Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap

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The Authors wish to thank David St. John Larkin, J.D. (2003) University of Colorado; B.S. (2002) Michigan Technological University; B.S. (1997) Northwestern University, for his excellent assistance in creating this Article. The views expressed in the Article are those of the Authors and should not be attributed to Nextel Communications, Inc. or Levine + Purcell LLC.

I. INTRODUCTION: THE WIRELESS ROAD LESS TRAVELED—TWO ROADS DIVERGED . . .

In May of 1998, the Authors surveyed America's wireless terrain in a *Federal Communications Law Journal* article[1] and observed that commercial mobile radio services ("CMRS") stood at a pivotal crossroads.[2] One road led to a new land envisioned by the Omnibus Budget Reconciliation Act of 1993 ("1993 Act")[3] and the Telecommunications Act of 1996 ("1996 Act")[4]—a deregulated landscape fostering competition, investment, and regulatory consistency through a uniform federal framework. The other road led back to the far country of the original Communications Act of 1934 ("1934 Act")[5]—a regulated, static industry landscape preserving the legacy of dual, and often conflicting, federal and state jurisdictional regimes tied to artificial geographical and political boundaries and onerous state burdens.

From this crossroads, the Authors looked back at the history of the 1934 Act and across the ocean to the enviable wireless position held by most European mobile carriers and posed the question: "Whither American wireless?" The Authors argued forcefully that unleashing the full potential of wireless communications in the United States would require both a frank acknowledgement that the unique nature of wireless technologies transcends old categories of state and local networks and an unblinking acceptance of Congress's vision for a national regulatory scheme. This overarching wireless framework—marked by federal forbearance and extremely limited state regulatory involvement—was essential to induce the nationwide build-out of a robust wireless communications infrastructure capable of serving customers where they live, work, study, and play.

Yet, many court cases and regulatory decisions since then have struggled to accept this federal "new world order" for wireless prescribed

1. Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COMM. L. J. 547 (1998).

2. The terms "wireless" and "CMRS" are used interchangeably in this Article unless otherwise stated. These terms refer specifically to mobile telephone services, including personal communications service ("PCS") and enhanced specialized mobile radio ("ESMR") service. Wireless technology can support mobile, fixed, or both uses.

3. Pub. L. No. 103-66, 107 Stat. 312 (codified as amended in scattered sections of U.S.C.).

4. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at scattered sections of 47 U.S.C.).

5. Ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).

by Congress and identified by the Authors. Presently, the Authors believe that entrenched, regressive attitudes towards CMRS have enticed some policymakers to envision pouring this promising new wine back into yesterday's casks of a balkanized system that ignores the deregulatory framework spelled out by Congress in the 1993 and 1996 Acts.[6] As such, the time appears right to revisit the wireless terrain five years down the road from 1998 to glean the hard-won lessons of the past half decade and the best policy prescriptions for tomorrow.

A. Once Again, Whither Wireless?

Today, the broad telecommunications terrain is littered with the steaming wrecks of failed companies, the struggling remnants of former titans (AT&T, MCI/WorldCom), and gaping potholes of regulatory uncertainty. Scholarly journals and publications are filled with explications of the "parade of horrors"[7] in the telecommunications sector (including corporate fraud, distraught shareholders, overcapacity, commodification of some services, price increases for others, decreasing competition, and investors chilled by constant uncertainty).[8] Even more postmortems detail "what went wrong" with the once lofty promises promoted by many who

6. See *infra*, Part I.B.

7. Editorial, *Show Them to Their Cells*, DES MOINES REG. (June 27, 2002), at 18A ("Lest all of [the business scandals] be reduced to material for late-night talk-show monologues, this parade of horrors down Wall Street has had a devastating impact on the markets.").

8. *See, e.g.*, J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207 (2003) (assessing the relationship of WorldCom's fraud and bankruptcy to the FCC's Triennial Review decision and impact upon the telecommunications industry and WorldCom's competitors); Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L. Q. 357(2003) (approving of criminal provisions of the Sarbanes-Oxley Act, given the history of corporate fraud including WorldCom, Adelphia, and Qwest); JOHN C. COFFEE, JR., WHAT CAUSED ENRON?: A CAPSULE SOCIAL AND ECONOMIC HISTORY OF THE 1990'S (Columbia Law and Economics Working Paper No. 214, 2003) (tracing the causes of Enron's bankruptcy and comparing to other corporate scandals), *available at* http://ssrn.com/abstract=373581; Kenneth N. Gilpin, *The Strong Will Survive the Fallout in Telecom*, N.Y. TIMES, Late Edition, Feb. 3, 2002, § 3 at 8 (telecommunications industry is "reeling" from excess capacity); Gretchen Morgenson, *Companies' Big Debts Now Carry Big Risks*, N.Y. TIMES, Late Edition, Oct. 7, 2001, § 3 at 1 (discussing recessionary pressures on telecommunications and other companies); Edie Herman, *Regulatory Impediments Blamed for Technology Lag*, WASH. INTERNET DAILY, Feb. 26, 2001, *available* at LEXIS, Washid File (quoting Mike Nelson, IBM Director of Internet Technology, as saying that "the Internet revolution is less than 3% complete" because regulatory uncertainty, in part, discourages investment); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002) (criticizing legislative response to recent corporate fraud involving Enron and WorldCom).

saw the 1996 Act as a chance to build "castles in the sky." Some even blame the tarnished telecommunications sector for dragging down the U.S. economy as a whole.[9] Yet, important lessons have been learned by those who have managed to survive, and potentially vibrant CMRS, wireless fidelity ("Wi-Fi") and voice over Internet protocol ("VoIP") innovators stand poised on wireless, cable, and telecommunications platforms for the final assault on the status quo of the last century's communications models.

Perhaps most prominently, the wireless industry stands out as a battered but promising survivor of the 1990s telecommunications saga. While facing its own set of significant challenges since 1998 (including costly and complex state and federal mandates, taxes and fees, unpredictable regulation and court decisions, and huge investments in the build-out of their networks), on the whole, wireless carriers have—with the notable exception of Nextwave—avoided the bankruptcies and liquidations encountered by emerging wireline operators. Instead, the wireless industry's past half decade has been marked by increased competition and consumer demand, innovative new products and features, significant debt reduction and balance sheet revival, service improvements, and delivery on the promises of "convergence."

What was done right in this area that helped to set CMRS apart? Will wireless operators be able to improve in the current environment? The Authors believe an examination of the CMRS industry's evolution, its still-looming barriers, and its prospects for the future will provide a useful road map for this critical industry in the 21st century.

B. Charting a Federal Course for CMRS—The FCC as Wilderness Guide

This Article explores legal and policy developments affecting CMRS providers since 1998 in the overall context of national and international telecommunications industry regulation and other networked industries. The Authors conclude that while the amendments to Sections 332 and 2(b) in the 1993 Act give the Federal Communications Commission ("Commission" or "FCC") exclusive, plenary regulatory jurisdiction over

9. *See, e.g.*, Dori Jones Yang, *Overwired World: Telecom's Crash For Investors, Consumers, More Trouble Ahead*, U.S. NEWS & WORLD REPORT, June 25, 2001, at 40 ("While dot coms cornered attention—and blame—for the stock market boom and bust, telecom firms attracted even more money, tapping debt as well as equity markets, and their wipeout has been far more disastrous."); James Glassman, Commentary Op-Ed., *For Whom The Bells Still Toll: More Deregulation Of Telecoms Needed*, WASH. TIMES Apr. 25, 2001, at A19. ("Giving in to the Bells' demands for a rollback of the Telecommunications Act of 1996 is a prescription for disaster that will throttle the prospects of the New Economy for decades to come.").

CMRS providers,[10] many courts and regulators have failed to recognize this fact—at great cost to industry and consumers. These failures severely impede wireless companies' ability to optimize their inherently national networks as well as their sales, marketing, and billing services. The Authors believe that despite strong overall growth and technological development in the post-1998 CMRS marketplace, the threat of continued inconsistent treatment of wireless companies by judges and regulators stifles investment opportunities, subverts Congress's deregulatory vision, and may ultimately frustrate CMRS's role as the engine of the next stage of technological development.

But which road taken in 2004 and beyond will best achieve these long-term aims of deregulation, innovation, and competition? The Authors believe that the Commission is the appropriate guide to lead the wireless sector out of the current morass and into the full promise of convergence. As the "expert agency" designated in American administrative law structure[11] to be the implementer of laws in complex policy areas, the Commission is the right body to reiterate and implement the federal framework for CMRS laid out by Congress in 1993 and 1996. To rectify the problems identified in this Article and realize the full potential of wireless technologies, the Commission should:

- Overcome political concerns and boldly state the imperative for minimal state regulatory involvement in wireless matters.

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10. The basis for exclusive, plenary regulatory jurisdiction over CMRS providers is set forth in 47 U.S.C. § 332(c)(3)(A) (2000).

> Notwithstanding sections 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.

Id. (emphasis added).

As examined in the Author's 1998 Article, Congress' combined 1993 revisions to both Sections 2(b) and 332 reserves only "other terms and conditions" as the states' bailiwick. The legislative history of the 1993 Act provides a description of the limited regulatory area intended to be reserved to the states through the phrase "other terms and conditions":

> 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.

11. *See* 47 U.S.C. § 151 (2000) (As set forth in its enabling legislation, the Federal Communications Commission was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio.").

Clear, well-articulated Commission decisions emphasizing the federal framework for wireless are much more likely to generate judicial deference than Commission orders which somewhat quixotically seek to placate all constituencies;

- Proactively submit clarifying comments to state PUC proceedings affecting wireless carriers, just as state regulators now file comments at the Commission. This new commitment by the Commission to "regulatory economy" would shave years off the current process for determining the correct boundaries for state/federal action and greatly improve regulatory predictability for carriers and their investors.

