

**BEFORE THE
UNITED STATES SENATE**

COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE

**Testimony of
JOHN R. PERKINS
CONSUMER ADVOCATE OF IOWA
PRESIDENT OF THE NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES**

**Regarding
State and Local Issues And Municipal Networks**

**Washington, D.C.
February 14, 2006**

**Office of Iowa Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063
(515) 281-5984
(515) 242-6564 (facsimile)
Email: jperkins@mail.oca.state.ia.us**

**National Association of State
Utility Consumer Advocates
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
(301) 589-6313
(301) 589-6380 (facsimile)
Email: nasuca@nasuca.org**

**Testimony of John R. Perkins, Consumer Advocate of Iowa, President of the
National Association of State Utility Consumer Advocates
Before the United States Senate Committee on Commerce, Science and
Transportation**

“State and Local Issues and Municipal Networks”

Chairman Stevens, Co-chairman Inouye, thank you for this opportunity to appear before your committee to discuss the important topic of the sharing of responsibilities between federal and state agencies responsible for enforcing consumer protection laws in the telecom industry. My name is John R. Perkins. I am the Consumer Advocate for the state of Iowa and am currently serving as the president of the National Association of State Utility Consumer Advocates. NASUCA is an association whose members are, for the most part, the statutorily authorized state officials responsible for representing their citizens in utility matters before their state public utility commissions, as well as before state and federal courts, federal agencies and Congress. They operate independently from their state PUCs. NASUCA currently has members from 43 states and the District of Columbia.

No one knows better than the members of this committee of the vast changes that have occurred in the telecommunications industry since the enactment of the Telecommunications Act of 1996. Technology that was barely, or not at all foreseeable in 1996 – save possibly by a few science fiction writers – is or will soon become a reality in this industry. Cell phones that take pictures, play songs, allow us to view our email, websites and favorite television shows,

even navigate for us in unfamiliar cities and telephones using the internet are all recent and still nascent technologies.

What is not new in this industry is the need for consumer protection laws and the vigorous enforcement of those laws by state and federal officials to protect the purchasers and users of these devices.

The telecom industry is no different than any other industry in the world. As long as there is a buck to be made by cheating unsuspecting individuals, there are a few unscrupulous operators who will do so. Others simply feel the doctrine of *caveat emptor* is a perfectly acceptable and legitimate creed to follow in doing business and if people don't protect themselves, they have no one to blame but themselves if they fall prey to someone smarter. Cramming¹ and slamming² are two of the most prevalent forms of consumer scams in the telecom industry.

While slamming is not so much of a problem with cell phones, certainly cramming continues to be an issue. Furthermore, long and complicated cell phone contracts routinely used by the carriers setting out a consumer's obligation to the cell phone company, usually for several years, are the norm and provide fodder for mischief, intentional and unintentional.

¹ "Cramming" refers to "charging a consumer for services that were not ordered, authorized or received." *Brittan Communications Int'l. Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 n. 2 (5th Cir. 2002).

² "Slamming" is "generally recognized as 'the illegal practice of changing a consumer's telephone service without permission.'" *Lovejoy v. AT&T Corp.*, 111 Cal.Rptr.2d 711, 714 n. 1 (Cal. App. 2001), citing FCC Consumer Facts.

NASUCA has become increasingly concerned with the efforts of the wireless and VoIP industries to persuade the FCC that it should assume total enforcement authority over all business practices of its members and totally preempt states that enact or enforce consumer protection laws applicable to the way those same companies do business in those states. NASUCA is even more concerned with the apparent success those industries have had as evidenced by the FCC's recent unilateral bold assertion it is to be the sole enforcer of consumer protection laws in the telecom industry, to the exclusion of the states. *See, I/M/O Truth-in-Billing and Billing Format: National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170 & CG Docket No. 04-208, FCC 05-55 (Rel. March 18, 2005 ("Second FNPRM"). A summary of the Second FNPRM was published in the Federal Register on May 25, 2005. See 70 Fed. Reg. 29979.*

The FCC asserts it has the authority to preempt states from enacting and enforcing industry-specific laws passed to protect that state's consumers from the various scams and schemes imaginative con artists will always devise. Assertions that are based on the FCC's agreement with the wireless and VoIP industries that cell phone and VoIP providers are nationwide in their scope of business (which is true) and it is too cumbersome for these nationwide providers to have to comply

with numerous and allegedly different state laws governing their conduct (which is not true).³ Assertions, we feel, that do a grave disservice to consumers.

In fact, the FCC's position is that not only does it have the authority to preempt states from regulating wireless rates, it also has the authority to preempt state consumer protection statutes dealing with "non-rate" items on the ground "there are clearly discernable federal objectives that may be undermined by states' 'non-rate' regulation of CMRS carriers billing practices." *Second FNPRM* at para. 50. This assertion by the FCC contradicts Congress' clear statement otherwise.

It is our concern the FCC has unilaterally attempted to take its authority to a place Congress has not yet been willing to go – uniform national standards applicable to all of the business practices of wireless and VoIP carriers that will virtually eliminate the states' traditional consumer protection role as to these telecommunication technologies. This attempt not only intrudes on traditional rights of the states to determine their own consumer protection laws, but also intrudes on this body's right to balance the various and diverse public interests and to determine whether uniform national standards in these areas are, as a matter of public policy, necessary. A solitary federal agency should not have that authority.

The courts have held the states have an important interest in enforcing their consumer protection statutes, an interest that has been recognized by the Supreme

³ See, e.g. *Second FNPRM* at para. 52 "We believe that limiting state regulation of CMRS and other interstate carriers' billing practices, in favor of a uniform, nationwide, federal regime, will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."

