. Code* §§ 17511 *et seq*. (requires telemarketer to register with state authorities and prescribes disclosures)

email, and electronic transactions.[73] Finally, most wireless carriers have "brick and mortar" storefronts and media advertising in states like Minnesota that clearly subject them to state regulation.

Far from "standing as an obstacle"[74] to Congress' decade-old goal of leaving wireless rates to be set as in any other competitive industry, a rational interpretation of Section 332 allowing for strong state consumer protection authority would put this no-longer fledgling industry[75] on equal footing with even the most competitive industries.

D. Article 5 Does Not Undermine Federal Detariffing Policy.

The FCC claims that Article 5 "undercuts the federal policy of detariffing" the wireless industry by "making it difficult for carriers to respond quickly to competitors' price changes within the 60-day waiting period established by the Minnesota legislation.[76] This argument is illogical.

By its terms, Article 5 applies to *all* wireless carriers operating in Minnesota. All wireless carriers are obliged to comply with Article 5 by not implementing any

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[73] *Minn. Stat*. §§ 325M *et seq*. (Internet service providers and privacy of subscriber information); *id.*, § 609.749 (repeated emails defined as harassing); *id.* § 325L (Uniform Electronic Transactions Act); *see also California Bus. & Prof. Code* §§ 17529 *et seq.* (California law regulating spamming).
[74] CTIA Br. at 33.
[75] The wireless industry has grown from 79 million customers in 1999 to over 160 million subscribers, generating over $88 billion in revenues in 2003. *See Ninth Competition Report,*¶¶ 20-21 & Table 1.
[76] FCC Br. at 18.

substantive changes to the terms and conditions of a customer's service contract absent customer consent. If a wireless carrier chooses to follow a competitor's lead and raise its rates, extend the term of its contracts, or make similar substantive changes to the terms and conditions of its customers' service, it is at no competitive disadvantage in doing so. Like the competitor to which it is responding, the wireless carrier must comply with Article 5.

The foregoing point highlights the illogical premise of the FCC's and the Carriers' argument. Both devote considerable attention to the growth of the wireless industry and its competitive nature. The growth of the wireless market has indeed been impressive.[77] Wireless carriers have been detariffed since 1994, and the FCC has determined that wireless carriers' rates are presumptively reasonable because carriers lack market power.[78] There is no shortage of carriers to serve customers either – at last count, there were over 1,000 wireless carriers operating nationally[79] and it is estimated that ninety-seven percent of the population has access to three or more wireless carriers.[80]

In light of the growth and competition in the wireless market, wireless carriers' need for flexibility begs the question why a wireless carrier would

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[77] *See, supra*, fn. 75.
[78] FCC Br. at 8.
[79] *See In re Numbering Resource Optimization*, Fourth Report and Order, CC Docket No. 99-200, FCC 03-126, ¶ 18 fn. 51 (June 18, 2003).
[80] FCC Br. at 11.

respond to a competitor's rate increase with an increase of its own. Typically, in a competitive market, carriers want flexibility to be able to respond quickly to *decreases* in a competitor's rates – *not increases*. In fact, the lack of flexibility decried by the wireless industry and the FCC is created to distract the Court from the very real consumer protection concerns noted by the Minnesota legislature.[81]

CONCLUSION

Amici NASUCA, AARP and NACA respectfully request that this Court affirm the District Court's Order.

Respectfully submitted,

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[81] CTIA's claim that wireless carriers need the flexibility of their change-in-terms contract provisions in order to respond to government mandates is misleading and self-serving. CTIA Br. at 13-14. Many of the so-called "regulatory" fees added to consumers' wireless bills are not mandated or even authorized by government. Instead, the fees are imposed by choice and go to the carriers rather than a government agency or program. *See NASUCA Fees Petition,* Petition, at 10, 44-59 (Filed March 30, 2004), available at http://www.nasuca.org/TIB%20Petition%203-25%20Clean.doc. Article 5, as subsequently interpreted by the District Court, provides all the flexibility wireless carriers need to respond to increases in legitimate government-mandated fees.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amici Curiae AARP, NACA and NASUCA certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in a 14-point, proportionately spaced typeface utilizing Microsoft Word 2000 and contains 6,920 words.

Dated: December 16, 2004

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Patrick W. Pearlman

CERTIFICATION OF VIRUS-FREE DISKETTE

Pursuant to Eighth Circuit R. App. P. 28A(d), the undersigned counsel certifies that the enclosed computer diskette containing Brief for Amici Curiae AARP, NACA and NASUCA has been scanned for computer viruses and is virus-free.

Dated: December 16, 2004

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Patrick W. Pearlman

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2004, I served on the persons listed below true and correct copies of the Brief for Amici Curiae AARP, the National Association of State Utility Consumer Advocates, and the National Association of Consumer Advocates in Support of Appellees and Affirmance by causing copies thereof to be mailed, first class U.S. mail, postage pre-paid to the addresses listed below:

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