Only such a major recalibration of the Commission's approach will address the recurrent problems in the wireless sector and generate the increased competition, convergence, innovation, and regulatory predictability that have so far eluded policymakers, consumers, and industry. Without this shift in Commission leadership, these bright promises for CMRS and the telecommunications sector as a whole will remain constantly beyond the horizon and still further down the wireless road less traveled.

II. WIRELESS LANDSCAPE IMPROVEMENTS—1998-2003

The five-year period from 1998 to 2003 resulted in tremendous growth in the wireless marketplace. Notwithstanding the significant gains in dispatch and messaging services, this period (see Appendix 1) produced dramatic net increases in gross revenue, subscribers, nationwide penetration rates, and average minutes of use for mobile telephony services.[12] In 1998, legacy wireline monopoly networks remained the dominant mode of communication. By 2002, some household statistical data supported the view that CMRS was approaching the status of a "moderate substitute" for fixed wireline monopoly networks.[13]

12. This Article addresses regulatory policies applied to mobile communications services. The 1993 Act does not apply to wireless networks that offer fixed, rather than mobile, services. *See* 47 U.S.C. § 332(d)(1), (3) (defining "commercial mobile services" and "private mobile service").

13. MICHAEL R. WARD ET AL., GOING MOBILE: SUBSTITUTABILITY BETWEEN FIXED AND MOBILE ACCESS 20 (Haas Sch. of Bus., Ctr. for Research on Telecomms. Pol'y, Working Paper No. CRTP-58, 2002) (examining fixed-mobile access substitution using household level data). Rodini, et al. further note that "discrepancies between the two services are fading. . . . [whereas a] small but increasing number of households are opting for mobile service in lieu of fixed service." *Id*; *see also* Simon Romero, *Land-Line Rules in a Wireless World*, N.Y. TIMES, Late Edition, Feb. 21, 2003, at C1 ("About 3 percent of telephone users have made cell phones their primary phones, and that figure is expected to climb . . . .").

"Intense"[14] and "fierce"[15] price competition in the provision of CMRS services have also led to continuous decreases in average consumer prices since 1998.[16] Finally, the last half decade also brought the nearly universal transition from analog to digital wireless services (see Appendix 1) and a meteoric rise in the use of mobile data services.[17]

Unprecedented levels of development and innovation in wireless technology have also marked the years from 1998 to 2003. Economists and industry analysts point to continuing technological innovation as the single most important growth factor affecting the wireless marketplace.[18] Today, wireless telephony exemplifies "technological convergence" (as well as the obsolescence of old categories) better than any other industry.[19] Mobile

14. Colette Fleming et al., UBS Warburg, *Wireless Communications: 3Q02 Wireless 411—Outlook*, GLOBAL EQUITY RESEARCH, Jan. 23, 2003, at 1.

15. Cannon Carr et al., CIBC World Markets, *Avoiding the Hotel California: An Equity/High Yield Wireless Weekly*, EQUITY RESEARCH, Dec. 23, 2002, at 2.

16. The FCC notes that "intense price competition [may be] a problem . . . from an investor's perspective." *Eighth Report*, *infra* note 17, para. 90 n.311 (citations omitted). While attractive to consumers in the short term, intense price competition may lead to higher long-term average prices for CMRS services. *Id.* (citing Linda J. Mutschler et al., *Wireless Preview: What About 3Q02?*, MERRILL LYNCH, EQUITY RESEARCH, Oct. 8, 2002, at 5 ("the continuing pricing pressure is worrisome, and, in our view, could disrupt the stable ARPU trend that we have seen up to this point"); Cannon Carr & Gregor Dannacher, CIBC World Markets, *Can Wireline Cannibalization Save Wireless ARPUs in 2003?*, EQUITY RESEARCH, Dec. 11, 2002, at 5 ("Pricing Trends Worrisome, But Volumes Have Made Up For It"). For discussion of deleterious competition, see *infra,* Parts IV.C and V.B.2.

17. A nascent technology in 1998, mobile data services gained widespread adoption by 2002. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourth Report*, 14 F.C.C.R. 10145, 10151, 16 (P & F) 289, 292 (1999) [hereinafter *Fourth Report*] ("The mobile data sector remains in a developmental stage."); Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Report*, 18 F.C.C.R. 14783, para. 124 [hereinafter *Eighth Report*] ("One analyst estimates there were 11.9 million mobile telephone users who subscribed to some type of mobile data service at the end of 2002 . . . .").

18. HARALD GRUBER, EUROPEAN INVESTMENT BANK, SPECTRUM LIMITS AND COMPETITION IN MOBILE MARKETS: THE ROLE OF LICENCE FEES 2 (2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=245288 ("The mobile telecommunications industry demonstrated that it is consistently improving the spectrum efficiency of its services. This . . . provided room for drastic reductions in the cost of service. Firms thus captured an increasing number of customers.") [hereinafter GRUBER, SPECTRUM LIMITS].

19. *See* Dawn Kawamoto, *Riding the Next Technology Wave*, CNET NEWS.COM, *at* http://news.com.com/2008-7351_3-5085423.html?tag=guts_bi_7351 (Oct. 2, 2003) ("[W]ireless is the biggest landscape for innovation and business creation."); *see also* Jane Black, *The Brainwork Behind Smartphones*, WIRELESS NEWSFACTOR, *at* http://www.wirelessnewsfactor.com/perl/story/22681.html (Nov. 12, 2003) (concluding that new "smartphones" must be "everything to everybody"; describing new "GameBoy-meets-cell-phone," "MP3-player-meets-cell-phone," and "TV-meets-cell-phone" devices); SHEILA RADER ET AL., MOBILE EXTREME CONVERGENCE: A STREAMLINED ARCHITECTURE TO

telephones have become the indispensable "Swiss Army knife" of the 21st century and are quickly evolving into a substitute for laptop computers.[20]

A single wireless device may combine mobile telephony, Internet services (e.g., Web browsers, e-mail, and instant messaging), digital photography, organizational tools (e.g., personal digital assistants), productivity applications and interfaces (e.g., Microsoft Office applications), dispatch and Nextel's Direct Connect or walkie-talkie services, paging services, gaming services, music and video recording and playback capacity, storage capacity, GPS services, and streaming music and video services (e.g., video recording and content display from Idetic and Sprint PCS).

Additionally, mobile telephones produced since 1998 embody significant reductions in size, weight, and, perhaps most importantly, power consumption. Many companies are now working together to standardize operating systems, applications, and network protocols for mobile telephones.[21] Local number portability between CMRS providers, or the preservation of mobile telephone numbers, is now in the process of remaking the industry (although this FCC mandate presents its own set of

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DELIVER MASS-MARKET CONVERGED MOBILE DEVICES 1 (Motorola White Paper No. MXCWP/D REV. 2, (2004), *available at* http://e-www.motorola.com/files/wireless_comm/doc/brochure/MXCWP.pdf (describing new device-level architecture to provide "smartphones, feature phones, and converged mobile devices at mass market prices"); *Nextel, Motorola Show Swiss Army Knife Handset*, RCR WIRELESS NEWS (Nov. 4, 2002), *at* http://rcrnews.com/cgi-bin/paidAccess.pl (announcing, literally, a Swiss Army Knife-inspired wireless telephone) [hereinafter *Swiss Army Knife Handset*].

20. As Commissioner Powell noted recently:

> But one need only to pause and look around to see the signs [of the digital migration]. Few people would even think of leaving home without their cell phone today. One's cell phone is more personal and intimate than the traditional phones most of us grew up with. Features that allow customization abound—personalized ring tones, faceplates, interfaces and styles," said Powell. "The Blackberry that we see today is one of the most talked about personal communication devices around. It was the hero of Sept. 11, allowing many people to communicate with their loved ones during a crisis. It is a communicator's Swiss Army Knife we so long for, allowing someone constant access to e-mail, voice calls, address books and schedules.

Heather Forsgren Weaver, *Powell Says Mobile Use Shows Digital Migration Is Here*, RCR WIRELESS NEWS, *at* http://rcrnews.com/cgi-bin/paidAccess.pl.(Jan. 15, 2004); *see also Swiss Army Knife Handset*, *supra* note 19.

21. *See, e.g.*, Robyn Weisman, *Mobile Giants Ally to Forge Open Standards*, TECH NEWS WORLD, *at* http://www.technewsworld.com/perl/story/31216.html (July 29, 2003) (discussing formation of the Mobile Industry Processor Interface Alliance by Nokia, Texas Instruments, ARM Holdings and STMicroelectronics to define and endorse open-standard specifications for mobile device application processor interfaces ("APIs")); Ben Charny, *Microsoft Joins Mobile Phone Alliance*, CNET NEWS.COM, *at* http://news.com.com/2100-1033-935414.html (June 12, 2002).

challenges for the wireless industry).[22]

Other innovative wireless services are also flourishing. Wi-Fi (commonly identified under the IEEE 802.11b/g standard and Bluetooth) technology has brought wireless networking to the mass market and enabled a surge in purchases of new appliances, applications, and devices. Blackberry and Sidekick mobile devices are fast becoming the *de rigueur* business tool of executive America. Enhanced 911 ("e911") services are now available on many mobile telephones, thus allowing emergency personnel to respond faster and with greater geographic accuracy. In addition, ultra-wideband sensors now monitor the location of emergency personnel, for example, who may be trapped in a fire or may be in need of medical service.

III. PERSISTENT PROBLEMS: MISGUIDED LEGAL ANALYSES AND STATE REGULATORY BURDENS

Despite these impressive advances since 1998,[23] the question today for policymakers, legislators, and industry is whether consumers will benefit more from market-based carrier practices adopted in response to competition or from well intended, but often misguided, assistance provided by regulators and judges. In passing the 1993 Act, Congress expressly acknowledged that the unique interstate characteristics of wireless communications necessitated a new deregulatory environment free from the artificial categories tying regulation to state geographic boundaries and a regulator's view of necessary levels of investment, service cost, and quality.[24] Congress addressed very real problems through

22. The Authors note that the pro-consumer benefits of line-number portability ("LNP") have not yet been realized. Costs of enabling current networks to become LNP compliant are passed on to customers by FCC mandate. Justifying an extension to the March 2000 CMRS LNP implementation deadline, the Commission explained:

> [T]he . . . schedule would impose additional costs and technical burdens on the wireless industry that, given the current market conditions in the industry, are not necessary to protect consumers, promote the public interest, and ensure just, reasonable, and nondiscriminatory rates and practices.

