No. _____

IN THE
Supreme Court of the United States

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

Petitioner,

v.

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street
Suite 1100
Saint Paul, MN 55101-2128

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In May 2004, the Minnesota Legislature enacted the "Consumer Protections for Wireless Customers" law in direct response to complaints by Minnesota consumers that wireless telecommunications service companies were unilaterally changing contract terms without notice or customer consent. 2004 Minn. Laws ch. 261, art. 5 (codified at Minn. Stat. § 325F.695 (2004)). The Minnesota law requires wireless service providers to disclose contract terms and to obtain customer consent to certain types of contract changes. The questions presented are:

1. Whether Minnesota's law requiring wireless service providers to provide notice and obtain customer consent before they change the terms of an existing contract is preempted by 47 U.S.C. § 332(c)(3)(A).

2. If the Court determines that any portion of Minn. Stat. § 325F.695 (2004) has been preempted by 47 U.S.C. § 332, whether the remaining portions of the statute are severable and enforceable.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Mike Hatch, in his official capacity as Attorney General of Minnesota, was the defendant-appellee in the court of appeals.

Respondents Cellco Partnership d/b/a Verizon Wireless, Verizon Wireless (VAW) LLC d/b/a Verizon Wireless, Duluth MSA Limited Partnership d/b/a Verizon Wireless, Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., American Cellular Corporation, Rural Cellular Corporation d/b/a Cellular 2000, Sprint Spectrum L.P., WirelessCo, L.P., AT&T Wireless Services of Minnesota, Inc., VoiceStream Minneapolis, Inc., and T-Mobile USA, Inc. were plaintiffs-appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Mike Hatch, in his official capacity as Attorney General of Minnesota, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-15a) is reported at 431 F.3d 1077 (8th Cir. 2005). The order of the district court on plaintiffs' motion for a preliminary injunction and dissolving its temporary restraining order (Pet. App., *infra*, 16a-32a) is not reported but is available at 2004 WL 2065807 (D. Minn. Sept. 3, 2004). The temporary restraining order of the district court (Pet. App., *infra*, 33a-44a) is not reported but is available at 2004 WL 1447914 (D. Minn. June 29, 2004).

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of 47 U.S.C. § 153, 47 U.S.C. § 332, and Minnesota Statutes § 325F.695 and

§ 645.20 are set forth in the Appendix at Pet. App., *infra*, 45a-49a.

STATEMENT OF THE CASE

I. Background

By December 2004, *184.7 million American customers*, or more than sixty percent of the population of the United States, subscribed to wireless telephone service. *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Tenth Report, WT Docket No. 05-71, 2005 WL 2429714 (F.C.C.), at *2 (rel. Sept. 30, 2005). And just as prolific as the number of wireless customers is the number of complaints generated by wireless phone use. In 2002, the Better Business Bureau ("BBB") received more complaints about the cellular (or wireless) industry than any other industry in the country. C.A. App. 0436.[1] In 2003, the number of complaints lodged with the BBB against the wireless industry was second only to the number against automobile dealers. *Id.* In 2004, the wireless industry once again ranked as the most-complained about industry in the country. *See* The Council of Better Business Bureaus, 2004 Summary at iv (United States BBBS Top Ten Complaints), http://www.bbb.org/about/stat2004/04summary.pdf (last visited March 6, 2006).

In 2004, the Minnesota Legislature enacted the "Consumer Protections for Wireless Customers" statute

[1] Citations to "C.A. App." are to the Joint Appendix filed with the court of appeals.

(the "Act") to protect Minnesota wireless consumers from serious problems involving wireless providers' abuse of customers' service contracts. *See* Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Laws ch. 261, art. 5). The Act includes three basic consumer protection provisions. First, wireless providers are required to give customers a copy of their contract. Minn. Stat. § 325F.695, subd. 2 (2004). Second, wireless providers are required to give notice of and obtain a customer's affirmative consent to any substantive change in the contract proposed by the provider.[2] *Id.*, subd. 3. Third, when a customer proposes a change in the contract, the provider is required to disclose any rate increase or contract extension that could result from the customer's proposed change and to maintain a record of the disclosures. *Id.*, subd. 4.

In adopting the Act, the Minnesota Legislature was clear that the statute was intended to protect consumers from wireless providers' unfair business practice of unilaterally changing substantive terms of service contracts, and to ensure meaningful customer assent to contract terms and changes. The Legislature wanted to address concerns like those expressed by John Povejsil, who testified at a legislative hearing that his wireless provider had converted his month-to-month contract into a one-year contract without his knowledge or consent. C.A. App. 0333. Povejsil became aware of this unilateral contract change only after he called to cancel his contract, and the company imposed an

[2] A "substantive change" is defined in relevant part as a change in "a term or condition in a contract that could result in an increase in the charge to the customer under that contract *or* that could result in an extension of the term of that contract." Minn. Stat. § 325F.695, subd. 1(d) (2004) (emphasis added).

"early termination fee" of $150, claiming that he was terminating the contract before the end of the new, and unilaterally imposed, one-year term. *Id.* at 0333, 0335. Povejsil paid the termination fee, explaining that it is not cost-effective for individual consumers to dispute the charge. *Id.* at 0336.

Similarly, the Minnesota Legislature considered consumer Melinda Peterson's testimony that her wireless provider extended her contract term without notice or her consent when she merely added nights and weekends to her calling plan. C.A. App. 0361. Not until she called to cancel her service was she told the wireless provider had unilaterally extended her contract. *Id.* The wireless provider then attempted to impose an early termination fee even though the end of her original contract term had long since passed. *Id.*

Minnesota regulators also received growing numbers of complaints from citizens about problems with their wireless providers. Complaints received by the Attorney General's Residential Utilities Division ("RUD") involved numerous wireless providers that engaged in remarkably similar conduct – extending the duration of wireless service contracts without customer knowledge or consent, imposing cancellation penalties of up to $200 per phone for "early termination" of the unilaterally extended contract, and threatening customers with collection agency action, thereby impacting their credit rating, if the customers did not pay the cancellation penalty. *See, e.g.*, C.A. App. 0304-09, 0316-24, 0413-15, 0418-26, 0440-43.

In 2002, the number of complaints received by the RUD against wireless providers exceeded the number of complaints made against all local and long distance

telephone companies and energy utilities *combined*. C.A. App. 0428. In 2003 and 2004, wireless complaints again outnumbered the number of complaints against all local telephone companies and energy utilities. *Id.*

II. Proceedings In This Case

A. The District Court Proceedings

On June 16, 2004, just two weeks before the Act was to become effective, the Respondents filed suit in the United States District Court for the District of Minnesota seeking declaratory judgment that the Act regulates rates charged by wireless providers and is preempted by 47 U.S.C. § 332(c)(3)(A).[3] The Respondents concurrently filed a motion for a temporary restraining order. The jurisdiction of the district court was invoked by the Respondents pursuant to 28 U.S.C. §§ 1331, 1337, 1343(3), and 2201.

Based on limited briefing and a limited factual record, the district court entered a temporary restraining order on June 29, 2004, enjoining implementation of the Act until the district court could further consider the Respondents' motion for a preliminary injunction. Pet. App., *infra*, 33a-44a. After supplemental briefing and the development of a more complete factual record (including the legislative history of the Act and affidavits from consumers who had been the target of unilateral contract changes), the district

[3] The Respondents also alleged that the Act is preempted by other provisions of federal telecommunications law. In addition, the Respondents alleged that the Act is unconstitutional in that it is void for vagueness and that it violates the Contracts Clause, the Due Process Clause, and the Commerce Clause. C.A. App. 0045-88.

court issued its Memorandum Opinion and Order on Plaintiffs' Motion for a Preliminary Injunction dissolving the temporary restraining order and denying a blanket injunction. Pet. App., *infra*, 16a-32a.

On September 10, 2004, the Respondents filed a Notice of Appeal.

B. The Eighth Circuit Court Of Appeals Proceedings

On December 9, 2005, the Eighth Circuit reversed the district court's denial of the Respondents' request for a blanket preliminary injunction and remanded the case to the district court for entry of a permanent injunction against enforcement of the Act. Pet. App., *infra*, at 1a-15a. The Eighth Circuit recognized that courts are to presume that "Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose.'" *Id.* at 5a (citation omitted). Nonetheless, the Eighth Circuit went on to hold that subdivision 3 of the Act is preempted by 47 U.S.C. § 332(c)(3)(A). Significantly, the Eighth Circuit reached this conclusion without finding it was Congress's "clear and manifest" purpose to preempt such a law. *Id.* at 1a-15a.

The Eighth Circuit held that 47 U.S.C. § 332(c)(3)(A) preempts state statutes which "fix[ ]" wireless service rates. *Id.* at 9a (citation omitted). The Eighth Circuit determined that the Act "fixes" rates simply by requiring notice and customer consent to mid-term rate increases because the law "prevents providers from raising rates for a period of time. . . ." *Id.* The Eighth Circuit also stated: "[s]ubdivision 3 . . . cannot be deemed a 'neutral application of state contractual or consumer fraud laws' that

avoids the preemptive force of the federal statute." *Id*. at 12a (citation omitted).

After determining that subdivision 3 of the Act was preempted by federal law, the Eighth Circuit struck down the remaining provisions of the Act. *Id*. at 12a-14a. The Eighth Circuit held that the remaining provisions of the Act are not severable, even though Minnesota law provides a strong presumption in favor of severability. *Id.*; Minn. Stat. § 645.20 (2004).

REASONS FOR GRANTING THE PETITION

This case presents the first time a court of appeals has examined whether a state statute specifically designed to protect consumers from the unfair business practices of wireless service providers is preempted by 47 U.S.C. § 332(c)(3)(A). This issue has immensely important, far-reaching implications for the sovereign rights of the fifty States and their 184 million wireless customers.

The Eighth Circuit's decision tramples upon the sovereign authority of the States. This Court has long recognized the historic police powers of the States to protect their citizens from unfair business practices. *See, e.g., Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 137-38, 146 (1963). In enacting 47 U.S.C. § 332(c)(3)(A), Congress expressly preserved the authority of the fifty States to regulate all terms and conditions of commercial wireless service other than "rates charged" and "entry." 47 U.S.C. § 332(c)(3)(A). The legislative history of 47 U.S.C. § 332(c)(3)(A) demonstrates that Congress intended this express reservation of state authority to include consumer

protection matters. *See* H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

The decision below effectively strips the States of their police power to prohibit unfair business practices by wireless providers. The Eighth Circuit interpreted the meaning of "regulat[ion]" of "rates charged" in 47 U.S.C. § 332(c)(3)(A) so broadly that States are left to wonder whether any state consumer protection laws focusing on wireless contracts, no matter how far removed from the rates charged, will be able to survive a preemption challenge. The Eighth Circuit's decision also threatens the States' authority to ensure notice of, and meaningful consent to, wireless contract changes even through a law of general applicability. As a result of the Eighth Circuit's overly expansive interpretation of the scope of preempted state regulation of "rates charged," the scope of permissible state regulation of "other terms and conditions" of wireless service is uncertain despite Congress's express preservation of state authority in 47 U.S.C. § 332(c)(3)(A).

In addition, the Eighth Circuit's decision has far reaching implications for this country's 184 million wireless customers. In the absence of state consumer protections, those consumers will be left without any meaningful remedy if a wireless provider unilaterally changes a contract term without notice or consent.

