Perspectives from FSF Scholars
December 13, 2022
Vol. 17, No. 62

The Ninth Circuit Should Uphold Preemption of State Rate Controls on Wireless Services

by

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The U.S. Court of Appeals for the Ninth Circuit will soon be issuing a decision about the scope of federal preemption of state regulation of entry and rates for mobile services. A key ingredient of the success of mobile wireless services is the bar on state regulation of mobile provider market entry and price controls under Section 332 of the Communications Act. But a California Public Utilities Commission (CPUC) requirement that all wireless provider participants in the California LifeLine Program offer eligible subscribers a mobile service plan with a $0 co-payment amounts to impermissible rate regulation by the state.

Therefore, in *National Lifeline Association v. Batjer*, the court should vindicate Section 332 from misguided arguments that preemption of state rate regulation is disfavored or that the preemption provision has been repealed. It should hold that the CPUC's rate control mandate is barred by federal law.

Section 332(C)(3)(A) of the Communications Act was originally passed by Congress as part of the Omnibus Budget Reconciliation Act of 1993. The provision states, in principal part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of mobile services.

Preemption of state laws regulating rates and entry of wireless services has been a critically important component of the light-touch federal regulatory framework for wireless services. The free market-oriented policy toward wireless that has prevailed for nearly 20 years has promoted strong investment, innovation, and competition in wireless services. Capital expenditures made over the life of the wireless industry exceed $635 billion, including a record $35 billion in private capital investment in wireless networks in 2021. Over the last 30 years, wireless technology has advanced from 2G analog voice to 5G data-rich broadband services. Today, most consumers enjoy competing service from three nationwide wireless providers, with considerable additional mobile wireless competition from regional providers, local providers, and by emerging cable-hybrid multichannel virtual network operators (MVNOs).

At issue in *National Lifeline Association v. Batjer* is an order by the California Public Utility Commission that required all wireless provider participants in California's LifeLine Program to offer at least one plan to low-income subscribers with a $0 co-payment. Wireless providers that participate in the state's program receive monthly subsidy support for service plans that meet certain minimum standards set by the CPUC. The subsidies, which are funded by surcharges assessed against voice service subscribers in California, enable the offering of discounted service to low-income consumers. Remarkably, the CPUC's order requiring service offerings discounted to a rate of $0 never even cited Section 332(c)(3)(A)'s express preemption provision barring state regulation of rates for wireless services. Instead, the CPUC order took the position that the agency didn't need rate jurisdiction over wireless providers to regulate their voluntary participation in the California LifeLine Program.

Plaintiff National Lifeline Association (NaLA) filed a lawsuit challenging the CPUC's $0 co-pay rule on the grounds that it was expressly preempted by Section 332(c)(3)(A). In a May 2021 order, the U.S. District Court for the District of Northern California granted NaLA's motion for judgment on the pleadings. The CPUC appealed the decision, and the Ninth Circuit heard oral arguments in the case in May 2022. After oral arguments, the Ninth Circuit invited the FCC to address whether Section 332(c)(3)(A) preempts the CPUC's order. The Commission filed its amicus brief with the court on August 29, 2022.

The Ninth Circuit's forthcoming decision hopefully will bolster the preemptive force of Section 332(c)(3)(A) and thereby ensure that the market-friendly policy established by Congress for mobile services is preserved.

First and foremost, it is important for the court to recognize that Section 332(c)(3)(A) is an express preemption provision that should be applied in light of its plain meaning and not be narrowly construed. In its briefing, the CPUC argues that preemption of its California Lifeline regulation is "disfavored," that "a strong inference exists that Congress did not intend to preempt state regulation," and that a "presumption against preemption" applies to Section 332(c)(3)(A). But while such a narrow reading may apply in conflict preemption cases, it does not apply in cases involving express preemption clauses like Section 332(c)(3)(A). Under Supreme Court preemption decisions such as *Chamber of Commerce of U.S. v. Whiting* (2011), when a statute contains an express preemption clause, the court does not invoke any "presumption against preemption" but instead focuses on the words of Congress for evidence of preemptive intent.

Additionally, the court should recognize that Section 332(c)(3)(A) has *not* been repealed or narrowed by Section 254(i). That section, which was adopted by Congress as part of the Telecommunications Act of 1996, states that "[t]he Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." The CPUC argues that Section 254(i) "gives direct rate regulation authority to the states" because the terms "just and reasonable" are historical ratemaking terms. And the CPUC argues further that Section 254(i) should prevail over Section 332(c)(3)(A) in the event of any conflict between the two provisions because Section 254(i) was passed by Congress three years after Section 332(c)(3)(A). But the CPUC's reading of the law is incorrect because Section 254(i) is an aspirational provision that does not conflict with or override the Section 332(c)(3)(A)'s express preemption clause. In *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313,322 (5th Cir. 2001) the U.S. Court of Appeals upheld the FCC's aspirational reading of 254(i) as a "permissible construction of the statute" under the *Chevron* doctrine.