CTIA's Petition for Forbearance from CMRS Number Portability, *Order on Reconsideration*, WT Dkt. No. 98-229, para 18 (Feb. 23, 2000).

23. *See e.g.*, Michele Farquhar, *Guest Opinion: Will the Golden Goose Migrate?*, WIRELESS WEEK (Oct. 13, 1997), *available at* http://www.wirelessweek.com/article/CA4699?stt=001&text=golden+goose ("Wireless . . . remains a 'potential' success story."). Symposium, *Legg Mason—Capital Markets: Investment Precursors In Telecom, Internet And Electronic Commerce*, 8 COMMLAW CONSPECTUS 253, 271 (Summer 2000) (remarks of Kathleen O'Brien Ham, Wireless Bureau Deputy Chief, FCC) (The wireless market "has been a huge success story from our standpoint.").

24. The purpose of the Omnibus Budget Reconciliation Act of 1993 was "to dramatically revise the regulation of the wireless telecommunications industry, of which cellular telephone service is a part." Conn. Dept. of Pub. Util. Control v. FCC, 78 F.3d 842,

the 1993 Act. The regulation that existed in about half of the states before [implementation of the 1993 Act] was clearly harmful to consumers. States with price or entry regulation had higher prices and lower output relative to states that did not have such regulation.[25]

Since then, however, realization of Congress's federal regulatory framework for wireless[26] has stalled due to persistent "attempts by some courts and state and local entities to shackle new wireless service to old regulatory categories."[27]

A. Conflicting Court and Commission Decisions

As detailed in the Authors' 1998 article, Congress amended Section 2(b) in the 1993 Act to establish a federal jurisdictional scheme for CMRS services that is the subject matter of Section 332.[28] As revised in 1993, Congress created a statutory "fence" delineating national boundaries for a CMRS regulatory framework. Instead of merely "fencing out" state regulation addressing "the entry of or the rates charged by any commercial mobile service or any private mobile service,"[29] Congress amended Section 2(b) to grant the Commission exclusive jurisdiction

> over wireless "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio"—leaving very little territory for the state regulators to legally "fence in." In fact, all that is left for [state regulation] under the law are "other terms and conditions."[30]

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845 (2d Cir. 1996).

25. Thomas M. Lenard & Brent D. Mast, *Taxes and Regulation: The Effects of Mandates on Wireless Phone Users*, THE PROGRESS & FREEDOM FOUND., PROGRESS ON POINT 10.18, at 6, 8 (Oct. 2003) (citing Jerry A. Hausman, *Mobile Telephone*, *in* 1 HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 564-605 (Martin E. Cave et al. eds., 2002a ed.)); and Jerry A. Hausman, *The Cost of Cellular Telephone Regulation*, MIT WORKING PAPER (Jan. 3, 1995)) [hereinafter Lenard & Mast].

26. *See* Kennedy & Purcell, *supra* note 1, Part II, for a summary of wireless regulation prior to 1998.

27. *Id*. at 571.

28. *Id*. at 561-62.

29. 47 U.S.C. § 332(c)(3)(A) (2000).

30. Kennedy & Purcell, *supra* note 1, at 561 (citing 47 U.S.C. §§ 152(b), 332(c)(3)(A) (2000)). The 1993 revised wording to section 2(b) states that:

> Except as provided in . . . section 332 . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

47 U.S.C. § 152(b) (2000). Congress's exclusionary language expressly removes state jurisdiction over CMRS and establishes an exclusively national regulatory framework.

This regulatory fence "is a major factor in the wireless success story."[31] Yet, despite establishing a comprehensive and uniform federal regulatory framework for CMRS providers, legal and administrative developments since 1998 are frustrating achievement of Congress's vision for wireless. Several recent decisions continue to misconstrue this national framework by preferring and erroneously imposing a classic preemption analysis to a Section 2(b) analysis when analyzing the "other terms and conditions"[32] language. Such cases threaten to broaden state regulatory jurisdiction at the expense of Congress's intended federal competitive framework.

1. Section 332 Cases: Identical Laws and Similar Facts Yield Inconsistent Holdings

Previously, the Authors concluded that the vestigial state regulatory authority over CMRS services is derived solely from the "other terms and conditions" clause of Section 332(c)(3)(A).[33] The "rates and entry" language of Section 332(c)(3)(A), read in conjunction with Section 2(b), should therefore preempt all other forms of state regulation over CMRS providers. At that time, however, the interpretation of "other terms and conditions" was subject to considerable litigation and uncertainty. For example, two representative pre-1998 U.S. District Court decisions, involving the same defendant and similar CMRS rate plans, demonstrate the inconsistent, unpredictable and often fact-specific analysis used to determine whether state claims are best characterized as "other terms and conditions" or federal "rate or entry regulation."

In *DeCastro v. AWACS*,[34] a New Jersey federal district court considered claims of deceptive and undisclosed billing practices arising from the defendant's alleged practice of charging for noncommunication time and rounding up minutes for billing purposes. The *DeCastro* court

31. Lenard & Mast, *supra* note 25, at 6.

32. 47 U.S.C. § 332(c)(3)(A) (2000). By "terms and conditions," the Committee intends to include such matters as customer billing information and practices, billing disputes, 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 is 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.

33. 47 U.S.C. § 332(c)(3)(A).

34. DeCastro v. AWACS, Inc., 935 F. Supp. 541, *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996); *see also* Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947 (D. Del. 1997) (holding on nearly identical facts to those in *DeCastro*, the court held that state consumer fraud claims were not preempted by the Communications Act).

held that such consumer fraud claims were not preempted by Section 332(c)(3)(A) since "the claims . . . in this case challenge a billing practice, not a rate or market entry."[35] Addressing the interplay between Sections 2(b) and 332(c)(3)(A), which creates a federal regulatory framework for CMRS, the *DeCastro* court reasoned that

> a "general framework" does not rise to the level of an affirmative and clear congressional intent to make causes of action challenging a provider's billing practice removable to federal court . . . .
>
> As emphasized repeatedly in Supreme Court and Third Circuit jurisprudence, to find complete [preemption], there must be an affirmative and clear indication of Congress'[s] intent that the Communications Act provides an exclusive federal remedy for the plaintiffs' claims.[36]

The *DeCastro* court relied[37] on another court's decision in *Esquivel v. Southwestern Bell Mobile Systems Inc.*,[38] involving similar issues. The *Esquivel* case was a class action challenging the validity of a $200 early termination fee for cancellation of a service agreement. In granting the motion to remand to state court for lack of preemption, the district court stated that "the liquidated damage provision here is a 'term and condition' of the agreement rather than a rate"[39] because "332(c)(3)(A) specifically declines to prohibit the states from regulating terms and conditions."[40]

In contrast, *In re Comcast Cellular Telecommunications Litigation*[41] illustrates the divergent interpretations given to Section 332(c)(3)(A) and the corresponding difficulty of defining rate or entry regulation. Despite involving the same basic CMRS rate plan addressed in *DeCastro*, (discussed *supra*), the *Comcast* court reached the opposite result. The issue before the Federal District Court for the Eastern District of Pennsylvania in *Comcast* concerned whether four claims of consumer fraud, arising from the defendant's alleged practice of charging for noncommunication time and rounding up minutes for billing purposes, were preempted by Section 332(c)(3)(A). In finding that the four claims were preempted, the *Comcast* court first addressed the federal regulatory framework and plenary authority granted to the Commission:

> In furtherance of its goal of fostering rapid and uniform development of the CMRS industry through deregulation, Congress gave the FCC

35. *DeCastro*, 935 F. Supp. at 553.

36. *Id*. at 553-554.

37. *Id*. at 552 ("Several courts have found that state claims challenging the fairness of a billing practice are not completely [preempted] by the Communications Act.").

38. 920 F. Supp. 713 (S.D. Tex. 1996).

39. *Id*. at 715.

40. *Id*. at 715-16.

41. 949 F. Supp. 1193 (E.D. Pa. 1996).

> plenary authority to forbear from regulating CMRS providers under many of the common carriage provisions of the Act. 47 U.S.C.A. § 332(c)(1)(C). In addition, sole authority to address violations of the Act by CMRS providers was vested with the FCC and the federal district courts.[42]

Recognizing the "doctrine of artful pleading,"[43] the court explained that "a careful reading of the complaint and the remedies sought by the Plaintiffs demonstrates that the true gravamen of the complaint is a challenge to Comcast's rates and billing practices."[44] The court further justified its preemption holding by explaining that:

> [The Plaintiff's complaint] attacks the reasonableness of the method by which Comcast calculates the length and, consequently, the cost of a cellular telephone call. As such, the Plaintiffs' claims present a direct challenge to the calculation of the rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a CMRS provider, something it is explicitly prohibited from doing.[45]

The conflicting holdings in these two Section 332 cases were repeatedly replicated by courts across the nation between 1998 and 2003,[46]

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42. *Id*. at 1198.

43. *Id*. at 1199 ("'[A] court will not allow a plaintiff to deny a defendant a federal forum when the plaintiff's complaint contains a federal claim "artfully pled" as a state law claim.'")(citations omitted).

44. *Id*. at 1203.

45. *Id*. at 1201.