It is this Court, not the Eighth Circuit, that should determine the critically important question of the scope of the States' rights to protect wireless consumers as preserved by Congress pursuant to 47 U.S.C. § 332(c)(3)(A). Determination of this issue will have profound consequences for the millions of wireless consumers in this country and the sovereign rights of the fifty States.

I. The Decision Below Addresses A Question Of Immense Importance To The States And To Millions Of Wireless Customers Regarding The Scope Of The States' Rights Preserved By 47 U.S.C. § 332(c)(3)(A)

A. The Decision Below Strips The States Of Their Sovereign Right To Protect Wireless Consumers

The Eighth Circuit's decision severely infringes on the States' sovereign right to exercise their police powers. States have long regulated consumer protection matters, including unfair business practices, pursuant to their police powers. *See*, *e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (recognizing States have traditionally regulated against monopolies and unfair business practices); *Fla. Lime & Avocado Growers*, 373 U.S. at 146 (recognizing state authority to "prevent the deception of consumers"). Further, "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted; citations omitted). As Justice Brandeis so aptly stated, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New Skate Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This Court has also recognized that the States have a long history of regulating utilities. *Fed. Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting) ("Long before the Federal Government could be stirred to regulate utilities, courageous states

took the initiative and almost a whole body of utility practice has resulted from their experience.")

"[B]ecause the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt" state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "In areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *See Bates v. Dow Agrosciences LLC.*, 125 S. Ct. 1788, 1801 (2005) (citations omitted). Where two alternative readings of a federal statute are plausible, this Court has said that it has "a duty to accept the reading that *disfavors* pre-emption." *See id.* (emphasis added).

In enacting 47 U.S.C. § 332(c)(3)(A), Congress expressly preserved States' authority over all terms and conditions of commercial wireless service, other than "rates charged" and "entry." The statute provides in pertinent 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 commercial mobile services.*[4]

Pet. App., *infra*, 45a (emphasis added). The legislative history of 47 U.S.C. § 332(c)(3)(A) evidences Congress's

[4] It is undisputed that the term "commercial mobile services" as used in 47 U.S.C. § 332(c)(3)(A) includes what are commonly known as commercial wireless service or cellular telephone service.

intent to preserve broad state authority to regulate wireless consumer protection matters:

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions*."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The decision below flies in the face of Congress's clear and manifest intent to allow States to regulate wireless consumer protection matters. The Eighth Circuit's conclusion that the Act is preempted "rate regulation" erroneously and detrimentally deprives Minnesota and the other forty-nine States of their historic, sovereign authority to protect their citizens from unfair business practices.

The Eighth Circuit's decision goes so far as prohibiting the States from even requiring wireless telecommunications companies to provide advance notice of contract changes. The Eighth Circuit evidently believes that Congress intended that States not be allowed even to ensure that their residents are informed of the terms of their own contracts. According to the Eighth Circuit's reasoning, Congress apparently intended to allow wireless providers to engage in a type of "gotcha" commerce through which the companies can regularly change the

terms of their customers' contracts without their customers' knowledge.

This result is absurd and unprecedented. States commonly use their police powers to impose notice requirements and such requirements are common consumer protection provisions applicable to a variety of industries. *See, e.g.*, Minn. Stat. § 17.92 (2004) (requiring prior notice of intention to terminate certain agricultural contracts); Minn. Stat. § 82A.11 (2004) (requiring notice of the right to rescind a membership camping contract); Minn. Stat. § 306.25 (2004) (requiring cemetery associations to provide prior notice of intention to terminate a burial plot contract); Minn. Stat. § 325G.25 (2004) (requiring health, social referral and buying clubs to notify new members of their right to cancel their contracts); Minn. Stat. § 325G.50 (Supp. 2005) (requiring travel clubs to notify new members of their right to cancel); Minn. Stat. § 325N.03 (2004) (requiring foreclosure consultants to notify customers that the consultant cannot take certain actions and of the right to cancel); Minn. Stat. § 559.21 (2004 & Supp. 2005) (requiring notice to purchaser of real estate that the contract will terminate unless the purchaser complies with certain conditions).

Similarly, the Eighth Circuit's decision bars States from requiring wireless providers to obtain a customer's consent before changing the terms of their contracts.[5] Yet

[5] Wireless providers offer a number of different calling plans, but the customer is typically required to take service subject to a standard form contract. *See*, *e.g.*, C.A. App. 0129, 0148 (Declaration of Nancy Clark in Support of Verizon Wireless's Motion for a Temporary Restraining Order; Verizon Standard Customer Agreement). These nonnegotiable form contracts generally allow the company – and *only* the company – to change the terms of the contract. For example, Verizon's

(Continued on following page)

this requirement is exactly the type of consumer protection provision that States have enacted in any number of areas. *See, e.g.*, Minn. Stat. § 27.03 (2004) (requiring the consent of both the buyer and the seller for a change to certain wholesale produce contracts); Minn. Stat. § 325F.245, subd. 3 (2004) (prohibiting the automatic renewal of consumer lawn care contracts); Minn. Stat. § 325G.26 (2004) (requiring customer consent to convert certain club contracts of eighteen months or less to longer than eighteen months); Ark. Code Ann. § 4-86-106 (Supp. 2005) (prohibiting automatic renewal of home security services contracts); Col. Rev. Stat. § 42-9-105 (2005) (requiring customer consent to auto repair charges exceeding an estimate by a designated amount). The Eighth Circuit's reasoning appears to suggest that even a state law of general applicability requiring affirmative customer consent to contract changes would be preempted as applied to wireless service contract changes. *See* Pet. App., *infra*, 9a-10a.

The decision below not only precludes the States from requiring affirmative customer consent to wireless contract changes (whether done through a wireless-specific law or a law of general applicability), but it also appears to bar the States from adopting other measures to protect wireless consumers from the unfair business dealings of

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contract includes a provision purporting to allow Verizon to make unilateral contract changes at any time. *Id.* at 0149. Potential customers wanting service under one of Verizon's calling plans have no choice but to agree to the non-negotiable standard contract containing such language. *See id.* at 0129, 0148-49. Many customers, however, probably do not even realize that they are subject to this provision because the language in the contract allowing unilateral changes does not appear until the second page and is printed in a small font. *See id.* at 0149.

wireless providers. For example, under the Eighth Circuit's reasoning, States could even be precluded from adopting an opt-out consent process for mid-term contract changes like that in existing wireless form contracts. Under the Eighth Circuit's reasoning, an opt-out approach to contract changes would also "prevent[ ] providers from raising rates for a period of time," namely the period of time the customer is given to opt-out, and thus "fix[ ] the rates." Pet. App., *infra*, 9a. The Eighth Circuit's reasoning appears to bar both a wireless-specific opt-out law and an opt-out law of general applicability.

The above are but a few examples of how the Eighth Circuit's decision directly interferes with the continued authority of the States to exercise their sovereign rights to adopt wireless consumer protection measures. Whether 47 U.S.C. § 332(c)(3)(A) limits the States' historic power to adopt consumer protection measures is a decision that needs to be made by this Court, not the Eighth Circuit.

B. The Decision Below Undermines States' Authority To Enact Laws Targeting Problems Unique To The Wireless Industry

The Eighth Circuit found that subdivision 3 of the Act "cannot be deemed a 'neutral application of state contractual or consumer fraud laws' that avoids the preemptive force of the federal statute." Pet. App., *infra*, 12a. This determination could be interpreted by courts to prohibit States from adopting wireless-specific consumer protection statutes. Such a result would have devastating and widespread consequences upon the States and their citizens.

Wireless-specific state statutes are a necessary consumer protection tool. These statutes allow States to

target the unique business practices arising in the wireless industry that may not be present in other industries. States have long exercised their police powers by enacting statutes designed to prevent an abuse unique to a specific industry. *See, e.g.*, Minn. Stat. § 325F.662 (2004) (governing the sale of used motor vehicles); Minn. Stat. § 325F.171 (Supp. 2005) (providing for crib safety); Minn. Stat. § 325F.665 (2004) (regulating new motor vehicle sales); Minn. Stat. § 504B.375, subd. 4 (2004) (prohibiting the waiver of certain rights in a residential lease). Some state laws expressly deal with consumer contract extensions. *See, e.g.*, Minn. Stat. § 325G.26 (2004) (requiring customer consent to convert certain club contracts of eighteen months or less to a period of longer than eighteen months); Minn. Stat. § 325F.245 (2004) (prohibiting automatic renewal of consumer lawn care contracts).

Further, consumer protection laws targeting a particular industry address problems for which traditional legal remedies, including claims brought under general contract or consumer protection laws, may be inadequate. Indeed, the Minnesota Legislature enacted the Act at issue here after learning that, as a practical matter, traditional legal remedies did not stop wireless providers from engaging in the unfair practice of unilaterally altering wireless contracts. *See* C.A. App. 0336; Minn. Stat. § 325F.695 (2004). The States will be extremely limited in their ability to stop problems specific to the wireless industry if they are precluded from adopting wireless-specific statutes. States will be compelled to pass legislation affecting all commercial endeavors in order to reach the offending wireless-industry practice. Few state legislatures will be inclined to enact broadly applicable laws just to discourage a specific practice limited to one industry.

The Eighth Circuit's decision also jeopardizes the validity of existing wireless-specific consumer protection statutes enacted by States throughout the country. At least thirteen, or fully one-quarter of all States, have already enacted wireless-specific laws.[6] Just last year, at least eleven new wireless-specific consumer protection statutes were enacted by eight different States.[7] The recent passage

[6] The States include California, Georgia, Illinois, Louisiana, Maine, Minnesota, Nebraska, Nevada, Rhode Island, South Dakota, Tennessee, Texas, and Washington. *See* notes 7-8, *infra*.