Moreover, the court should decline to address speculative arguments, made by the FCC's Office of General Counsel (OGC) in an amicus curiae brief, that state ratemaking authority might exist to impose rate controls for purposes of advancing universal service. Section 332(c)(A)(3) states:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such a State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

But the CPUC did not base its $0 co-payment rule on that statutory provision, and the universal service exception isn't at issue in the case. Beyond that, and significantly, the OGC admitted in its amicus brief:

> The Federal Communications Commission (FCC) has never addressed whether states may advance universal service by requiring wireless providers to offer minimum service standard plans with a $0 co-payment as a condition of receiving state subsidies through a voluntary program like California LifeLine.

Given OGC's admission that the FCC has adopted no rules or other policy relevant to the state authority issues that are before the Ninth Circuit, its decision to file an amicus brief offering conjectures about the scope of state ratemaking power in future cases is suspect. CTIA's amicus brief – filed by its counsel of record, former FCC Solicitor General Thomas Johnson – pointed to past instances in which the OGC sensibly declined to address legal issues in areas where the Commission lacked defined policy. Since the OGC's brief was not produced through any formal administrative procedure or decisionmaking open to public comment or determination, or formally approved by the Commission, CTIA's amicus brief recommended – rightly – that the OGC's brief falls outside the scope of *Chevron* and that the court should not give any deference to it.

As to the CPUC order that gave rise to *National Lifeline Association v. Batjer*, the court should recognize the $0 co-pay requirement for California's LifeLine program eligibility constitutes state rate regulation of mobile services and thus is expressly preempted by Section 332(c)(3)(A). The CPUC exercised its rulemaking authority to adopt a final state agency action that set a price of zero for wireless service offerings.

Contrary to CPUC's characterization of California's LifeLine program as entirely voluntary, the agency's $0 co-pay requirement has effectively operated as a mandate in certain respects. Under the CPUC's order, a wireless provider's decision to end its participation in the program requires at least 30 days advance notice, and thus even parties who wish to withdraw from the program would have to abide by the $0 co-pay rule for at least a month.

Notably, there is case law that supports a finding that the CPUC's 30-day rule is impermissible. In *Cellco Partnership v. Hatch* (2005), the U.S. Court of Appeals for the Eighth Circuit held that Section 332(c)(A)(3) preempted a Minnesota regulation that required 60-day advance notice to consumers of wireless service rate increases. According to the court, the state's 60-day freeze on rates constituted impermissible rate regulation. Moreover, participation in the California Lifeline program is mandatory for wireless providers T-Mobile and Verizon. Merger approval orders issued by the CPUC in 2020 and 2021, require those providers to participate in the program and be subject to program rules for a period of 20 years so long as each respective provider continues to operate in California.

Yet even if the court deems the $0 co-payment rule voluntary, it still should be preempted. Although the CPUC tries reading into the statute an exception for rate controls via conditional grants of state funds, the statutory text makes no such allowance. The language of Section 332(c)(3)(A) states broadly that no state or local government shall have "any authority" to regulate the rates charged by "any" commercial or private mobile service provider.

An implied voluntariness exception to preemption of state regulation of mobile rates also ought to be rejected. Section 332(c)(3)(A) expressly permits a state to petition the FCC for authority to regulate wireless rates and its petition is to be granted if the state can demonstrate that market conditions "fail to protect subscribers adequately from unjust and unreasonable or rates that are unjustly or unreasonably discriminatory." But the CPUC did not file such a petition and that part of the statute is not at issue in the case.

Furthermore, an implied voluntariness exception to Section 332(c)(3)(A) was rejected by the U.S. District Court for the Northern District of Georgia in *CTIA v. Echols* (2013). In *Echols*, the court ruled that requiring wireless provider participants in the Georgia Lifeline program to collect a $5 minimum service rate charge was "clearly a rate regulation" and therefore subject to preemption. In *National Lifeline Association v. Batjer*, the Ninth Circuit should reach a similar conclusion and find that Section 332(c)(3)(A) preempts California's $0 co-payment rate requirement for wireless provider participants in the California Lifeline Program.

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