Court of the United States. *See, e.g., Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002), citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 563, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980). The courts have also observed that Congress has given the states “some latitude to ‘protect the public safety’ and ‘safeguard the rights of consumers.’” *Cedar Rapids Cellular*, 280 F.3d at 800, citing 47 U.S.C. § 253(b).

The broad constitutional underpinning of preemption is the Supremacy Clause of the United States Constitution. Clearly, laws passed by Congress preempt conflicting state laws. Where there is no conflict, however, dual sovereignty allows complementary state and federal laws to exist. Furthermore, the presumption is that Congress does not intend to preempt state law, unless it speaks with clarity otherwise.

Nothing in the Constitution, the Act, judicial precedent or the telecommunications industry supports the broad preemption asserted by the FCC in the *Second FNPRM*. State commissions have long regulated the billing practices of local, interexchange and wireless carriers, in order to ensure that those practices are fair, reasonable, lawful, nondiscriminatory, etc. under terms of state law. These regulations have existed alongside federal regulatory, or deregulatory, policies and rules.

According to the FCC, such state regulations must now be preempted in order to achieve its goal of promoting competition. The FCC does not discuss what changes in the law compel this sweeping change in regulatory policy. The

FCC cites no expression of Congressional intent or any particular provision of the Act in support of its conclusions. In fact, the expressions of Congressional intent in the 1993 amendments to 47 U.S.C. § 332(c)(3)(A) contradict the FCC's conclusions. Section 332(c)(3)(A) expressly preserves to states jurisdiction over "other terms and conditions" of wireless service. The legislative history of the section provides strong evidence of Congress' intent that preemption of state jurisdiction over commercial mobile services was meant to be limited, and that the reservation of jurisdiction to the states should be widely, not narrowly interpreted. Nothing has changed the legal backdrop against which the FCC's order was issued.

In fact, the FCC's stated rationale for the desirability of a uniform national standard – wireless is an national industry and therefore should not be subject to a myriad parochial state interests – is a rationale without substance. The question is not whether the wireless industry is a national industry – it is, as is the banking industry, the insurance industry, the trucking industry, the drug industry, the tobacco industry, the credit industry and a host of others. The question is, do states have a legitimate interest in crafting their own consumer protection laws regarding wireless and VoIP in areas not otherwise reserved by the federal government, such as rates and entry into the market as explicitly reserved in 47 U.S.C. § 332(c)(3)(A)? Clearly, the answer is yes. States have long protected their citizens in whatever unique ways they desire, ranging from contract terms that were, in their judgment, onerous or necessary or from business practices they

deemed not desirable. For instance, most states have unique laws governing credit terms of national companies and unique franchise terms that must be in (or out of) national franchise agreements in their states.

Those requirements exist alongside federal laws governing the same fields – federal laws that are usually a floor. Yet Congress, or the federal agencies regulating those areas, have not felt the need to preempt the states from enacting those laws, even though they usually, to some degree or another, force “national” industries to craft their dealings with one states’ citizens in a manner different than their dealings with those of another state. And, if asked, most executives in those national industries would undoubtedly say they also would prefer not having to deal with 50 different state laws. Yet they do and they survive and make a profit, usually. If they don’t, it’s not because of the difficulty with complying with different state laws by the national headquarters.

The manner in which a person makes a telephone call should not be dispositive of whether that person’s state consumer protection laws apply to the carrier providing the service. If that person enters into a contract with a wireless, wireline or VoIP provider, the state has a legitimate interest in assuring that its citizens will be treated fairly and not taken advantage of – just like the state has a legitimate interest in assuring its citizens will be treated fairly with respect to their need to have insurance, banking, credit terms and the like.

Not only is the FCC’s unilateral assumption of power constitutionally suspect, there are very real and practical negative considerations flowing from its

unilateral preemption fiat. Those problems were summed up by FCC

Commissioner Michael Copps in his separate statement in the FCC's rulemaking in this matter:

In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today. . . . Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.

Second FNPRM, separate statement of Commissioner Michael J. Copps. How is the FCC going to investigate the thousands of complaints it will receive concerning wireless business practices? I can't say it anymore eloquently than did Commissioner Copps: "I'm afraid consumers will remember that when they called this Commission for help understanding their bills, we hung up." *Id.*

States play a vital role in protecting their citizens from the unscrupulous in ways they deem appropriate for that state. No doubt, wireless and VoIP providers would prefer not to have to deal with 50 separate state attorneys general or public utility commissions enforcing their statutes protecting their consumers.⁴ They would much prefer to deal with a single understaffed and overworked federal agency. However, allowing that to occur is a policy decision for this body to make –not the FCC.

In your deliberations on this important issue, I hope you will not heed the false siren song sung by these industries that only uniform federal laws will allow

⁴ In fact, in a 1996 survey, it was noted 19 state PUCs (subsequently raised to 22 states), had no authority over wireless. In addition, attached to the printed testimony is a spreadsheet of a NASUCA survey of complaints filed with the FCC's Consumer and Government Affairs Bureau that reveals the majority of wireless complaints involved rates, which states are explicitly prohibited from regulating.

them to prosper and profit, as did the FCC. They should be asked over and over, as has NASUCA: why are your industries so different from all the other national industries that must comply with dual federal and state consumer protection laws governing their conduct, that you should be treated differently? They have had no reasonable answer for us and, I feel confident, they will have no reasonable answer for you. Once you ask that question and receive the expected answer (more likely nonanswer) I am also confident Congress will deem it not advisable to preempt state consumer protection laws applicable to these industries.

Thank you for this opportunity to testify. I would be happy to address any questions.