[7] *See, e.g.*, Cal. Mil. & Vet. Code § 823 (West Supp. 2006) (authorizing active military personnel to cancel wireless service contracts without penalty); Ga. Code Ann. § 46-5-8 (Supp. 2005) (allowing termination of wireless service contracts by active service members); Ga. Code Ann. § 46-5-28 (Supp. 2005) (requiring the wireless customer's consent for inclusion in a wireless telephone database or a directory); 2005 Ill. Legis. Serv. P.A. 94-567 (West) (to be codified at 815 Ill. Comp. Stat. § 205/2VV) (requiring wireless providers to provide certain information regarding third party billings); 2005 Ill. Legis. Serv. P.A. 94-635 (West) (to be codified at 815 Ill. Comp. Stat. § 633/10) (allowing termination of wireless service contracts by active duty service members without penalty); La. Rev. Stat. Ann. § 29:314 (Supp. 2006) (allowing termination of cellular contracts by active duty service members without penalty under certain circumstances); La. Rev. Stat. Ann. § 29:418.1 (Supp. 2006) (allowing termination or suspension of cellular phone contracts by persons called to service in the military); Minn. Stat. § 325E.318 (Supp. 2005) (prohibiting wireless providers from including a customer's telephone number in a wireless telephone directory assistance database without the customer's prior authorization); S.D. Codified Laws § 49-31-118 (Supp. 2005) (prohibiting wireless providers from including a customer's telephone number in a wireless directory assistance service database or disseminating that information without the customer's prior authorization); Tex. Util. Code Ann. § 64.202 (Vernon Supp. 2005) (prohibiting wireless providers from publishing the name and telephone number of a wireless customer without the customer's express consent); Wash. Rev. Code Ann. § 19.250.010 (West Supp. 2006) (prohibiting wireless providers from including the telephone number of any customer in any directory without the customer's consent and prohibiting wireless providers from charging for opting not to be listed in a directory).

of so many wireless consumer protection statutes evidences the widespread, growing and serious nature of the problems faced by wireless customers. The wireless-specific laws cover a wide range of consumer matters.[8] For example, state wireless-specific laws:

1) allow military personnel in active duty to cancel wireless telephone service contracts without penalty;

2) prohibit wireless providers from including the telephone number of a wireless customer in a directory or telephone database without customer consent;

3) prohibit wireless providers from charging a customer for opting not to be listed in a directory;

4) ban automatic renewal of wireless contracts;

5) require disclosure of contract terms;

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[8] *See* note 7; *see also* Cal. Pub. Util. Code § 2885.6 (West 1994) (requiring cellular companies to provide service quality reports upon request of the California commission; enacted in 1993); La. Rev. Stat. Ann. § 45:844.5-8 (Supp. 2006) (requiring wireless providers to provide a written contract and prohibiting wireless providers from automatically renewing a contract; enacted in 1999); Me. Rev. Stat. Ann. tit. 35-A § 8902 (Supp. 2005) (authorizing the Maine commission to exercise jurisdiction over wireless providers for purposes of implementing telephone number conservation measures; enacted in 1999); Neb. Rev. Stat. § 86-125 (Supp. 2004) (requiring registration of wireless providers with the Nebraska commission; enacted in 2002); Nev. Rev. Stat. § 707.370 (2003) (requiring wireless companies to provide access to emergency telephone numbers at no charge; enacted in 1993); R.I. Gen. Laws § 39-2-1.3 (Supp. 2005) (limiting use of late fees imposed by wireless providers; enacted in 1998); Tenn. Code Ann. § 47-18-1901 (2001) (requiring contracts for wireless services to have a separate acknowledgment of any minimum service period; enacted in 1997).

6) require acknowledgment of any minimum contract term;

7) limit charges for late fees;

8) regulate third party billings on wireless bills;

9) require registration by wireless providers;

10) require service quality reporting at the request of the state commission; and

11) subject wireless providers to telephone number conservation measures.[9]

As the number of wireless customers continues to grow, the number of States enacting similar laws can be expected to grow as well.

Significantly, Respondents admitted in the course of this proceeding that the Louisiana, Rhode Island and Tennessee laws cited in Petitioner's Eighth Circuit Brief "do not regulate rates." *See* Reply Brief of the Joint Appellants, *Cellco Partnership d/b/a Verizon Wireless, et al. v. Hatch*, Eighth Cir. No. 04-3198, at 13, note 8 (December 20, 2004); *see also* Appellee's Brief and Addendum, *Cellco Partnership d/b/a Verizon Wireless, et al. v. Hatch*, Eighth Cir. 04-3198, at 44 (December 2, 2004) (citing La. Rev. Stat. Ann. § 45:844.5-844.8, R.I. Gen. Laws § 39-2-1.3, and Tenn. Code Ann. § 47-18-1901).[10] Thus, Respondents themselves acknowledged that state wireless-specific

[9] *See* notes 7-8, *supra*.

[10] The other state wireless-specific laws listed above were not included in Petitioner's brief filed with the Eighth Circuit. In fact, many of those state laws were not enacted until *after* briefing before the Eighth Circuit was completed.

statutes banning the automatic renewal of wireless service contracts, requiring advance disclosure of contract terms, and restricting the imposition of late fees do not constitute improper rate regulation. Respondents conceded that such laws are not preempted by 47 U.S.C. § 332(c)(3)(A) because that section only precludes States from regulating "rates charged" and "entry."[11] Consequently, though even the industry admits that States may regulate these areas through wireless-specific statutes, the Eighth Circuit's decision suggests that state laws of "neutral" or general applicability are permissible, but not laws targeting the wireless industry even if those wireless-specific laws do not regulate rates. *See* Pet. App., *infra*, 11a-12a; 47 U.S.C. § 332(c)(3)(A).

The determination as to whether 47 U.S.C. § 332 precludes States from adopting wireless-specific consumer protection statutes is a matter of critical importance to the States and their ability to protect the growing number of wireless customers.[12] It is imperative that this Court resolve the uncertainty regarding whether Congress preserved the States' traditional police power authority to adopt wireless-specific consumer protection statutes when

[11] The Respondents' admission that the Louisiana law banning automatic-renewal provisions in wireless contracts does not regulate rates reinforces the conclusion that requiring customer consent to an extension in the length of a wireless contract likewise does not regulate "rates charged," and therefore is not preempted by 47 U.S.C. § 332(c)(3)(A).

[12] According to the Federal Communications Commission ("FCC"), the number of wireless subscribers in the country grew from 160.6 million in 2003 to 184.7 million in 2004. *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Tenth Report, WT Docket No. 05-71, 2005 WL 2429714 (F.C.C.), at *2 (rel. Sept. 30, 2005).

it preserved the States' right to regulate "terms and conditions" of commercial wireless service.

C. The Decision Below Leaves More Than 184 Million Wireless Customers In This Country Unprotected From The Unfair Business Practices Of The Wireless Industry

Unfortunately for the millions of wireless customers in this country, the wireless providers will be allowed to continue the unfair practices of unilaterally changing contracts and imposing unconscionable change-in-terms provisions if the decision below is allowed to stand. Wireless customers who have their contract terms changed without notice or consent, like Minnesota customer John Povejsil, will be left with no meaningful remedy. As detailed in the affidavits from other Minnesota citizens filed with the district court, wireless customers aggrieved by the industry's deceptive practices frequently capitulate to unilateral contract changes because they do not have the time or money necessary to fight these companies and because they fear that their credit ratings will be harmed if they do not pay what the wireless providers demand. *See* C.A. App. 0323 (Cloutier, Jr. Aff. ¶ 9); C.A. App. 0441 (Palmer Aff. ¶ 7); C.A. App. 0422 (Macdonald Aff. ¶ 10); C.A. App. 0429-30 (Second Neal Aff. ¶¶ 10-11). This tragic and unjust situation can only be remedied if this Court steps in and reviews the decision below.

Similarly, if the decision below stands, wireless providers will be allowed to continue to impose one-sided, non-negotiable change-in-terms provisions in wireless contracts that allow the company – and only the company – to change the contract terms anytime without the customer's consent. Minnesota customers will be subject to

these one-sided provisions even though the Minnesota Legislature found these provisions fail to allow for meaningful assent to substantive contract term changes. The Eighth Circuit's decision will almost certainly be used by the wireless industry to argue that the other forty-nine States also are preempted from banning one-sided change-in-term provisions. As a result, millions of wireless consumers will continue to be subject to these abusive contracting practices.

II. The Eighth Circuit Erroneously Found That The Minnesota Act Regulates Rates And Is Preempted By Federal Law

The Eighth Circuit failed to follow this Court's established preemption standards and improperly concluded that subdivision 3 of the Act is preempted by 47 U.S.C. § 332. This Court recently reaffirmed the preemption standard that applies when states are acting in areas of traditional state authority, stating that courts are to presume that "a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *See Bates*, 125 S. Ct. at 1801 (citations omitted). In such cases where two alternative readings of a federal statute are plausible, courts have a duty to "accept the reading that *disfavors* pre-emption." *See id.* (emphasis added).

The Eighth Circuit's attention to this Court's direction was purely salutary. The appeals court noted that federal courts "presume that Congress does not intend preemption of historic police powers of the States 'unless that was [its] clear and manifest purpose.'" Pet. App., *infra*, 5a (citation omitted). Yet, the Eighth Circuit completely ignored the required presumption against preemption. *Id.* at 4a-12a.

Instead, the court simply concluded, based on its own overly broad interpretation of "rate regulation," that requiring customer consent to substantive, mid-stream contract changes by wireless providers "regulates rates" and is preempted by 47 U.S.C. § 332(c)(3)(A). *Id.* at 12a. The Eighth Circuit did *not* find that it was Congress's "clear and manifest purpose" to preempt such a law. The Eighth Circuit's finding of preemption is erroneous and should be reversed by this Court.

A. Requiring Affirmative Customer Consent To The Extension Of A Contract Is Not "Rate Regulation"

Congress could not have been more clear when it enacted 47 U.S.C. § 332(c)(3)(A) – States are *only* pre-empted from regulating "rates charged by" and "entry of" commercial wireless providers. *See* 47 U.S.C. § 332(c)(3)(A). Congress expressly preserved the States' authority to regulate all "other terms and conditions" of commercial wireless service. *Id.* The Eighth Circuit erred when it found that requiring customer consent to an extension *in the length* of a wireless contract amounts to "impermissible rate regulation" and is preempted by 47 U.S.C. § 332(c)(3)(A). *See* Pet. App., *infra*, 9a.

The Eighth Circuit focused its analysis on subdivision 3 of the Act, which requires notice of, and affirmative customer consent to, any "substantive change" proposed by a provider. Pet. App., *infra*, 8a-12a. The Eighth Circuit recognized that subdivision 3 applies to two different and independent types of provider-initiated contract changes: (i) contract changes that could result in an extension of the *length of the contract*; and (ii) contract changes that could result in an *increase in the charge* to the customer under

the contract. Pet. App., *infra*, 9a. Nonetheless, the Eighth Circuit's preemption analysis focused solely on the second type of contract change: namely, a change resulting in an increase in the customer's charges. *See, e.g.*, Pet. App., *infra*, 9a. ("The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from *raising rates* for a period of time. . . .") (emphasis added). The Eighth Circuit then broadly found that "subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A)." *Id.* at 12a.

Significantly, the Eighth Circuit did not find that subdivision 3 is preempted *only* as to contract changes resulting in an increase to customer charges. *See* Pet. App., *infra*, 8a-12a. Nor did it preserve the State's authority to require affirmative consent to contract changes involving only an *extension* in the length of the contract even though the issue was expressly raised below. *See id.*; *see also* Appellee's Brief and Addendum at 40. As a result, the Eighth Circuit preempted the States' authority to require affirmative customer consent to an extension in the length of the contract *with absolutely no findings* as to how such a requirement regulates the "rates charged by" wireless providers. *See* Pet. App., *infra*, 8a-12a. The Eighth Circuit's holding is erroneous and should be reversed on that basis alone.

Furthermore, the unsupported holding of the Eighth Circuit defies logic. A state law requiring customer consent to a wireless provider's proposed extension in the length of the contract is not preempted by the plain language of 47 U.S.C. § 332(c)(3)(A). By its terms, 47 U.S.C. § 332(c)(3)(A) only preempts the States from regulating "rates charged" and "entry." The length of a contract is not a "rate[ ] charged" because the wireless provider does not "charge"

the contract length. Rather, the length of the contract clearly falls within "other terms and conditions," which Congress expressly allowed the States to regulate. 47 U.S.C. § 332(c)(3)(A).[13] Further, when considered in light of the long-standing presumption against preemption, it is clear that 47 U.S.C. § 332(c)(3)(A) does not prohibit laws governing contract extensions.