46. While the majority of courts upheld the *DeCastro* conclusion that Section 332 does not completely preempt state law claims, the scope of "other terms and conditions" became even more uncertain. *See* State *ex rel.* Nixon v. Nextel West Corp., 248 F. Supp. 2d 885, 892 (E.D. Mo. 2003) (noting the allegedly deceptive description of rates in invoices and advertising "does not challenge the rates themselves and does not ask the state court for any relief that would regulate the defendants' rates."); Russell v. Sprint Corp., 264 F. Supp. 2d 955, 961 (D. Kan. 2003) (holding state law claims for unfair business practices, consumer fraud, declaratory relief, and injunctive relief not preempted); *In re* Wireless Tel. Radio Frequency Emissions Prod. Liab. Litig., 216 F. Supp. 2d 474 (D. Md. 2002) (holding state negligence and fraud claims not preempted); Braco v. MCI WorldCom Comm. Inc., 138 F. Supp. 2d 1260 (C.D. Cal. 2001) (holding claims that advertising of prepaid calling cards were false and unfair under state unfair competition act not preempted); Crump v. WorldCom Inc., 128 F. Supp. 2d 549 (W.D. Tenn. 2001) (holding claims for violation of state consumer protection act, misrepresentation, and unjust enrichment based on false advertising of long-distance calling plan not preempted); Brown v. Washington/Baltimore Cellular, Inc. 109 F. Supp. 2d 421 (D. Md. 2000) (finding "rates" of service do not include late fee charges assessed on wireless telephone subscribers' cellular phone accounts); Minnesota *ex rel.* Hatch v. WorldCom, Inc., 125 F. Supp. 2d 365 (D. Minn. 2000) (holding claims that advertising of long-distance calling plan violated state consumer protection statutes were not preempted); Cellular Telecomms. Indus. Ass'n v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (finding mandatory contributions to state universal service programs are not "rate" regulation); *see also* Paging, Inc. v. Bd. of Zoning Appeals for the County of Montgomery, 957 F. Supp. 805 (W.D. Va. 1997) (holding that FCA preempts different treatment by state or local government of functionally equivalent wireless communications

yielding scant predictability for wireless carriers and their investors.

2. *Central Office Telephone* and CMRS Preemption Law

Aside from reaching entirely different outcomes when reviewing similar billing practices, the *DeCastro*, *Esquivel*, and *Comcast* decisions highlight the divergent analysis used by courts interpreting "rate regulation." This inconsistency was further complicated by the Supreme Court's ruling in *AT&T Co. v. Central Office Telephone, Inc*.[47] In the context of Title II long-distance regulation, *Central Office Telephone* addressed the issue of whether the federal filed rate doctrine[48] preempts "state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff."[49] In ruling that the state claims were preempted by federal law, the Court overturned a Ninth Circuit decision[50] finding the "filed rate doctrine inapplicable '[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing.'"[51] Explaining the Court's holding, Justice Scalia reasoned that "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."[52]

Uncertainty about whether the Court's conclusion in *Central Office* that Title II billing practices amounted to rate and entry regulation applies to CMRS providers spurred a great deal of litigation in the years following 1998. Interestingly, and perhaps foreshadowing the resolution of this question, the reasoning of Justice Stevens' dissent in *Central Office* ultimately became the majority position for resolving this question. As set forth by Justice Stevens:

> More akin to [*Central Office Telephone*] is *Nader v. Allegheny Airlines, Inc.*, in which we held that a common-law tort action for fraudulent misrepresentation against a federally regulated air carrier

providers); Cincinnati SMSA v. Pub. Util., 98 Ohio St. 3d 282 (2002) (explaining "rate" regulation does not include Public Utility Commission determination that wholesale CMRS provider discriminated against reseller because wholesaler set rates internally to zero).

47. AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214 (1998).

48. The "filed rate doctrine" requires that every common carrier file a rate or tariff with the Commission prior to collecting for its services. *See* 47 U.S.C. § 203(a). "[T]he rate of the carrier duly filed is the only lawful charge [it may collect]. Deviation from it is not permitted upon any pretext." Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

49. Pet. for a Writ of Cert., *Cent. Office Tel., Inc.*, 524 U.S. 214 (No. 97-679), 1997 WL 33485630, at *i (U.S. Oct. 16, 1997).

50. Cent. Office Tel., Inc., v. AT&T Co. 108 F.3d 981, 990 (9th Cir. 1997).

51. *Cent. Office Tel., Inc.*, 524 U.S. 214, 224 (1998) (citing AT&T Co. v. Cent. Office Tel., Inc.,108 F.3d 981 (9th Cir. 1997)).

52. *Id.*

> could "coexist" with the Federal Aviation Act. To a limited degree it may be said that here, as in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." If the Communications Act's saving clause means anything, it preserves state-law remedies against carriers on facts such as these.[53]

Shortly after the decision in *Central Office Telephone*, the Commission responded[54] to a request by Southwestern Bell Mobile Systems ("Southwestern" or "SBMS") to address six questions[55] central to resolving numerous class actions filed in state and federal courts challenging the billing practices of CMRS providers (including charging for calls in whole-minute increments and charging subscribers for incoming calls). Relying partially upon the decision in *Comcast*, the Commission held as a preliminary matter that "Section 332(c)(3)(A) bars lawsuits challenging the reasonableness or lawfulness *per se* of the rates or rate structures of CMRS providers."[56] The Commission then addressed each of the six questions individually—four of which bore directly upon the issue of whether state law is preempted by Section 332(c)(3)(A). First, the Commission granted Southwestern's proposed ruling that "there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.'"[57] Second, the Commission interpreted Section 332(c)(3)(A)'s use of the phrase "rates charged by" to "include both rate levels and rate structures for CMRS and [held] that the states are precluded from regulating either of these."[58] Finally, the Commission addressed two

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53. *Id*. at 233-34 (citing Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 300 (1976)) (Stevens, J., dissenting) (citations omitted).

54. Southwestern Bell Mobile Sys., Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, 14 F.C.C.R. 19898, 18 Comm. Reg. (P & F) 541 (1999) [hereinafter *SBMS Ruling*].

55. The requests made by Southwestern Bell Mobile Systems included whether:

> (a) Congress and the Commission have established a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation; . . . (d) the definition of the term "rates charged" in Section 332(c)(3) . . . includes at least the elements of a CMRS provider's choice of which services to charge for and how much to charge for these services; (e) challenges to the "rates charged" to end users by a CMRS provider . . . are exclusively governed by federal law under Section 332(c)(3) . . . and (f) state-law claims directly or indirectly challenging the "rates charged" by CMRS providers are barred by Section 332(c)(3).

Id. para. 3 (citation omitted).

56. *Id*. para. 7 (citing *In re Comcast Cellular Telecomm. Litig*., 949 F. Supp. at 1201).

57. *Id*. para. 9.

58. *Id*. para. 20.

separate, but related, proposed rulings that questioned whether Southwestern's specific billing practices were governed by federal law and whether states could directly or indirectly challenge "rates charged" by CMRS providers. On this final point, the Commission agreed with Southwestern that "states do not have the authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments."[59] However, the Commission balked at giving its complete support for a plenary federal regime by noting that "[w]e do not agree . . . that state contract or consumer fraud laws relating to the disclosure of rates and rate practices have generally been preempted with respect to CMRS [and] . . . fall within 'other terms and conditions.'"[60] The Commission therefore upheld the plenary federal scheme for "rate and entry regulation," but also adopted a narrowed scheme allowing for the incidental "non-preempted" framework as envisioned by Justice Stevens in *Central Office Telephone*.[61]

3. *Bastien v. AT&T Wireless Services*—Complete Preemption Redux?

The *Central Office Telephone* case, however, led the Seventh Circuit to a completely different conclusion about the preemptive force of Section 332(c)(3)(A) than was reached by the Commission in the *SBMS Ruling*. In *Bastien v. AT&T Wireless Services*,[62] the Seventh Circuit considered whether breach of contract and consumer fraud claims against a CMRS provider were properly preempted by Section 332 and removed to federal court.[63] The Seventh Circuit relied partially on *Central Office* to get to the heart of the state claims against wireless carriers:

> In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service. As the Supreme Court recognized in *Central Office Telephone*, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law.[64]

59. *Id*. para. 23.

60. *Id*.

61. Shortly after the FCC's declaratory ruling, the D.C. Circuit favorably reviewed the Commission's SBMS Ruling. Cellular Telecomm. Indus. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (upholding an FCC ruling requiring mandatory contributions by CTIA members to state universal service funds).

62. Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983 (7th Cir. 2000).

63. *Id*. at 989.

64. *Id*. at 988 (citing *Cent. Office Tel. Inc.*, 524 U.S. at 223 ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.")).

By finding in favor of the defendants, the Seventh Circuit thus upheld the federal plenary framework promulgated by Sections 332 and 2(b).[65] The court found that the plaintiff's complaint, "although fashioned in terms of state law actions, actually challenges the rates and level of service offered by AT&T Wireless, an area specifically reserved to federal regulation."[66] Because the plaintiff in *Bastien* challenged only the validity of the jurisdiction, and not the dismissal of his suit under Rule 12(b)(6) based on the preemption afforded by 332, the suit was dismissed.

Many courts initially followed the Seventh Circuit's reasoning in *Bastien* that Section 332 completely preempts state rate or entry regulation.[67] However, several other subsequent cases soon distinguished or criticized the Seventh Circuit's preemption holding in *Bastien*.[68] Despite

65. *See supra*, Part I.B.

66. *Bastien*, 205 F.3d at 990.

67. *See* Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998); Marcus v. AT&T Corp., 138 F.3d 46, 55-56 (2nd Cir. 1998); World Access USA Corp. v. AT&T Corp., No. 99-1864, 2000 WL 297845 (S.D. Fla. 2000); Mellman v. Sprint Comm. Co., 975 F. Supp. 1458 (N.D. Fla.1996); *In re* Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193 (E.D. Pa. 1996); Thermalcraft, Inc. v. U.S. Sprint Comm. Co. Ltd. P'ship, 779 F. Supp. 1039 (W.D. Mo. 1991)).