B. Requiring Affirmative Customer Consent To Contract Changes That Could Result In An Increase In Price Is Not "Rate Regulation"

The Eighth Circuit also erred when it held that requiring customer consent to a mid-term contract change in the amount charged somehow "constitutes impermissible rate regulation" preempted by 47 U.S.C. § 332(c)(3)(A). *See* Pet. App., *infra*, 9a. In making this determination, the Eighth Circuit gave an impermissibly broad meaning to the language of 47 U.S.C. § 332(c)(3)(A), which prohibits the States from "regulat[ing] . . . the rates charged by any commercial mobile service. . . ." This conclusion is inescapable when considered in light of this Court's well-established presumption against preemption.

The Eighth Circuit stated that "'fixing rates'" of wireless providers is "rate regulation." Pet. App., *infra*, 9a (citing *In re Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)). The Eighth Circuit determined that

[13] In any event, requiring customer consent to a substantive contract change, whether a change to the length of the contract or the amount charged, is a regulation governing the contract change process, not "rates charged" by wireless providers, and is within the States' authority to regulate.

subdivision 3 "fixes" rates because the law "prevents providers from raising rates for a period of time" and held that subdivision 3 of the Act "constitutes impermissible rate regulation preempted by federal law." Pet. App., *infra*, 9a. In reaching this conclusion, the Eighth Circuit erred for two important reasons.

First, in 1993, when Congress amended 47 U.S.C. § 332 to adopt 47 U.S.C. § 332(c)(3)(A) in its current form, regulation of telephone and other utility rates was commonly accomplished by government agency oversight of rates. State and federal laws giving regulatory agencies the authority to oversee rates generally required that rates be reasonable. *See, e.g.*, Minn. Stat. §§ 237.06, 237.075 (1992); 47 U.S.C. § 201.

Importantly, it was well-established by 1993 that a rate regulated entity generally could charge only the rate on file with the relevant federal or state agency. The regulated company was not free to negotiate and charge the customer a rate different from the filed rate. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (stating that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992) (finding the filed rate doctrine applies to landline phone rates filed with the Minnesota commission).

The Act does not "regulate" the "rates charged" by wireless providers within the meaning of 47 U.S.C. § 332(c)(3)(A) because the Minnesota law does not involve any state oversight of wireless rates. There is no state review of wireless rates for reasonableness. *Compare* Minn. Stat. § 325F.695, subd. 3 (2004) *with* Minn. Stat.

§§ 237.06, 237.075, subd. 5 (2004) (requiring rates charged for landline telephone service to be reasonable and authorizing the Minnesota commission to "fix" rates at reasonable amounts). Significantly, the Act does not prohibit the wireless provider from charging any rate for wireless service to which the wireless company and customer mutually agree, even if the rate is an "unreasonable rate." *See Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (holding that state law claims involving wireless charges were not preempted where the court was not required to inquire into the reasonableness of rates charged, and the claims did not impact entry). Nor does the Act require wireless providers to file their rates with the State. To the contrary, the Act leaves it to the customer and company to negotiate "the rates charged" by wireless providers.

Second, the Eighth Circuit improperly concluded that the Act regulates the rates charged by "fixing" rates. Importantly, the language in the FCC Order relied upon by the Eighth Circuit, which provides that States may not "fix[ ]" wireless rates, was written in response to a request pursuant to 47 U.S.C. § 332 for continued regulation of wholesale wireless rates by the Connecticut Department of Public Utility Control. *See* Pet. App., *infra*, 9a (citing *In re Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997) which cites to *In re Pet. of Conn. Dep't of Pub. Util. Control to Retain Regulatory Control of Rates of Wholesale Cellular Service Providers in the State of Conn.*, Report and Order ("*Connecticut Preemption Order*"), 10 F.C.C.R. 7025, 7060 (1995)). At the time, Connecticut law required that wholesale wireless rates be filed with the Connecticut agency, and be cost-justified. *See Connecticut Preemption Order* at 7046. In stark contrast to traditional rate regulation, the Minnesota Act does *not* "fix" rates at a dollar

amount on file with the State or require that the rates charged be cost-justified. *Compare* Minn. Stat. § 325F.695 (2004) *with* Minn. Stat. § 237.075, subd. 5 (2004) (providing that the "[C]ommission shall determine the rates [of the incumbent landline telephone company] to be charged . . . and shall *fix* them by order. . . .") (emphasis added).

Under the Act, if a company proposes a rate increase during the term of the contract and the customer does not affirmatively agree to the mid-term rate increase, the State is not "regulat[ing]" the "rates charged by" the wireless provider in violation of 47 U.S.C. § 332. As the district court correctly found:

> Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates.

Pet. App., *infra*, 25a.

Subdivision 3 of the Act simply governs the consent process for a change in an existing substantive contract term. This Act clearly falls within the "other terms and conditions" left by Congress to the States to regulate. The law is at its core a consumer protection measure, not a rate regulation measure.

Further, the Eighth Circuit's finding that the notice requirement in the Act "freezes rates for 60 days" is contrary to well established principles of statutory construction. Pet. App., *infra*, 9a. The Act simply requires notice "60 days before the change is proposed to take effect," and provides that the change may take effect if the customer "opts in" before the "proposed effective date." Minn. Stat. § 325F.695, subd. 3. The "proposed effective date" is properly read as just that – a "proposed" effective

date. Nothing in the law prohibits a contract change from going into effect immediately once the customer agrees to it. This interpretation is logical and consistent with established rules of statutory construction. *See Hince v. O'Keefe*, 632 N.W.2d 577, 582 (Minn. 2001) (noting that courts should construe statutes to avoid absurd results and should interpret statutes to avoid constitutional problems).

The Eighth Circuit's decision that subdivision 3 of the Minnesota Act is preempted by 47 U.S.C. § 332(c)(3)(A) runs afoul of this Court's clear directive that laws such as this are not to be preempted unless the court finds preemption is the "clear and manifest" intent of Congress. Tellingly, the Eighth Circuit cited *no* Congressional intent – let alone "clear and manifest" intent – to support its finding of preemption. The Eighth Circuit impermissibly and erroneously expanded the preemptive scope of regulation of "rates charged" as used in 47 U.S.C. § 332(c)(3)(A). Further, Petitioner's interpretation of 47 U.S.C. § 332(c)(3)(A) as permitting the States to require notice of and affirmative customer consent to substantive contract changes is clearly a plausible interpretation. The decision below cannot be reconciled with this Court's recent pronouncement that, in cases involving areas of traditional state authority, courts have a duty to accept a plausible interpretation of federal law that "*disfavors* pre-emption." *See Bates*, 125 S. Ct. at 1801 (emphasis added).

C. The Provisions Of The Minnesota Act Are Severable

This Court has established that state law governs whether a state statute is severable. *Leavitt v. Jane L.*,

518 U.S. 137, 139 (1996). Minnesota law contains a strong presumption in favor of severability. Minn. Stat. § 645.20 (2004).

Having found that subdivision 3 of the Act is preempted, the Eighth Circuit considered whether the remaining provisions of the Act dealing with customer-initiated changes (subdivision 4); requiring the customer be provided with a copy of the contract (subdivision 2); and setting forth the applicable definitions (subdivision 1) could be enforced. Pet. App., *infra*, 12a-15a. The Eighth Circuit incorrectly determined that these subdivisions are *not* severable from subdivision 3, governing provider-initiated changes. *Id.* In doing so, the Eighth Circuit failed to properly apply the strong presumption of severability under Minnesota Law. *See* Minn. Stat. § 645.20 (2004).

The Eighth Circuit erred because the remaining substantive provisions, subdivisions 4 and 2, stand on their own. The Minnesota Legislature clearly viewed the notice and consent requirements relating to customer-initiated changes in subdivision 4 as separate and distinct from the requirements governing provider-initiated changes in subdivision 3 because it specifically adopted distinct provisions for each. Given that subdivision 4 is not "inseparably connected with" subdivision 3, it logically follows that subdivisions 2 and 1 are also severable from subdivision 3. Subdivision 2, requiring wireless telecommunications companies to provide a copy of the contract to the customer, remains important because subdivision 4 is severable. Subdivision 1 sets forth the applicable definitions. Therefore, the Eighth Circuit critically erred when it determined that not one of the provisions of this vital consumer protection law is enforceable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street
Suite 1100
Saint Paul, MN 55101-2128

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127

Counsel for Petitioners

March 2006

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3198

Cellco Partnership, doing business as Verizon Wireless; Verizon Wireless, doing business as Verizon Wireless, (VAW) L.L.C.; Duluth MSA, doing business as Verizon Wireless, Limited Partnership; Midwest Wireless Holdings, L.L.C.; Midwest Wireless Communications, L.L.C.; American Cellular Corporation; Rural Cellular Corporation, doing business as Cellular 2000; Sprint Spectrum L.P.; AT&T Wireless Services of Minnesota, Inc.; Voicestream Minneapolis, Inc.; T-Mobile USA, Inc.,	*	Appeal from the United States District Court for the District of Minnesota.
Appellants,	*	
v.	*	
Mike Hatch, in his official capacity as Attorney General of Minnesota and not as an individual,	*	
Appellee.	*	

Cellular Telecommunications & Internet Association; Federal Communications Commission,

Amici on Behalf of Appellant,

AARP; National Association of State Utility Consumer Advocates; National Association of Consumer Advocates,

Amici on Behalf of Appellee.

Submitted: May 11, 2005
Filed: December 9, 2005

Before WOLLMAN, BYE, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Cellco Partnership and its co-appellants (collectively, "Cellco") appeal from the district court's partial denial of their request for a preliminary injunction against implementation and enforcement of Minnesota Statutes § 325F.695 ("Article 5").[1] The district court ruled that Cellco's claims – that Article 5 was preempted and that the statute was

[1] The district court granted Cellco's request for a preliminary injunction barring Attorney General Hatch and employees of the State from "taking any action to prevent wireless communications providers from passing through to customers federally assessed fees," pursuant to its determination that Article 5 conflicted with 47 C.F.R. § 54.712(a), which authorized recovery of the fees. This portion of the district court's order is not challenged on appeal.

unconstitutionally vague – did not have a likelihood of success on the merits, and dissolved the temporary restraining order it had previously entered. We reverse and remand for entry of a permanent injunction.

I.

On May 29, 2004, the Governor of Minnesota signed into law Article 5 of House File No. 2151, entitled "Wireless Consumer Protection." Article 5 imposes several requirements on Cellco and other providers of wireless telecommunications services. The statute forbids the providers to implement changes in the terms and conditions of subscriber contracts that "could result" in increased rates or an extended contract term, unless they first obtain affirmative written or oral consent from the subscriber. Minn. Stat. § 325F.695, subd. 3; *see id.* § 325F.695, subd. 1(d). Article 5 also requires providers to deliver copies of the subscriber contracts to the subscribers, *id.*, subd. 2, and, in the event a subscriber proposes a change to the contract, to disclose clearly any rate increase or contract extension that could result from the change. *Id.*, subd. 4. The statute further requires providers to maintain recorded or electronic verification of the "disclosures" required by the law. Article 5 was scheduled to take effect on July 1, 2004, but on June 16, Cellco filed suit in the District of Minnesota seeking a declaration that, among other things, Article 5 was preempted by the Communications Act of 1934, 47 U.S.C. §§ 151-614, and invalid under several provisions of the United States Constitution. Cellco also sought an injunction against enforcement of Article 5.

The district court first granted a temporary restraining order against enforcement of Article 5, ruling that Cellco had "shown an initial likelihood of success on at least a portion of [its] preemption argument." (Add. at 24). On consideration of Cellco's request for a preliminary injunction, however, the court reached a different conclusion. The district court concluded that Cellco had not satisfied the standard for preliminary injunctions set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), with respect to its claim that Article 5 is preempted, except to the extent that Article 5 applied to Cellco's attempts to pass along the costs of contributions to the Universal Service Fund pursuant to 47 C.F.R. § 54.712(a). The district court also determined that Cellco did not meet the *Dataphase* test with respect to its claim that Article 5 is unconstitutionally vague. As a result, the district court dissolved its temporary restraining order effective September 15, 2004. We granted a stay pending appeal.

Although the district court analyzed the preemption question under the "likelihood of success on the merits" prong of the test for granting preliminary injunctions, *see Dataphase*, 640 F.2d at 113, Cellco now proposes without objection from the State that there are only legal issues unresolved on appeal. Accordingly, we consider Cellco's motion as one for a permanent injunction. *See Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

II.

Cellco urges that Article 5 is expressly preempted by a federal statute, § 332(c)(3)(A) of the Communications Act of 1934, which provides in relevant 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 commercial mobile services.

47 U.S.C. § 332(c)(3)(A). A "mobile service" is defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," *id.* § 153(27); *see id.* § 332(d), and it is undisputed that Cellco is a commercial mobile service ("CMRS" or "provider"). The parties also agree that Article 5 does not regulate market entry, so whether any part of Article 5 is expressly preempted by § 332(c)(3)(A) turns on whether the statute regulates "rates charged" by providers. Our interpretation of the scope of an express preemption clause "must rest primarily on a fair understanding of congressional purpose," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal quotation and emphasis omitted), and we presume that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose." *Id.* at 485.

Section 332(c)(3) was added to the Communications Act in 1982, *see* An Act to amend the Communications Act of 1934, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087, 1096 (1982), and its original preemption language provided that "[n]o State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 47 U.S.C.

§ 332(c)(3) (1992). An amendment in 1993 gave § 332(c)(3)(A) its current form, introducing the commercial/private mobile service distinction and providing for state regulation of "other terms and conditions." *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993).

The legislative history of the 1993 amendment speaks only briefly and indirectly about the meaning of "rate" regulation. A report from the House Budget Committee elaborated on the meaning of "other terms and conditions," which the statute distinguishes from the regulation of "rates" and "market entry":

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.,* zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

As the agency charged with administering the Communications Act, *see* 47 U.S.C. § 151, the FCC has interpreted § 332(c)(3)(A) on several occasions, often relying on

the aforementioned legislative history.[2] The FCC has determined that a State's review of the rates charged by providers prior to implementation of the rates, where the review often occasioned delays of 30 days before new rate offerings could take effect, is "rate regulation" for purposes of § 332(c)(3)(A). *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995). The Commission also has ruled that regulation of rates includes regulation of "rate levels and rate structures," such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls, and that States are prohibited from prescribing "the rate elements for CMRS" and from "specify[ing] which among the CMRS services provided can be subject to

[2] The FCC has filed an amicus brief in this case asserting that Article 5 is preempted by § 332(c)(3)(A) because Article 5 is not a "generally applicable" state contract or consumer fraud law. Cellco urges us to accord "some" deference to the FCC's litigating position, citing the Supreme Court's grant of deference to an agency's amicus brief where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). We note, however, that the FCC is in the midst of a rulemaking process designed to consider the merits of a rule similar to that espoused in the amicus brief. *See Truth-In-Billing & Billing Format*, 20 F.C.C.R. 6448, 6475-76 (2005) (second report and order, declaratory ruling, and second further notice of proposed rulemaking). The agency's position thus appears somewhat fluid, and perhaps short of "considered judgment." *See id.* at 6476 ("[W]e *tentatively* conclude that the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices.") (emphasis added). In any event, because our consideration of the FCC's previous adjudications and our interpretation of § 332(c)(3)(A) independently lead to our conclusion, we need not decide whether deference to the FCC's position in its brief is appropriate here.

charges by CMRS providers." *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999).

In light of the legislative history classifying billing information, practices, and disputes as "other terms and conditions," however, the FCC has concluded that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332." *Id.* at 19908. The FCC later clarified that while § 332(c)(3) "does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims[,] . . . whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000). In reaching that conclusion, the Commission noted that the "indirect and uncertain effects" of damage awards pursuant to state contract and tort law are not the same as the effects of direct rate regulation, and that although such awards may increase the costs of doing business, these costs "fall no more heavily on CMRS providers than on any other business." *Id.* at 17034-35 (internal quotation omitted).

Cellco focuses its preemption arguments primarily on subdivision 3 of the Minnesota statute. Subdivision 3 is entitled "Provider-initiated substantive change," and it mandates that providers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting

> the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Minn. Stat. § 325F.695, subd. 3. A "substantive change" is defined in relevant part as "a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." *Id.* § 325F.695, subd. 1(d).

We agree with the FCC that "fixing rates of . . . providers" is rate regulation, *see Pet. of Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1745 (1997), and we conclude that subdivision 3 of the Minnesota statute constitutes impermissible rate regulation preempted by federal law. The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from raising rates for a period of time, and thus fixes the rates. The 60-day notification period created by subdivision 3 effectively freezes rates for 60 days when the provider notifies a customer of a proposed change in rates. The State's position – that Article 5 imposes only a "window within which the customer has to decide whether or not to accept a change proposed by the wireless provider," and that rate changes could go into effect immediately upon the consumer's consent – strikes us as inconsistent with the plain meaning of the text of the statute. Subdivision 3 requires that providers notify customers of "any proposed substantive change . . . 60 days before the change is proposed to take effect," and this change may take effect only if the customer "opts in" before "the proposed

effective date." Minn. Stat. § 325F.695, subd. 3. A proposed change thus must include a proposed effective date, and modification of the "effective date" is not contemplated by the statute.

But even accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's proposed rate increase, then the rate for that customer's service would be fixed for the term of the existing contract, often one or two years. Even assuming, *arguendo* (and contrary to our experience with human nature), that all consumers would willingly accept rate hikes when proposed, and thus "opt in" before the expiration of the 60-day period, subdivision 3 indisputably freezes rates for *some* period – at least until the consumer manifests acceptance. The statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days. (J.A. at 146, 149).

The State argues that subdivision 3 is a consumer protection measure that "further[s] the underlying traditional requirements of contract law as a way to protect consumer interests" by guarding consumers against unilateral contract changes. "Consumer protection matters," it notes, were among the matters listed by the House Budget Committee as illustrative of "terms and conditions" that would be open to state regulation under § 332(c)(3)(A). H.R. Rep. No. 103-11, at 261. We find this argument overbroad, and we are not persuaded. Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to

serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers.

Subdivision 3, moreover, goes beyond traditional requirements of contract law, and thus falls outside the scope of the "neutral application of state contractual or consumer fraud laws," which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement. The existing contracts exemplify an "opt-out" structure – that is, they permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes. (J.A. at 149). Subdivision 3 mandates an "opt-in" contract structure: the provider cannot increase rates unless the customer affirmatively accepts the changes. The State contends that the current structure used by the providers renders the contracts "illusory," because it permits the providers "unilateral[ly]" to "change the contract's terms," (Appellee's Br. at 33), but we are not convinced. There is no indication that "opt-out" contracts of the sort used by the providers are considered illusory under Minnesota's consumer protection statutes or its common law, and in fact, such contracts are generally accepted as legal and binding. *See Iberia Credit Bureau,*

Inc. v. Cingular Wireless LLC, 379 F.3d 159, 173-74 (5th Cir. 2004); *cf. Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (declaring enforceable the acceptance, by continued performance, of modification in a unilateral contract for employment). Subdivision 3, therefore, cannot be deemed a "neutral application of state contractual or consumer fraud laws" that avoids the preemptive force of the federal statute. *See Wireless Consumers Alliance*, 15 F.C.C.R. at 17025-06 [sic]. A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

III.

There remains the question whether the other subdivisions of Article 5 may be enforced independent of subdivision 3. Whether one provision of a statute is severable from the remainder is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In Minnesota, the remaining provisions of a statute shall be valid, "unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one," or "unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20. To give these clauses independent meaning, we understand the former clause to forbid severance in cases where the remaining provisions are *not* incomplete or incapable of

being executed, but where the interrelationship of the void and non-void provisions nonetheless precludes the presumption that the legislature would have enacted only the latter provision. *See Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982) (concluding remaining provisions of statute, standing alone, were not severable, where legislative intent to prefer limited application of statute was "not at all clear"); *Bang v. Chase*, 442 F. Supp. 758, 771 (D. Minn. 1977) (three-judge court).

We believe that the remaining subdivisions of Article 5 – a definitional section, a provision requiring wireless providers to furnish customers with a copy of written contracts, and a subdivision regulating "customer-initiated changes" – are connected with and dependent upon subdivision 3. The legislative history shows that subdivision 3 was the motivating force behind Article 5. The principal Senate sponsor, for example, explained that "the reason for the genesis of this bill . . . is people in our area were contacting our local representative . . . and telling him that their contracts were being changed without their consent." (J.A. 361).

The three substantive subdivisions were then conceived together as a unified effort to regulate certain practices of wireless telecommunications service providers. The requirement of subdivision 2 that providers furnish customers with a written copy of *existing* contracts serves as foundation for the later subdivisions, which require disclosure of proposed changes to those existing contracts. As the principal House sponsor explained, "keep in mind we are just doing two things: One) we want to verify in the records that the customer did agree to a contract in the first place and two) if a unilateral change is made in that contract by the provider, the customer is off the hook."

(J.A. 384). Subdivisions 3 and 4 work in tandem as requirements for consent and disclosure, depending on whether a change in contractual terms is "provider-initiated" or "customer-initiated."

The legislature recognized that the regulatory provisions would place a burden on the industry, and potentially would raise costs for consumers. The principal House sponsor remarked that depending on how the legislation was crafted, "[i]t could turn into something that ends up costing everybody more money and it does kind of complicate the whole process." (J.A. 383). The legislature ultimately concluded that the expected benefits to the consumer outweighed concerns about costs to providers and the system, but it enacted a two-year sunset provision, so, as one representative put it, "we can all reevaluate whether or not that is cumbersome or not, or if it works as well as many think it may work." (J.A. 396; *see also* J.A. 387). "Provider-initiated" substantive changes were central to the development of Article 5, and we find it difficult to presume that the legislature would have enacted the two remaining substantive provisions standing alone, with their attendant costs to the system, if it had been precluded at the outset from regulating in the area of principal concern and perceived benefit to consumers – that is, provider-initiated changes. It also bears noting that one senator active in the legislative process surrounding Article 5 commented on the "complexities of all the moving pieces" in the proposed legislation, and on the need to ensure that each of the "multiple moving pieces" fit together in a final bill. (J.A. 394).

We conclude, therefore, that subdivisions 1, 2, and 4 are not severable from subdivision 3, and that Article 5 should be enjoined in its entirety. The remaining articles

of House File No. 2151 operate independently, and they remain valid. This conclusion makes it unnecessary for us to consider Cellco's contentions that subdivisions 1, 2 and 4 of Article 5 are unconstitutionally vague, because the subdivisions fail to define such important statutory terms as "customer" and "disclosure," and because the statute defines "substantive change" indefinitely as any modification of contract that "could result" in an increase in charges. *See Planned Parenthood of Idaho v. Wasden*, 378 F.3d 908, 937 (9th Cir. 2004). If and when the legislature revisits this area, it will be in a position to consider whether more precise definitions are appropriate.