68. Many courts held that the *Bastien* court wrongfully applied the artful pleading doctrine to justify removal to a federal court by broadly interpreting the scope of the complete preemption doctrine. The District Court of New Hampshire's reasoning in *Guglielmo v. WorldCom, Inc.*, is representative:

> The Supreme Court has narrowly interpreted the scope of the complete preemption doctrine. To date, the Court has found such extraordinary preemptive force in only two federal statutes . . . . [Those cases finding complete preemption are] impossible to reconcile with the Supreme Court's restrictive interpretation of the complete preemption doctrine.

Guglielmo v. WorldCom, Inc., No. CIV. C-00-160-B. 2000 WL 1507426, at *3, *5 (D.N.H. July 27, 2000) (citations omitted).

See also Gatton v. T-Mobile USA, Inc., No. SACV 03-130 DOC., 2003 WL 21530185, at *6 (C.D. Cal. Apr. 18, 2003) (Noting that the Ninth Circuit has not yet addressed the issue of complete preemption, the district court held that "[A]fter examining both *Bastien* and *Marcus*, along with other district court opinions, . . . the FCA does not provide complete preemption. . . . [T]he Court does not find congressional intent to create removal jurisdiction under the FCA.")); State *ex rel.* Nixon v. Nextel West Corp., 248 F. Supp. 2d 885 (E.D. Mo. 2003) ("[P]laintiff's claims in this case are readily distinguishable from those in *Bastien*. . . ."); Russell v. Sprint Corp., 264 F. Supp. 2d 955, 961 (D. Kan. 2003) (stating that, in *Bastien*, "[t]he Seventh Circuit did not analyze removal intent . . . as mandated by the Supreme Court"); TPS Utilicom Servs., Inc. v. AT&T Corp., 223 F. Supp. 2d 1089, 1099 (C.D. Cal. 2002) (noting that the majority of district courts outside the Seventh Circuit have found no complete preemption under analysis of congressional intent); *In re* Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig., 216 F. Supp. 2d 474, 499 (D. Md. 2002) (Because the Seventh Circuit did not "engage in the analysis used by either the Supreme Court or the Fourth Circuit . . . this court cannot rely on *Bastien* as persuasive authority."); Bryceland v. AT&T Corp., 122 F. Supp. 2d 703 (N.D. Tex. 2000) (criticizing similar reasoning used in *Bastien*); Marcus v. AT&T Corp., 938 F. Supp. 1158 (S.D.N.Y. 1996), *aff'd* 138 F.3d 46 (2nd Cir. 1998) (holding that state law claims for fraud and

involving similar claims that CMRS providers were violating state law on unlawful and unfair business practices, the California Court of Appeals in *Ball v. GTE Mobilnet*[69] noted that the plaintiff's claims were "more directly related to 'the rates charged' than the challenges found preempted under section 332(c)(3)(A)" in *Bastien*.[70] In sustaining the defendant's demurrer—without directly applying the *Bastien* decision—the court held that the plaintiff's state law claims were preempted.

> In the end, the gravamen of plaintiffs' complaint, as they themselves allege, is that the defendants' actions have resulted "in subscribers, including plaintiffs, being *overcharged for service*." From this description, it is clear that plaintiffs challenge *the rates charged* by defendants. If the states could still regulate in the context presented by the plaintiffs here, that would undermine the 1993 amendment to section 332(c)(3)(A), and that statute would not have "dramatically revise[d] the regulation of the wireless telecommunications industry."[71]

In *Naevus Int'l, Inc. v. AT&T Corp.*,[72] the New York Superior Court considered whether federal law preempted claims[73] seemingly identical to those litigated in *Bastien*. Yet in comparing the case to *Bastien*, the court stated that "[u]nlike the complaint in *Bastien*, the instant complaint does not attack defendants' access to the market or demand any judgment that restricts market entry."[74] While the *Naevus* court dismissed a breach of contract claim for poor quality of service, relying upon *Bastien's* prohibition of state rate and entry regulation, it upheld "plaintiff's causes of action for deceptive acts and practices, false advertising and common law fraud [to] be litigated in state court. Like the cases involving a failure to

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negligent misrepresentation based on deceptive advertising and billing were not preempted, although breach of contract claim was preempted based on doctrine of artful pleading).

69. Ball v. GTE Mobilnet, 81 Cal. App. 4th 529 (2000). *But see*, Russell v. Sprint Corp., 264 F. Supp. 2d 955 (D. Kan. 2003) ("Congress has specifically found complete preemption of claims that involve the 'entry of or rates charged by any commercial mobile service,' and therefore such claims necessarily 'arise under' federal law for purposes of removal.") (citation omitted); World Access USA Corp. v. AT&T Corp., No. 99-1864, 2000 WL 297845 (S.D. Fla. Feb. 2, 2000); Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998).

70. *GTE Mobilnet*, 81 Cal. App. 4th at 539.

71. *Id*. at 540 (citing Conn. Dep't of Pub. Util. Control v. FCC, 78 F.3d 842, 845 (2nd Cir. 1996); Kennedy & Purcell, *supra* note 1, at 559-62).

72. Naevus Int'l, Inc. v. AT&T Corp., 713 N.Y.S.2d 642 (N.Y. Sup. Ct. 2000).

73. In *Naevus*, the plaintiff's complaint alleged "frequent[ly] dropped calls, inability to make or receive calls, and failure to obtain credit for calls that were involuntarily disconnected" were preempted. *Id*. at 644.

74. *Id*. at 645.

disclose certain billing practices, plaintiffs' statutory claims do not require the court to engage in retroactive rate-setting."[75]

The line drawing as to whether billing practices involve "rate-setting" continued in two other post-*Bastien* cases, *Brown v. Washington/Baltimore Cellular, Inc.*[76] and *Gilmore v. Southwestern Bell Mobile Sys., Inc.*[77] In *Brown*, the complaint asserted that state law prohibited late fee charges by the wireless carrier and sought damages based on the excessive late fees.[78] In rejecting complete preemption, the *Brown* district court found that the challenge to the validity of late fee charges was not precluded by the Section 332 ban on rate regulation.[79] Specifically interpreting "other terms and conditions" as requiring a case-specific factual inquiry, the court reasoned that "any legal claim that results in an increased obligation . . . could theoretically increase rates. . . . Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves."[80]

An example offered by the court was a claim of false advertising that results in greater costs to inform consumers of charges, which could be manifested as high rates.[81]

In *Gilmore*, similar to the *Naevus* decision, the United States District Court for the Northern District of Illinois split the preemption baby. By applying a fact-specific inquiry into whether the plaintiff's claims required proof that rates or fees were "unreasonably high"[82] or "unjust,"[83] the court held that all but one of plaintiff's claims for violation of state law consumer fraud and billing practices were preempted.

After the Seventh Circuit decision in *Bastien*, as originally promised in the *SBMS Ruling*,[84] the Commission issued a Memorandum Opinion and Order[85] in response to a Petition for Declaratory Ruling filed by the

75. *Id*. at 645-46.

76. Brown v. Washington/Baltimore Cellular, Inc., 109 F. Supp. 2d 421 (D. Md. 2000).

77. Gilmore v. Southwestern Bell Mobile Sys., Inc., 156 F. Supp. 2d 916 (N.D. Ill. 2001).

78. *Brown*, 109 F. Supp. 2d at 422.

79. *Id*. at 423 ("The court finds that late fees are not included in 'rates' of service, but rather are part of the 'other terms and conditions' of service. While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment.").

80. *Id*.

81. *Id*.

82. *Gilmore*, 156 F. Supp. 2d at 924.

83. *Id*. at 925.

84. *SBMS Ruling*, *supra* note 54, para. 24.

85. Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 F.C.C.R. 17021, 21 Comm. Reg. (P & F) 1219 (2000) [hereinafter *WCA Order*].

Wireless Consumers Alliance ("WCA Petition") to resolve whether, as a matter of law, the Communications Act preempts state courts from awarding monetary damages as relief against CMRS providers for violating state consumer laws or to resolve disputes involving state contract or tort law.[86] The WCA Petition came in response to the increasing uncertainty wrought by conflicting fact-specific Section 332 court decisions. The WCA argued that "CMRS providers are not endowed with a special status in the market place which shields them from state laws which regulate normal commercial practice."[87] The response of the Commission to the WCA Petition, however, preserved the trend of fact-specific, case-by-case analysis by disregarding the federal framework for CMRS intended by Congress:

> Section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims.[88]
>
> . . .
>
> [T]he award of monetary damages based on state contract or tort causes of action is not necessarily equivalent to rate regulation and thus is not generally preempted by Section 332. We further conclude that the award of monetary damages in these types of causes of action would generally fall under the terms and conditions provisions of Section 332, which can be the subject of state action. Finally, we conclude that whether a specific damage award or 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.[89]

In support of its conclusion, the Commission found the filed rate doctrine "inapposite because there are no filed rates or tariffs for CMRS services."[90] Subsequently, the Commission found that filed rate doctrine cases (e.g., *Central Office*) "regarding the issue of whether awarding monetary damages is tantamount to ratemaking" were "inapplicable."[91] The Commission thus adopted an interpretation of Section 332 that finds preemption only where express rate or entry regulation occurs, notwithstanding the well-reasoned cases supporting an interpretation of Section 332 as broadly excluding any state claims that may affect rate or

86. Pending the Commission's action on this petition, the California Court of Appeals stayed a class action suit against a CMRS provider. Spielholz v. Superior Court, 86 Cal. App. 4th 1366 (2001).

87. Wireless Consumers Alliance, *Petition for a Declaratory Ruling*, WT 99-263, at ii (Jul. 16, 1999), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6008647903.

88. *WCA Order*, *supra* note 85, para. 9.

89. *Id.* para. 36.

90. *Id.* para. 9.