* * *

For the foregoing reasons, we reverse the district court's partial denial of Cellco's request for a preliminary injunction and remand for entry of a permanent injunction against enforcement of Article 5.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

CELLCO PARTNERSHIP d/b/a Verizon Wireless; VERIZON WIRELESS (VAW) LLC d/b/a/ Verizon Wireless; DULUTH MSA LIMITED PARTNERSHIP d/b/a Verizon Wireless; MID-WEST WIRELESS HOLDINGS L.L.C.; MIDWEST WIRELESS COMMUNICATIONS L.L.C.; AMERICAN CELLULAR CORPORATION; RURAL CELLULAR CORPORATION d/b/a Cellular 2000; SPRINT SPECTRUM L.P.; WIRELESSCO, L.P.; AT&T WIRELESS SERVICES OF MINNESOTA, INC.; VOICESTREAM MINNEAPOLIS, INC.; and T-MOBILE USA, INC.,

Plaintiffs,

v.

MIKE HATCH, in his official capacity as Attorney General of Minnesota and not as an individual,

Defendant.

Civil No.
04-2981 (JRT/SRN)

MEMORANDUM OPINION AND ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

September 3, 2004

Andrew G. McBride, **WILEY REIN & FIELDING**, 1776 K Street N.W., Suite 500, Washington, DC 20006; and Jeffrey John Keyes, **BRIGGS & MORGAN**; 2200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402, for plaintiffs Cellco Partnership, Verizon Wireless (VAW) LLC, Duluth MSA Limited Partnership;

Jeffrey John Keyes, **BRIGGS & MORGAN**, 2200 IDS Center, 80 South 8th Street, Minneapolis, MN, 55402 for plaintiffs Midwest Wireless Holdings L.L.C.; Midwest Wireless Communications L.L.C.; American Cellular Corporation; Rural Cellular Corporation;

Kenneth Schifman, **SPRINT CORPORATION**, 6450 Sprint Parkway, Overland Park, KS 66251; and Teresa J. Kimker, **HALLELAND LEWIS NILAN SIPKINS & JOHNSON**, 220 6th Street South, Suite 600, Minneapolis, MN 55402, for plaintiffs Sprint Spectrum L.P. and WirelessCo, L.P.;

Seamus C. Duffy, **DRINKER BIDDLE & REATH**, One Logan Square, 18th & Cherry Streets, Philadelphia, PA 19103; and Barbara P. Berens, **KELLY & BERENS**, 3720 IDS Center, 80 South 8th Street, Minneapolis, MN 55402, for plaintiff AT&T Wireless Services of Minnesota, Inc.;

Michael R. Drysdale, **DORSEY & WHITNEY-MINNEAPOLIS**, 50 South 6th Street, Suite 1500, Minneapolis, MN 55402-1498; and Daniel B. Rapport, **FRIEDMAN KAPLAN SEILER & ADELMAN LLP**, 1633 Broadway, New York, NY 10019-6708 for plaintiffs VoiceStream Minneapolis, Inc. and T-Mobile USA, Inc.

Michael J. Vanselow, Cassandra Opperman O'Hern and Brian Sande, Assistant Attorneys

General, **OFFICE OF THE MINNESOTA ATTORNEY GENERAL**, 445 Minnesota Street, St. Paul, MN 55101, for defendant.

Plaintiffs, a group of national and regional wireless carriers, challenge Article 5 of H.F. No. 2151, Minn. Sess. L. CH. 261 ("Article 5"), and seek a preliminary injunction to prevent implementation and enforcement of the new law.[1] Plaintiffs maintain that Article 5 is illegal and unenforceable for a variety of reasons, and principally argue that the law constitutes rate regulation and is therefore preempted. Article 5 was scheduled to go into effect at the beginning of July, however, on June 29, 2004, after two oral arguments, and extensive briefing, the Court granted a Temporary Restraining Order enjoining the law's implementation until the Court could further consider plaintiffs' motion for a preliminary injunction. At defendant's request, the Court permitted additional briefing after the Temporary Restraining Order issued, but before the Court ruled on the preliminary injunction.

The Court reiterates its opinion that the question of whether Article 5 constitutes impermissible rate regulation or whether it simply codifies consumers' rights to a balanced and fair contract is a close issue. Nonetheless, for the reasons discussed below, the Court is persuaded that the majority of Article 5 is lawful, and therefore dissolves the Temporary Restraining Order. As set forth below, the Court grants the following, limited preliminary injunction. The Court will stay implementation of this Order until September 15, 2004.

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[1] All plaintiffs have joined in the motion for a preliminary injunction. (*See* Docket Nos. 4, 5, 14, 32, and 34.)

BACKGROUND

I. Congress's Regulation of the Telecommunications Industry

Congress governs and regulates the telecommunications industry through the Federal Communications Act. States are prohibited from regulating "the entry of or the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A). The statute also has a "savings clause" which provides, "except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *See also* 47 U.S.C. § 414 ("Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this chapter are in addition to such remedies.").

II. Article 5

The Minnesota Legislature passed the bill titled the "Consumer Protections for Wireless Consumers" statute (also referred to as the "Wireless Consumer Protection State" or "Article 5") with overwhelming bipartisan support. The challenged law provides:

> Subd. 3. [**PROVIDER-INITIATED CHANGE.**] A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer

does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. [**CUSTOMER-INITIATED CHANGE.**] If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

"Substantive change" is defined in Subdivision 1 as:

(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for the purposes of this section.

In defense of the legality of Article 5, defendant submitted transcripts of the testimony and debate in the Minnesota House and Senate related to the new law. (Cohran Aff'd.) The House and Senate heard testimony

from consumers who believed that their wireless contracts had been changed without their knowledge or consent. Representatives of wireless companies also testified before the legislators; the wireless representatives suggested that the new law was unnecessary, and indicated that consumers had adequate protections through the Consumer Code for Wireless Service,[2] and through complaints to government entities such as the Attorney General's Office. The bill's sponsors represented that the bill is designed to give cell phone users the opportunity to opt-out of cell phone contracts if a provider unilaterally alters the contract. (Cohran Aff'd at Attachment 3.) According to the sponsors, Article 5 simply requires wireless providers to inform consumers of the extra-contractual result of requested changes.

Lawmakers also heard testimony from consumers about when notification of potential changes to established contracts would be useful. Consumers testified that the notification of substantial changes in contracts (such as an extension of a contract term, or a switch from month-to-month to year-to-year) must occur at the time the consumer signs up for the change if the notification is to be effective. In addition, the transcripts reveal discussions about whether an opt in or an opt out provision would

[2] The Consumer Code for Wireless Service ("CCWS") is a voluntary code of conduct to which many plaintiffs adhere. The CCWS is intended "to provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that meets consumers' needs." The CCWS contains provisions regarding disclosure of rates, service areas, and other policies and practices.

better balance the competing interests at issue in Article 5.

ANALYSIS

In its previous Opinion and Order, the Court analyzed the *Dataphase* factors,[3] and determined that plaintiffs had shown some likelihood of success on the merits, and that on the whole, the *Dataphase* factors favored some limited relief. The Court has more fully considered the parties positions, and provides the following additional analysis of the *Dataphase* factors, incorporating by reference its previous Opinion and Order.

I. Likelihood of Success on the Merits

A. Preemption[4]

As the Court noted, 47 U.S.C. § 332(c)(3)(A) prevents states from regulating either the **entry** or the **rates** of wireless services. Congress did not, however, preempt all state laws that impact commercial mobile services. The statute, by its terms, provides an exception by allowing states to regulate the "other terms and conditions" of commercial mobile services. 47 U.S.C. § 332(c)(3)(A); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001).

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[3] *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

[4] The Court centered its previous analysis on the preemption arguments; the parties additional briefing continued in this vein, and therefore the Court will continue to focus on the preemption issue. The Court notes that defendant has reserved its opposition to any other claim and arguments plaintiffs may assert; in addition, plaintiffs address briefly the argument that Article 5 is void for vagueness.

Congress's intent is made clear in the legislative history, which reveals:

> it is the intent of the Committee that the states still would be able to regulate the terms and conditions of these [wireless] services. By "terms and conditions," the Committee intends to include such matters as customer **billing information** and **practices** and **billing disputes** and **other consumer protection matters**. . . . This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111 103rd Con, 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

Congress's intended reservation to the states of the ability to legislate consumer protection matters is not surprising, considering the "long history of [states] regulating against unfair business practices." *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002). "Federal telecommunications law implicitly acknowledges the importance of this interest [the interest in protecting the public] by leaving states some latitude to 'protect the public safety and welfare' and 'safeguard the rights of consumers.'" *Id.* (quoting 47 U.S.C. § 253(b)).

Even with this explicit reservation to the states of "other terms and conditions," it is clear that if Article 5 is "rate regulation," it is preempted.[5] The parties vigorously dispute whether Article 5 is such regulation. While "rates" seems easily defined, the line between impermissible rate regulation, and permitted state regulation is not clearly

[5] The parties do not suggest that Article 5 regulates market entry.

demarked in the statute or case law. *See, e.g., Phillips v. AT&T Wireless*, No. 4:04-CV-40240, 2004 WL 1737385 (S.D. Iowa July 29, 2004) (discussing whether an early termination fee amounted to a "rate"). A law is not preempted merely because the law could increase wireless providers' costs of doing business. *Cellular Telecommunications Indus. Ass'n v. F.C.C.*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). Plaintiffs strongly argue that Article 5 is "rate" regulation. Defendant describes Article 5 as a consumer protection bill that, while it might implicate rates, in no way regulates them.

Several courts have deemed various general regulatory statutes or common law theories of recovery not preempted. *See, e.g., Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (holding not preempted a putative class action alleging breach of contract, and characterizing the relief sought as "an accounting problem" the remedy for which would require the cell phone companies, at most to (1) adjust billing systems or (2) alter contracts to provide that roaming charges are billed separately – neither of which amounted to preempted rate regulation); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987) (holding not preempted plaintiffs' state law claims that providers failed to inform customers of practices for charging for uncompleted calls); *but see, e.g., Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) (plaintiff's claims, ostensibly for breach of contract, were preempted because the claims would have required AT&T to exceed the FCC's requirements regarding towers, signals, and rates).

Article 5 certainly implicates rates. It defines "substantial change" as any "modification to, or addition or deletion of, a term or condition in a contract that **could**

result in an increase in the charge to the customer under that contract." Article 5, subd. 1(d) (emphasis added). Although Article 5 is directed at wireless providers, the Court is no longer convinced that the law presents impermissible rate regulation. Article 5 manifests basic principles of contract law. Nothing in the law prevents wireless providers from charging any rate the market will bear. Nothing in the law caps wireless rates. Similarly, the law does not dictates [sic] whether a particular billing method is unreasonable. *Cf. In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 1999 WL 1062835, at ¶ 23 (F.C.C. November 18, 1999) (FCC finding that lawsuits challenging the practice of billing in whole minute increments constituted such rate regulation). Instead, the law requires notice and informed consent to contract changes. As the FCC has observed, state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332." *Id.* at ¶ 23. Article 5 requires wireless providers to disclose rates, to obtain consent to rate increases, and to honor contractual obligations. Article 5 also prohibits changes to established contracts absent informed consent to those changes. In the view of the Court, this is not rate regulation, as that term has been defined by the FCC and the courts.