91. *Id.* para. 9.

entry regulation. In a subsequent Order on Reconsideration,[92] issued in response to a petition by the Cellular Telecommunications Industry Association ("CTIA"), the Commission affirmed its position in the *WCA Order* and again rejected the arguments that "damages awards are in fact retroactive rate adjustments" and "that the logic or analysis of the filed-rate doctrine cases should apply."[93]

The effect of the Commission's *WCA Order* was readily apparent in *Union Ink Co. v. AT&T Corp.*[94] As in previous Section 332 cases, the *Union Ink* court considered "the extent to which the statutory language expressly pre-empts a state court from awarding damages against providers of cellular telephone service based upon state statutes dealing with consumer fraud or under the state's common law regarding fraud or negligent misrepresentation."[95] After a detailed review of *Bastien* and relying upon the Commission's *WCA Order*, the court held:

> On the basis of the analyses employed by the FCC and several other courts, especially those in *Ball, Naevus,* and *Spielholz,* and for substantially the same reasons expressed in those cases, we conclude that plaintiffs' State law claims for relief based on the Consumer Fraud Act, common law fraud, and negligent representation are not barred by federal law.[96]

Other cases following *Union Ink* reasoned similarly that only express or overt rate or entry regulation by a state (an increasingly narrow set of actions) is preempted by Section 332.[97] The majority of these cases generally distinguish the *Bastien* decision as finding preemption only where there are purely direct attempts by a state to regulate rates or entry of

92. Wireless Consumers Alliance, Inc., *Order on Reconsideration*, 16 F.C.C.R. 5618 (2001) [hereinafter *WCA Order on Reconsideration*].

93. *Id*. paras. 6-7; *see also* Lewis v. Nextel Comm., Inc., 281 F. Supp. 2d 1302, 1305 (N.D. Ala. 2003) ("*Central Office*, however, dealt with ordinary preemption pursuant to § 203, not with complete preemption. . . . Extrapolating from the ordinary preemption analysis in *Central Office* to find complete preemption appears suspect, as reading tea leaves often is.").

94. Union Ink Co. v. AT&T Corp., 801 A.2d 361 (N.J. Sup. Ct. App. Div. 2002).

95. *Id*. at 368-69.

96. *Id*. at 378.

97. *See* Moriconi v. AT&T Wireless PCS, LLC, 280 F. Supp. 2d 867 (E.D. Ark. 2003)(noting that the Communications Act provides a federal cause of action for unreasonable rates and inadequate service, but not for deceptive advertising or billing); Lewis v. Nextel Comm., Inc., 281 F. Supp. 1302 (N.D. Ala. 2003) (reasoning that the express grant of authority for states to regulate the other terms and conditions, along with the savings clauses of Sections 414 and 332, demonstrates that Congress did not intend complete preemption); Bryceland v. AT&T Corp., 114 S.W.3d 552, 555 (Tex. App. 2003) (holding that reviewing the allegations would not require rate regulation to adjudicate the claims and that an award of damages, as the difference between what the defendant promised and what the plaintiff received, was not preempted by Section 332).

a CMRS provider.[98] Thus, as a result of this serpentine line of cases, in 2004 realization of Congress's deregulatory and federal framework, and the concomitant growth of the domestic wireless industry, remains, at best, uncertain.

4. The Burdens of Universal Service Levies

In addition to conflicting court decisions, the question of whether "other terms and conditions" in Section 332(c)(3)(A) allows nonfederal universal service levies against CMRS providers[99] continues to cast shadows of uncertainty over the wireless arena. In 1998, the Commission relied on reasoning in its *Universal Service Report and Order*[100] to "find that section 332(c)(3) does not preempt [a state] from requiring CMRS providers to contribute to state [universal service] mechanisms."[101] The second sentence of Section 332(c)(3)(A) provides the primary basis for challenges to state universal service requirements:

> 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.[102]

Instead of interpreting the conditional language "where such services are a substitute for land line telephone exchange service" by its plain meaning,[103] as a mandatory condition for any state universal service regulation, the Commission and courts have interpreted the condition only

98. *See e.g.*, *Moriconi*, 280 F. Supp. 2d at 876 ("Here, the Plaintiff's state law claims do not, as in *Bastien*, present a direct challenge to either AT & T's rates or its entry into the wireless market."); *Bryceland*, 114 S.W.3d at 552 (examining whether the fact-finder would be required to "prescribe, set, or fix wireless rates to adjudicate [the plaintiff's] claims" by reviewing "the facts alleged and damages sought for each claim asserted.").

99. *See* Kennedy & Purcell, *supra* note 1.

100. Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776 (1997); *see also* Universal Service, 63 Fed. Reg. 2094, 2117 (Jan. 13, 1998) ("The state is not required to demonstrate that CMRS is a substitute for land line service, however, when it requires a CMRS provider to contribute to the state's universal service mechanisms on an equitable and nondiscriminatory basis, in compliance with section 254(f).").

101. Petition of Pittencrieff Comm., Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, *Memorandum and Order*, 13 F.C.C.R. 1735, para. 13, 9 Rad. Reg.2d (P & F) 1041 (1997) [hereinafter *Pittencrieff Memorandum and Order*] (quotation omitted).

102. 47 U.S.C.A. § 332(c)(3)(A) (2000) (emphasis added).

103. For arguments supporting a plain meaning interpretation of Section 332(c)(3), see Kennedy & Purcell, *supra* note 1, at 579 (claiming that the interpretation commonly given Section 332(c)(3) by the Commission and courts "is unsupported by the unambiguous language of section 332").

to modify the first sentence—which prohibits direct or express "rate and entry" regulation.[104]

Since 1998, the majority of courts that have considered this issue have found that state universal service contributions by CMRS providers fall under the "other terms and conditions" language, rather than constituting forbidden rate or entry regulation by a state or local government.[105] In upholding state universal service levies, most courts[106] have looked beyond the plain language of Section 332[107] to the broad language of Section 254(f)[108] that requires universal service contributions from intrastate telecommunications providers. Continuing to ignore the *Iowa Utilities* decision[109] and its corresponding reliance on the Section 2(b) "fence," the Commission and most courts have examined Sections 332 and 254 in isolation and found no statutory conflict between the two sections.[110]

104. *See* Sprint Spectrum, L.P. v. State Corp. Comm'n, 149 F.3d 1058, 1062 (10th Cir. 1998) ("[T]he only time a state must show that wireless services are a substitute for land line service is when a state wants to regulate rate and entry under § 332(c)(3)(A)."); Bell Atl. Nynex Mobile, Inc. v. Dep't of Pub. Util. Control, No. CV 970572450, 1998 WL 405115, at *4 (Conn. Super. Ct. July 8, 1998) ("We believe this provision applies only to a state's authority to impose requirements that would otherwise constitute regulation of rates or entry.").

105. Mountain Solutions, Inc. v. State Corp. Comm'n, 966 F. Supp. 1043 (D. Kan. 1997), *aff'd Sprint Spectrum*, 149 F.3d 1058 (concluding that nothing in Section 332 indicates congressional intent to prevent states from attempting to guarantee universal availability of telecommunications services through means other than rate or market entry regulation).

106. This bifurcated analysis was first promulgated by the Commission in the *Pittencrieff Memorandum and Order*, *supra* note 101, para. 13. See Kennedy & Purcell, *supra* note 1, for a discussion of this order.

107. *See* Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control, 253 Conn. 453, 485 (2000) (concluding after looking at sections 332(c)(3)(A) and 254(f) and the legislative history that ". . . the phrase 'other terms and conditions' contained in 47 U.S.C. § 332(c)(3)(A), which states may regulate without having to satisfy the substitutability condition, encompasses universal service funding requirements.").

108. 47 U.S.C. § 254(f) (2000) requires that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."

109. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom.*, AT&T Corp. v. Iowa Utils. Bd., 522 U.S. 1089 (1998). The *Iowa Utilities* decision adhered to a "plain meaning" interpretation of Section 332(c)(3) and affirmed that Section 2(b) "remains a Louisiana-built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." *Iowa Utilities*, 120 F.3d at 800. The Eight Circuit also explained that "Congress is fully capable of opening the gate in the 2(b) fence . . . when it wishes to do so." *Id*. at 797. See also Kennedy & Purcell, *supra* note 1 and accompanying text for a further discussion of the *Iowa Utilities* decision.

110. *See* Sprint Spectrum, L.P. v. State Corp. Comm'n, 149 F.3d 1058, 1062 (10th Cir. 1998) ("[B]ecause § 254(f) is not a rate or entry regulation, it neither applies to nor implicitly contradicts or modifies § 332(c)(3)(A)."); Cellular Telecomm. Indus. Ass'n v.

Notably, only the court in *Metro Mobile CTS, Inc. v. Dep't of Pub. Util. Control* [111] found that universal service fees do fall under "other terms and conditions" of Section 332. Several courts criticized *Metro Mobile*, however, because it was decided prior to the Commission's *Pittencrief Order* and gave Section 254(f) minimal treatment.[112]

In one case, the narrow construction of Sections 332 and 254, applied by the majority of courts since 1998 to impose state universal service contributions on wireless carriers, was even extended to permit the collection of *local* universal service fees. In *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*,[113] the plaintiff CMRS provider challenged the validity of a city ordinance imposing a registration fee on cellular providers. The *City of Eugene* ordinance specifically required any company offering telecommunications services through a facility located in the city to pay an annual registration fee to fund universal service, among other goals.[114] Addressing the federal preemption claims of AT&T arising under Section 332(c)(3)(A), the Oregon Court of Appeals overturned a lower court decision finding the ordinance preempted by state and federal law. The court concluded that the registration fee was valid, in part, because local government regulation of zoning is included within the "other terms and conditions" of Section 332. Based on this reasoning, the court found that this provision must therefore apply equally as much to local governments as to state governments.[115]

FCC, 168 F.3d 1332, 1336-37 (D.C. Cir. 1999) ("The Commission's interpretation of § 332(c)(3)(A) gives meaning to each sentence, fairly reflects the statute's purpose to limit state rate and entry but not universal service regulation, and harmonizes § 332(c)(3)(A) and § 254(f). There is thus no basis for setting aside the Commission's decision.") (citations omitted); *see also* AT&T Comm. of the Pac. Northwest, Inc. v. City of Eugene, 35 P.3d 1029, 1049 (2001) ("[The] language of exemption 'does not preempt and it does not forbid. Just the opposite.'") (citing *Cellular Telecomm. Ind. Ass'n* , 168 F.3d at 1335).