On the other hand, the Court remains convinced that Article 5 conflicts with FCC regulations regarding the federal Universal Service Fund ("USF"). FCC regulations require wireless carriers to remit to the FCC monetary support for the USF, and the Code of Federal Regulations expressly authorizes wireless carriers to recoup USF fees by recovering them directly from customers. 47 C.F.R. § 54.712(a). The plain language of Article 5 seems to prevent plaintiffs from continuing to recover the USF fees

directly from customers because Article 5 exempts from its notice and opt-in policy only those fees that are **required** by the federal government to be collected. Providers are authorized, but not required, to pass USF and other similar fees, such as those for enhanced 911 services, through to their consumers. Because the plain language of the statute appears to conflict with federal policy, the Court will continue to enjoin implementation and enforcement of this portion of the statute.

B. Void for Vagueness

Plaintiffs also assert that Article 5 is void for vagueness. Specifically, plaintiffs claim that Article 5's critical terms – such as "customer" and "substantive change" are impermissibly vague. Plaintiffs, as challengers to the statute, have the burden of establishing that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 497 (1982). Plaintiffs must also overcome the presumption that state statutes are constitutional. *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983) (state statutes are presumed constitutional). The Court applies a relaxed standard to this economic regulation which does not implicate fundamental rights and provides only for civil penalties. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Courts, including those in Minnesota, consistently uphold consumer protection and related laws against claims that the laws are impermissibly vague. For example, in *United States v. Sun and Sand Imports, Ltd., Inc.*, 725 F.2d 184 (2d Cir. 1984), the Second Circuit upheld an economic regulation against a vagueness challenge. In

that case, the challenger was a manufacturer and distributor of children's garments, some of which the Consumer Products Safety Commission classified as sleepwear, but which failed to comply with the Flammable Fabrics Act ("FFA"), 15 U.S.C. §§ 1191-1204 (1982). The corporation argued that the FFA failed to give an adequate definition of children's sleepwear. *See id.* at 186. The Second Circuit held that there are "'few words [which] possess the precisions of mathematical symbols, [and] most statutes must deal with untold and unforeseen variations in factual situations.'" *Id.* at 187 (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952)). The Second Circuit upheld the regulation, noting that statutes and regulations will not become "impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope." *Id. See also Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296 (Cal. Ct. App. 2003) (upholding Telephone Consumer Protection Act, which prohibits "unsolicited advertisement" defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission" in face of void for vagueness challenge); *Harjoe v. Herz Financial*, 108 S.W.3d 653 (Mo. 2003) (same); *People by Vacco v. Chazy Hardware, Inc.*, 675 N.Y.S.2d 770 (N.Y. Sup. 1998) (price gouging statute not void for vagueness).

Minnesota courts follow similar logic; for example, in *State v. Directory Pub. Servs, Inc.*, 1996 WL 12674 (Minn. Ct. App. Jan. 16, 1996), a business challenged several consumer protection laws, including Minnesota's Uniform

Deceptive Trade Practices Act,[6] and its False Statement in Advertising statute.[7] The laws prohibited conduct including advertising that "cause[d] likelihood of confusion or of misunderstanding" and forbade advertisements that contained "any material assertion, representation, or statement of fact which is untrue, deceptive or misleading." The court rejected the challenge, referring to the dictionary definition of the terms "deceptive" and noting that a person of ordinary intelligence could understand what was forbidden by the laws. *Id.* at *4-5.

Although Article 5 is not free from ambiguity, plaintiffs have not shown a strong likelihood of success on their void for vagueness challenge to this consumer protection statute. The terms in the statute are common terms, with ordinary meanings, and the plaintiffs are adequately on notice as to what conduct is prohibited.

II. Irreparable Harm

The Court discussed plaintiffs' claims of irreparable harm in its previous Opinion and Order. Included in that discussion were plaintiffs' claims of lost customer goodwill, an inability to recover increases in federal program contributions, and the unrecoverable expenditures plaintiffs claimed they will be forced to make in an effort to comply with this law. These remain legitimate concerns. However, the Court did not previously devote substantial discussion to the harms faced by consumers, some of which are potentially irreparable. The Court therefore focuses in this

[6] Minn.Stat. § 325D.44, subd. 1 (1994).

[7] Minn.Stat. § 325F.67 (1994).

Opinion and Order on the harms faced by Minnesota consumers.

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

III. Public Interest and Balance of Harms

The Court discussed the conflicting public interests in its previous Opinion and Order. Those competing interests include proper deference to the will of the legislature, Minnesota's interest in consumer protection, and the strong public interest in deferring to the will of Congress.

Plaintiffs argue that the record keeping requirements are onerous, and therefore the balance of harms tips in favor of continuing the injunctive relief. However, the Court is not convinced that the record keeping is quite as onerous as plaintiffs suggest. The requirement is quite similar to what plaintiff companies indicate is already done. Specifically, testimony at the legislative hearings regarding Article 5 and affidavits submitted by the plaintiffs reveal that when changes to contracts are proposed, it is the wireless providers' policy to send notification of the change to consumers, and to allow some period of time to renege on the change. Article 5 simply codifies these practices, and requires that the notification occur on the front-end of the transaction. The legislature was aware that the record keeping requirements would burden wireless providers, but the legislature heard testimony from consumers which supports the record-keeping requirement. Specifically, consumers who disputed extension of contract terms, or other changes, indicated that wireless providers had not informed them of the adverse change, but that the wireless company claimed that it did. Consumers believed they were left with no recourse other than paying the disputed bill, and the legislature acted rationally, and within its authority, when it shifted the responsibility of maintaining records of such agreements to the wireless company. The legislature heard testimony that it would not be feasible for an individual consumer to hire an attorney to dispute the early termination fee. The consumer's alternative is to spend time, in some cases what appears to be a ridiculous amount of time, disputing the fee, only to have accounts turned over to collection agencies, and/or adversely affecting credit.

IV. Conclusion

Minnesota consumers can enforce contract rights through existing state common law and state statutes prohibiting unilateral changes in contracts. This is modern contract law at its most basic. It is therefore within the power of state legislatures to ensure that wireless providers honor existing contracts with consumers, without forcing consumers to go to court to enforce contracts against unilateral changes. Article 5 simply provides that assurance. The fact that Article 5 may impact the cost of doing business in the short run does not make it impermissible rate regulation under federal law. It is simply the state legislature doing what it has the power to do: protecting consumers from what it considers unlawful business practices. The Court will dissolve the Temporary Restraining Order, except to the extent the Order enjoined prohibition on "pass throughs" of federal fees, and allow Article 5 to go into effect on September 15, 2004.

ORDER

Based upon all of the files, records, and proceedings herein, and upon the argument of counsel, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for a preliminary injunction [Docket Nos. 4, 5, 14, 32, 34] is **GRANTED IN PART**.

2. Until further order of the Court, the defendant and any officers or employees of the State of Minnesota, are enjoined from taking action to prevent wireless communications providers from passing through to customers federally assessed fees, whether those fees "are required" to be passed through to customers or "permitted" to be

passed through to customers. Such fees and fee increases are collectable **without** notice, and **without** a customer opt in. Further, no waiting period may apply before such fee increases are passed through.

3. No other provision of Article 5 is enjoined by this Order, and to the extent the Temporary Restraining Order prevented the implementation of other provisions of Article 5, the Temporary Restraining Order [Docket No. 47] is **DISSOLVED**.

4. The bond [Docket No. 48] posted in accordance with the Temporary Restraining Order shall be continued in accordance with Rule 65(c); and no additional bond shall be required.

5. This Order shall be stayed until September 15, 2004; the Temporary Restraining Order issued on June 29, 2004, shall remain in effect until this Order and Article 5 of H.F. No. 2151 take effect on September 15, 2004.

DATED: September 3, 2004 /s/ John R. Tunheim
at Minneapolis, Minnesota. JOHN R. TUNHEIM
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

CELLCO PARTNERSHIP d/b/a Verizon Wireless; VERIZON WIRELESS (VAW) LLC d/b/a/ Verizon Wireless; DULUTH MSA LIMITED PARTNERSHIP d/b/a Verizon Wireless; MID-WEST WIRELESS HOLDINGS L.L.C.; MIDWEST WIRELESS COMMUNICATIONS L.L.C.; AMERICAN CELLULAR CORPORATION; RURAL CELLULAR CORPORATION d/b/a Cellular 2000; SPRINT SPECTRUM L.P.; WIRE-LESSCO, L.P.; AT&T WIRELESS SERVICES OF MINNESOTA, INC.; VOIC-ESTREAM MINNEAPOLIS, INC.; and T-MOBILE USA, INC., Plaintiffs, v. MIKE HATCH, in his official capacity as Attorney General of Minnesota and not as an individ-ual, Defendant.	Civil No. 04-2981 (JRT/SRN) **TEMPORARY RESTAINING** [sic] **ORDER**

June 29, 2004

Andrew G. McBride, WILEY REIN & FIELDING, 1776 K St NW Ste 500, Washington, DC 20006 and Jeffrey John Keyes, BRIGGS & MORGAN; 2200 IDS Center, 80 South 8th St., Minneapolis, MN 55402 for plaintiffs Cellco Partnership, Verizon Wireless (VAW) LLC, Duluth MSA Limited Partnership;

Jeffrey John Keyes, BRIGGS & MORGAN, 2200 IDS Center, 80 South 8th St., Minneapolis, MN 55402 for plaintiffs for plaintiffs [sic] Midwest Wireless Holdings L.L.C.; Midwest Wireless Communications L.L.C.; American Cellular Corporation; Rural Cellular Corporation;

Kenneth Schifman, Sprint Corporation, 6450 Spring Parkway, Overland Park, KS 66251 and Teresa J. Kimker, HALLELAND LEWIS NILAN SIPKINS & JOHNSON, 220 6th Street South, Suite 600, Minneapolis, MN 55402, for plaintiffs Sprint Spectrum L.P. and WirelessCo, L.P.;

Seamus C. Duffy, DRINKER BIDDLE & REATH, One Logan Square, 18th & Cherry Streets, Philadelphia, PA 19103 and Barbara P. Berens, KELLY & BERENS, 3720 IDS Center, 8th Street, Minneapolis, MN 55402, for plaintiff AT&T Wireless Services of Minnesota, Inc.;

Michael R. Drysdale, DORSEY & WHITNEY – 50 South 6th Street, Suite 1500, Minneapolis, MN 55402-1498 and Daniel B. Rapport, FRIEDMAN KAPLAN SEILER & ADELMAN LLP, 1633 Broadway, New York, NY 10019-6708 for plaintiffs VoiceStream Minneapolis, Inc. and T-Mobile USA, Inc.

Cassandra Opperman O'Hern and Brian Sande, MINNESOTA ATTORNEY GENERAL, 445 Minnesota Street, St. Paul, MN 55101 for defendant.

Plaintiffs, a group of national and regional wireless carriers, challenge Article 5 of H.F. No. 2151, Minn. Sess. L. CH. 261 ("Article 5"), which is scheduled to take effect on Wednesday, July 1, 2004. Plaintiffs seek an immediate injunction prohibiting the Attorney General from enforcing Article 5.[1] The Court held a short telephone conference regarding plaintiffs' motion for preliminary injunctive relief on June 23, 2004, and heard more extensive oral argument on June 28, 2004. For the reasons set forth below, the Court grants the following temporary restraining order. During oral argument, the parties indicated that no additional briefing would be required for the Court's consideration of a preliminary injunction. The purpose of this Order, therefore, is to preserve the status quo until the Court can more fully consider the parties' positions. The Court considers the motions fully submitted and will issue an Opinion and Order on the preliminary injunction as soon as practicable.

BACKGROUND

The relevant portions of the challenged law provide:

> Subd. 3. [PROVIDER-INITIATED CHANGE.] A provider must notify the customer in writing of

[1] Plaintiffs Cellco Partnership d/b/a Verizon Wireless; Verizon Wireless (VAW) LLC d/b/a Verizon Wireless; Duluth MSA Limited Partnership d/b/a Verizon Wireless filed the initial motion for a temporary restraining order. [Docket No. 4]. This motion was joined by plaintiffs Rural Cellular Corp., Midwest Wireless Holdings L.L.C., Midwest Wireless Communications L.L.C., and American Cellular Corp. [Docket No. 5]. Plaintiff Sprint Spectrum L.P. joined the motion [Docket No. 14]; as did AT & T Wireless Services of Minnesota, Inc. [Docket No. 32], and plaintiff VoiceStream Minneapolis, Inc., and T-Mobile USA, Inc. [Docket No. 34].

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

Subd. 4. [CUSTOMER-INITIATED CHANGE.] If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

"Substantive change" is defined in Subdivision 1 as

(d). "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government

> requires the provider to impose upon the customer, is not a substantive change for the purposes of this section.

Also relevant to this case is Congress's regulation of telecommunications. In particular, plaintiffs argue that 47 U.S.C. § 332 preempts any state law that touches on rate-making.

47 U.S.C. § 332(c)(3)(A) provides that

> no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service

The next clause of the statute has been termed a "savings clause" and provides:

> except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

ANALYSIS

The parties agree that the *Dataphase* factors control this motion. The following four factors are relevant to the Court's consideration of plaintiffs' request for a TRO/preliminary injunction: (1) that there is a likelihood of success on the merits; (2) that the movant will suffer irreparable harm absent the restraining order; (3) that the balance of harms favors the movant; and (4) that the public interest favors the movant. *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981).

I. Likelihood of Success on the Merits

A. Preemption[2]

There is no dispute that 47 U.S.C. § 332(c)(3)(A) prevents states from regulating either the entry or the rates of wireless services. There is also no dispute, however, that the statute provides an exception to this rule by allowing states to regulate the "other terms and conditions" of commercial mobile services. 47 U.S.C. § 332(c)(3)(A). The plain language of the statute, subsequent case law, and legislative history establish that Congress did not intend to preempt all state law.[3] Therefore, for plaintiffs to show a likelihood of success on this argument, they must demonstrate that "the broader and more familiar doctrine of ordinary preemption" applies. *Smith v. GTE Corp.,* 236 F.3d 1292, 1313 (11th Cir. 2001) (citations omitted).

Plaintiffs' overall success on the merits hinges on their ability to demonstrate that Article 5 amounts to a prohibited rate regulatory scheme. Although it is clear that Article 5 will increase plaintiffs' costs of doing business,

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[2] Plaintiffs suggest that the "heart" of their claim is that "this is a clear case of state regulation preempted by section 332(c)(3) of the Communications Act." (*Pl. Reply Brief* at 5.) Therefore, the Court focuses its preliminary analysis on the preemption arguments.

[3] "[I]t is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and **other consumer protection matters**; facilities citing issues (e.g., zoning); transfers of control. . . . This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions.' " H.R. Rep. No. 103-111 103rd Con, 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

that is not enough. "To equate state action that may increase the cost of doing business with rate regulation would . . . forbid nearly all forms of state regulation, a result at odds with the 'other terms and conditions' portion of the [statute]." *Cellular Telecommunications Indus. Ass'n v. F.C.C.,* 168 F.3d 1332, 1336 (D.C. Cir. 1999). At the same time, this statute is clearly aimed, in part, at rates. Specifically, the definition of "substantial change" which is integral to the statute's function is directed at "modification to, or addition or deletion of, a term or condition in a contract that **could result in an increase in the charge** to the customer under that contract." Article 5, Subd. 1(d) (emphasis added).

Article 5 is certainly closer to rate regulation than those cases, cited by both parties, in which a general regulatory statute or common law theory of recovery was deemed not preempted. *See, e.g., Fedor v. Cingular Wireless Corp.,* 355 F.3d 1069, 1074 (7th Cir. 2004) (holding not preempted a putative class action alleging breach of contract, and characterizing the relief sought as "an accounting problem" the remedy for which would require the cell phone companies, at most to (1) adjust billing systems or (2) alter contracts to provide that roaming charges are billed separately – neither of which amounted to preempted rate regulation); *In re Long Distance Telecommunications Litig.,* 831 F.2d 627 (6th Cir. 1987) (holding not preempted plaintiffs' state law claims that providers failed to inform customers of practices for charging for uncompleted calls); *but see also Bastien v. AT&T Wireless Serv., Inc.,* 205 F.3d 983, 987 (7th Cir. 2000) (plaintiff's claims, ostensibly for breach of contract, were preempted because the claims would have required

AT&T to exceed the FCC's requirements regarding towers, signals, and rates).

Article 5 is distinguishable from the cited cases because Article 5 is not a "generally applicable" consumer protection law. Instead, it is directed only at providers of cellular services. *Compare* Article 5 *with Fedor,* 355 F.3d at 1072-73 ("claims stemming from state contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted") (citations omitted) *and Cellular Telecommunications Indus.,* 168 F.3d at 1336 (discussing more general consumer protection laws). If Article 5 does not amount to rate regulation, it is very close. Plaintiffs have shown some likelihood of success on this claim, and therefore the Court considers this factor to be in favor of granting temporary injunctive relief.

Plaintiffs also claim that Article 5 conflicts with FCC regulations implementing certain federal programs. In particular, plaintiffs suggest that Article 5 conflicts with the FCC rules regarding the federal Universal Service Fund ("USF"). FCC regulations require wireless carriers to remit to the FCC monetary support for the USF, and the Code of Federal Regulations expressly authorizes wireless carriers to recoup USF fees by recovering them directly from customers. 47 C.F.R. § 54.712(a).

Despite this authorization, the plain language of Article 5 seems to prevent plaintiffs from continuing to recover the USF fees directly from customers. Article 5 exempts from its notice and opt-in policy only those fees that are **required** by the federal government to be collected. Providers are authorized, but not required, to pass USF and other similar fees, such as those for enhanced 911 services, through to their consumers. Because the

plain language of the statute appears to conflict with federal policy, the plaintiffs have shown an initial likelihood of success on the merits of this portion of their challenge to the statute.

Because the Court finds that plaintiffs have shown an initial likelihood of success on at least a portion of their preemption argument, the Court will not address plaintiffs' alternate grounds for challenging the statute. Instead, the Court turns to the remaining *Dataphase* factors.

II. Irreparable Harm

Plaintiffs claim that they face irreparable harm in the form of lost customer goodwill, the inability to recover increases in federal program contributions, and the unrecoverable expenditures that plaintiffs will be forced to make in an effort to comply with this law by July 1, 2004. Plaintiffs also claim that it will be impossible to effectively train all of its customer service representatives or to put into place adequate methods of preserving records, prior to Article 5's effective date. Plaintiffs further emphasize that they compete directly with wire telephony services, and Article 5 puts them at a competitive disadvantage to traditional wire service providers.

The Court is persuaded that plaintiffs have established a showing of irreparable harm, should Article 5 take effect July 1, 2004.

III. Public Interest and Balance of Harms

Conflicting public interests are implicated in this matter. Defendant notes that the judicial branch cannot lightly dispute a determination by the political branches

that the interests at stake are compelling. (*Def. Brief* at 4 (quoting *Finzer v. Barry,* 798 F.2d 1450, 1459-60) (D.C. Cir. 1986))). Defendant further articulates Minnesota's obvious interest in protecting its consumers from unilateral changes to its contracts. The Court has reviewed summaries by employees of the Attorney General's office detailing legitimate complaints by Minnesota cell phone customers. On the other hand, the Court must also consider the strong public interest in deferring to the will of Congress, including Congress's goal of preventing states from regulating rates, and Congress's goal of allowing market forces to shape the wireless industry.

Despite these interests, plaintiffs have established that these factors favor the issuance of temporary, limited relief. Plaintiffs have demonstrated that they face significant expense, which could be for naught if the law is modified or found unenforceable. In contrast, the potential "harm" to consumers is mitigated substantially by the application of Minnesota's generally applicable consumer protection and contract laws. The Attorney General characterizes Article 5 as an unremarkable notice statute that simply codifies consumers' rights to have their contract terms respected. In essence, the Attorney General suggests that Article 5 merely requires cellular service providers to notify consumers of potential contract modifications, and obtain (and record and maintain) the customers' consent to that change. If this is an accurate interpretation of Article 5, there will be little harm to consumers if the implementation is delayed a short time, because Minnesota consumers will be able to protect their contractual rights via standard contract and consumer protection laws.

In the Court's view, the question of whether Article 5 constitutes impermissible rate regulation or whether it simply codifies consumers' rights to a balanced and fair contract is a very close issue. The parties and the people of Minnesota will benefit from the Court having sufficient time to carefully review this close question. So for the express purpose of preserving the status quo as much as possible and minimizing the possibility of irreparable harm until the Court has had an opportunity to rule on plaintiffs' motion for injunctive relief, the Court issues the following order.

ORDER

Based upon all of the files, records, and proceedings herein, and upon the argument of counsel, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for a temporary restraining order [Docket Nos. 4, 5, 14, 32, 34] is **GRANTED IN PART**.

2. Until further order of this Court granting or refusing a preliminary injunction or dissolving this Temporary Restraining Order, a Temporary Restraining Order is hereby entered preventing the defendant and any officers or employees of the State of Minnesota from taking action to enforce or attempt to enforce any provision of Article 5 of H.F. No. 2151.

3. In accordance with Rule 65(c) of the Federal Rules of Civil Procedure, plaintiffs shall post a bond with the Clerk in the amount of $ 50,000.00 for the payment of such costs and damages as may be incurred or suffered by

defendant in the event defendants are found to have been wrongfully enjoined or restrained.

DATED: June 29, 2004
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

1. 47 U.S.C. §153(27) provides in relevant part:

* * *

The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

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2. 47 U.S.C. §332(c)(3)(A) provides:

* * *

Notwithstanding section 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. 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 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. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that –

> **(i)** market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> **(ii)** such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

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3. 47 U.S.C. §332(d) provides in relevant part:

* * *

For purposes of this section –

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.

* * *

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4. Minn. Stat. §325F.695 (2004) provides:

Minn. Stat. §325F.695 CONSUMER PROTECTIONS FOR WIRELESS CUSTOMERS.

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

(b) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

(c) "Provider" means a provider of wireless telecommunications services.

(d) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. **Copy of contract.** A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the date the contract is entered into. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Subd. 3. **Provider-initiated substantive change.** A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. **Customer-initiated change.** If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

Subd. 5. **Expiration.** This section expires August 1, 2007.

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5. Minn. Stat. §645.20 (2004) provides:

Minn. Stat. §645.20. CONSTRUCTION OF SEVERABLE PROVISIONS.

Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.