111. Metro Mobile CTS, Inc. v. Conn. Dep't of Pub. Util. Control, Nos. CV950051275S, CV95055500096S, 1996 WL 737480, at *2 (Conn. Super. Ct. Dec. 11, 1996) ("The FCC has not yet adopted rules [to preserve and advance universal service], and therefore Connecticut has not yet adopted any such regulations.").

112. *See* Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control, No. CV 98-0492713 S, 1999 WL 162806, at *3 (Conn. Super. Ct. Mar. 3, 1999) ("The *Metro Mobile* decision did not have the benefit of the FCC construction of the Telecommunications Act and the federal authority construing these issues of federal law."); Bell Atl. Nynex Mobile, Inc. v. Dep't of Pub. Util. Control, No. CV 970572450, 1998 WL 405115, at *4 n.2 (Conn. Super. July 8, 1998) (declining to follow *Metro Mobile*); Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control, 754 A.2d 128, 145 (Conn. 2000) ("Simply put, we are not persuaded by the reasoning of the Superior Court in that case.").

113. AT&T Comms. v. City of Eugene, 35 P.3d 1029 (Or. Ct. App. 2001).

114. *See id*. at 1033.

115. Specifically, the court of appeals reasoned that: "As we have noted, included within the meaning of "other terms and conditions" are 'facilities siting issues (e.g., zoning).'" The section goes on to provide, however, that zoning authority is expressly reserved to both

These developments since 1998 reveal that a focus on primarily local interests has blinded many courts and regulators to the federal wireless framework intended by Congress and has effectively gutted many prohibitions on state and local actions against the wireless industry. Most significantly perhaps, over the past five years, this tearing down of the 2(b) "fence" built by Congress to promote the development of wireless has left CMRS providers vulnerable to ongoing destructive attacks on multiple fronts, including litigation and taxation.

5. Epidemic of Class Action Suits Against CMRS Providers

As suggested by the preceding cases, the fact-specific analysis necessary to determine whether billing practices or universal service contributions fall within federal jurisdiction as "rate and entry regulation" or state jurisdiction as "other terms and conditions" places a heavy financial burden on CMRS providers that may undermine Congress's intent to create a competitive wireless marketplace. Increasingly, wireless carriers have been the targets of a steady barrage of class action litigation relating to routine billing practices—often those practices used by carriers to pass through or recoup universal service and other governmental levies. The plaintiffs in these cases often allege multiple state causes of action ranging from fraud to deceptive trade practices. Because the carriers generally argue that any such state claims are preempted, these cases also often implicate Section 332(c)(3)(A).[116] This groundswell of litigation acts as a

"'State or local government[s] or instrumentalit[ies] thereof.'" Thus, it is clear that, merely because the statute recognizes that states retain authority to regulate "other terms and conditions," it does not necessarily mean that local governments do not also retain the same authority. *Id*. at 1050-51 (citing 47 U.S.C. § 332(c)(3)(A) (Supp 2001)).

116. *See e.g.*, Jeffrey Silva, *Nextel Hit with Another Consumer Lawsuit*, RCR WIRELESS NEWS (Oct. 22, 2003), *available at* http://rcrnews.com/cgi-bin/news.pl?newsId=15592&print=Y ("Nextel has been barraged with billing lawsuits."); Jeffrey Silva, *Nextel Hit with 17 More Billing Lawsuits*, RCR WIRELESS NEWS (Oct. 9, 2003), *available at* http://rcrnews.com/cgi-bin/news.pl?newsId=15412&type=news&bt=billing+practices+litigation ("Nextel and Sprint PCS had to contend with 10 billing lawsuits between them. . . . [However] 17 more billing suits had been filed against the carrier since . . . Nextel first asked to have the billing lawsuits consolidated in the Missouri federal court."); Jeffrey Silva, *Nextel, Sprint PCS Face Slew of Billing Lawsuits*, AXCESS BUSINESS NEWS, (Sept. 3, 2003), *available at* http://www.theaxcess.net/technology_01_0903.html ("Nextel Communications Inc. and Sprint PCS are facing unprecedented billing litigation."); Jeffrey Silva, *States Question Carriers About Bills, Ads*, RCR WIRELESS NEWS, Dec. 17, 2001, at 3 ("Cingular Wireless is the third national mobile-phone operator to have been asked in March [2001] by 22 state attorneys general for information on advertising, marketing and billing practices, a query with potentially serious implications for the wireless industry."); Steve Ellman, *Fee Static: South Florida Consumers Say Sprint, Nextel Deceived Them with Charge For Emergency Service*, MIAMI DAILY BUS. REV., Jul. 15, 2003, at 1, *available at*

significant entry barrier for nascent firms and significantly increases the costs of service for incumbent wireless providers—costs that are ultimately passed on to consumers. A review of currently pending litigation suggests that the lack of detailed guidelines for assessing what amounts to "rate and entry" regulation is diverting significant resources away from competition and innovation and into the defense of an avalanche of claims rooted in the misguided court decisions of 1998-2003.

Nextel Communications, Sprint PCS, Verizon, and other wireless carriers have all been named in lawsuits contesting billing practices under various state laws.[117] In a recent exemplary case,[118] the United States District Court for the Northern District of Alabama concluded that Section 332(c)(3)(A) does not completely preempt a plaintiff's state law claims challenging billing practices. This court dismissed the *Bastien* approach, noting:

> Regardless of the Seventh Circuit's take on the [Communications Act], this court is bound by a dispositive, post-*Bastien* case from the Eleventh Circuit. In *Smith v. GTE Corp.*, putative class representatives attempted to enjoin GTE. . . . In an interesting twist, plaintiffs retreated to the argument that their state-law claims against GTE for fraud, unjust enrichment, breach of contract, and breach of warranty were completely preempted by § 207 of the [Communications Act] and, therefore, that the court had federal-question jurisdiction. The Eleventh Circuit noted that the [Communications Act's] savings clause, 47 U.S.C. § 414, contemplates the application of state law and the

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WESTLAW, Miamidbr File ("Two major wireless phone providers are under fire in separate South Florida lawsuits for allegedly deceiving their customers and the state about charges to consumers for a mobile phone emergency call system.").

117. *See* State *ex rel*. Nixon v. Nextel West Corp., 248 F. Supp. 2d 885 (E.D. Mo. 2003) (holding that Section 332(c)(3)(A) did not preempt plaintiff's consumer fraud claims); Lewis v. Nextel Comm., Inc., 281 F. Supp. 2d 1032 (N.D. Ala. 2003); Class Action Complaint and Demand for Jury Trial, Freeman v. Nextel South Corp., Case No. 03 CA 1065 (Fla. Leon County Cir. Ct. filed May 2, 2003) (litig. pending) (claiming violation of the Fla. Deceptive and Unfair Trade Practices Act, unjust enrichment and assumpsit for monies received as a result of omission, deception and artifice for defendant's allegedly deceptive billing practices); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 293 F. Supp. 2d 1378 (JPML 2003) (authorizing centralization and transfer to Western District of Missouri for seven actions and eighteen potential tag-along actions); Class Action Complaint, Dynamic Network Support v. Nextel Comms., Inc., Case No. 03-08951-21 (Fla. Broward County Cir. Ct. filed May 22, 2003) (litigation pending) (claiming violation of the Fla. Deceptive and Unfair Trade Practices Act, breach of contract, breach of implied covenant of good faith and fair dealing and unjust enrichment for defendant's allegedly deceptive billing practices); Complaint, Lamb v. Nextel Comms., Case No. 2003-2919-18-2 (Pa. Bucks County Ct. Common Pleas filed May 6, 2003) (litigation pending) (claiming violation of the Pa. Unfair Trade Practices and Consumer Protection Act, negligent misrepresentation and breach of contract for defendant's allegedly deceptive billing practices)).

118. Lewis v. Nextel Comm., Inc., 281 F. Supp. 2d 1302 (N.D. Ala. 2003).

> exercise of state-court jurisdiction. If there is state-court jurisdiction the jurisdiction cannot be exclusively federal. . . . The savings clause also applies to § 332. The Eleventh Circuit's analysis that the savings clause evidences Congress's intent to save state-law actions precludes complete [preemption] within the Eleventh Circuit and thus in this case.[119]

The *Lewis* court further examined the plain language of Section 332 (without regard to the amendment to Section 2(b)) and concluded that "[p]ermitting states to regulate 'other terms and conditions' strongly suggests that Congress did not intend complete preemption."[120]

Another example of the fact-specific class actions burdening CMRS providers is *Moriconi v. AT&T Wireless PCS, LLC*.[121] In *AT&T Wireless*, plaintiffs brought a class action alleging state claims of misleading advertising, billing practices, and unfair contract terms. Holding that Section 332(c)(3)(A) did not completely preempt state-law consumer fraud-type causes of action, the United States District Court for the Eastern District of Arkansas removed the case to state court on the plaintiff's motion.[122] The district court reasoned that the plaintiff's state law claims were not merely disguised federal claims, nor were the claims direct challenges to rate or entry regulation.[123]

While Nextel and Sprint PCS achieved a partial victory when a federal court in Western Missouri agreed to consolidate seven pending billing practices cases into a multi-district litigation framework,[124] the

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119. *Id*. at 1305-06 (citing Smith v. GTE Corp., 236 F.3d 1292, 1298, 1313 (11th Cir. 2001) (citations omitted)).

120. *Id*. at 1306 (citing Bryceland v. AT&T Corp., 122 F. Supp. 2d 703, 707 n.3 (N.D. Tex. 2000)).

121. Moriconi v. AT&T Wireless PCS, 280 F. Supp. 2d 867 (E.D. Ark. 2003); *see also* Russell v. Sprint Corp., 264 F. Supp. 2d 955 (D. Kan. 2003) (holding under similar facts that Section 332(c)(3)(A) did not completely preempt state consumer fraud claims).

122. *Moriconi*, 280 F. Supp. 2d at 876.

123. The *Moriconi* court distinguished *Bastien* and prior "disguised state law claim" cases, concluding:

> [Section] 332 of the FCA lacks the extraordinary preemptive power necessary to convert Plaintiff's state law challenges to Defendant's marketing and advertising practices into a federal claim. Moreover, even assuming that the complete preemption recognized by the Court in Bastien were appropriate, it would not compel a finding of complete preemption in this case. Here, the Plaintiff's state law claims do not, as in Bastien, present a direct challenge to either AT & T's rates or its entry into the wireless market.
>
> *Id*.

124. Industry observers have noted the importance of this consolidation for wireless competitors:

> The MDL ruling is a major victory for Nextel, which requested that the lawsuits be consolidated in the same Missouri federal court in Kansas City where preliminary approval already has been given to a nationwide settlement in the consumer suit. What is significant about that settlement—modeled after one that

onslaught of these class actions, generally based on state claims, exemplifies just the sort of deleterious local actions Congress sought to shield the CMRS industry from through its actions in the 1990s. In Verizon Wireless's case, the cost of settling similar class action billing practices lawsuits is reported to exceed $1 billion dollars—costs inevitably impacting consumers and shareholders more than the parties to the settlement.[125] The time and resources devoted by wireless carriers to defending and resolving these attacks also illustrate the deeply negative effects of this trend on both industry and innovation.

Despite the Commission's early pronouncement that "[o]ur preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity,"[126] the expensive case-specific factual analysis necessary to determine whether a state (or local) government engages in forbidden rate or entry regulation significantly increases the financial burdens upon CMRS providers and diverts them from their mission of bringing innovative new products to consumers on a profitable basis. To avoid further costly litigation, reduce barriers to entry, and promote competition in the wireless marketplace, the Commission should reconsider its conclusion in its *WCA Order* in light of recent developments and clearly draw the line between legitimate state claims (e.g., consumer protection suits pursued by state attorneys general) and inappropriate attacks on CMRS "rates and entry" merely disguised as state claims.

ended a billing lawsuit brought by Missouri Attorney General Jay Nixon—is that it requires greater disclosure of fees but provides for no restitution to consumers other than some free wireless minutes.

Jeffrey Silva, *Nextel, Sprint PCS Billing Lawsuits Consolidate*, RCR WIRELESS NEWS, Nov. 24, 2003, at 9.

125. *See id*.

126. Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 F.C.C.R. 1411, para. 23, 74 Rad. Reg.2d (P & F) 835 (1994).

B. Continuing Federal, State, and Local Burdens on CMRS

In addition to class action litigation battles, state and local initiatives and mandates continue to place increasing anticompetitive regulatory burdens on CMRS providers. This section of the Article examines the effects of increased regulation and taxation of CMRS providers and questions the wisdom of state and local efforts to expand the heavy regulatory shadow cast by legacy wireline regulation. As recently noted by the Progress & Freedom Foundation in a report profiling major regulations and taxation affecting the wireless industry:

> [W]ireless [providers operate] in a highly regulated environment. And, as wireless applications converge with traditional telecommunications functions (e.g., wireline telephony), pressures build to bring wireless into the traditional framework of telecommunications regulation and taxation.
>
> [T]he now arguably "mature" wireless sector is under increasing pressure on a number of regulatory fronts—most notably in the areas of taxation and regulatory mandates. Wireline telephony is one of the most heavily taxed services, and states and localities are moving to apply similar treatment to wireless.[127]

While the continued growth of wireless service requires the removal of barriers to effective competition, the crazy quilt of myriad state and local taxation rules undermines the efforts of Congress to create a truly competitive national wireless marketplace. The federal deregulatory framework for wireless should be embraced, rather than repeatedly disregarded, particularly considering federal efforts to revitalize wireline competition in long distance.

1. State and Local Taxation

State and local governments have often taken the misguided view of CMRS "as a ready source of tax revenue"[128]—a "quasi-luxury good" that could be taxed not unlike cigarettes,[129] espresso, [130] or lottery tickets.[131]

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127. Lenard & Mast, *supra* note 25, at 1. Lenard and Mast suggest that Michael Powell's pronouncement that wireless is "mature" may itself be premature. *Id*. at 8; *see also* Michael K. Powell, Dialogue with Thomas Wheeler, President CTIA at the National Association of Cellular Telecommunications & Internet Association (CTIA), *at* http://www.fcc.gov/Speeches/Powell/2002/spmkp206.html (Mar. 19, 2002) [hereinafter Powell Remarks].

128. Jerry Hausman, *Efficiency Effects on the U.S. Economy from Wireless Taxation*, 53 NAT'L TAX J. 733, 734 (2000) [hereinafter *Efficiency Effects*].

129. *See* Jonathan Gruber, *Government Policy Towards Smoking: A View from Economics*, 3 YALE J. HEALTH POL'Y L. & ETHICS 119, 119 (2002). ("In 1995, federal and state excise taxes on cigarettes were one-third lower, in real terms, than their peak level in the mid-1960s. Since 1995, however, taxes have risen forty percent, or twenty-two cents per pack, and now stand at seventy-eight cents per pack."); Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31

However, as historical differences in the technological capability of wireline and wireless networks increasingly fade away, the stereotype of wireless service as a "luxury good" must also disappear or else serve to raise even greater barriers to effective wireless competition, specifically, and telecommunications competition, generally.[132] Regardless of whether wireless service can realistically be labeled" mature,"[133] at this stage, the potential for wireless service to become a truly competitive substitute hinges upon a sensible tax and limited regulation by federal, state, and local governments.[134] The success of the wireless industry depends upon the removal of artificial taxation obligations. As one observer has noted,"[I]t is time [that CMRS providers are] taxed on a level playing field with other businesses rather than being [taxed] at levels comparable to products the government wants to discourage, such as liquor and tobacco."[135]

SETON HALL L. REV. 563, 576 (2001) ("[S]tate legislatures have long exercised their powers to tax and regulate with respect to tobacco products. In addition to sales-tax revenues, state governments in 1993 collected $6.2 billion in tobacco excise tax revenues." (citing W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, *in* 9 TAX POLICY AND THE ECONOMY 57 (James M. Poterba ed., 1995))).

130. Perhaps in response to the popularity of Starbucks in the Northwest, Seattle recently considered a ballot initiative proposing a ten-cent tax "on any cappuccino, latte, iced drink or Americano." Kathy Mulady, *Latte Tax Debate Whips Up Strong Feelings*, SEATTLE POST-INTELLIGENCER, Aug. 19, 2003, at A1 (discussing the controversial "latte tax" proposal to fund Seattle preschools and teacher continuing education programs). Not surprisingly, Seattle overwhelmingly rejected the "latte tax." *See* Elaine Porterfield et al., *Voters Scald Latte Tax: Pot Measure Passing*, SEATTLE POST-INTELLIGENCER, Sep. 17, 2003, at A1 (showing that Seattle voters rejected the "latte tax by a 2-1 ratio.").

131. Federal and state governments regularly tax income received as prizes or awards. *See* Internal Revenue Code, 26 U.S.C.A. § 74(a) (2004) ("[G]ross income includes amounts received as prizes and awards."); *see also* Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination Of State-Sponsored Gambling*, 34 B.C. L. REV. 11 (1992).

132. *See*, Steve Rosenbush et al., *A Wireless World: In a Few Years, Mobile Phones Will Dominate U.S. Communications*, BUSINESSWEEK ONLINE (Oct. 20, 2003) ("The days when the cell phone was a luxury for business executives and Hollywood power brokers are long gone."), *available at* https://www.neodata.com/ITPS2.cgi?ItemCode=BWEK&OrderType=Reply+Only&iResponse=BWEK.SUBSCRIBEUSCAN.

133. *See* Powell Remarks, *supra* note 127.

134. Denny Strigl, Guest Opinion, *Speaking Up for Wireless*, WIRELESS WEEK (Jul. 22, 2002) (citing unequal tax treatment as one of "three government-imposed burdens threaten[ing] our ability to continue . . . extraordinary innovation and investment"). At the time that this guest opinion was published, Mr. Strigl was the President and CEO of Verizon Wireless.

Indeed, given that wireless is a competitive industry with greater consumer price sensitivity than local communications, that wireless carriers have only recently begun to become profitable, and that wireline carriers are monopolists whose networks and businesses have long been profitable, the relative impact of even equal tax treatment imposes a greater burden on wireless carriers.

135. *Id*. (recounting remarks made before the National Governors Association Committee on Economic Development and Commerce). *But see* Tillman L. Lay, *Some*

The 1996 Act contains a tax savings clause that does not preclude state and local governments from collecting taxes and other fees.[136] Specifically, subject to one exception,[137] "[n]othing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation . . . ."[138] However, as the Commission noted in a 1999 Notice of Inquiry on competition ("1999 NOI"), "[s]tate and local tax policies that impose excessive or unequal burdens on competitive service providers have the potential to inhibit the development of competitive facilities-based networks in local telecommunications markets."[139]

The 1999 NOI raised the issue of "excessive or unequal"[140] taxes when it responded to allegations by CMRS providers that some States and local taxes are excessive or discriminatory.[141] "[O]ut of respect for principles of federalism,"[142] the Commission declined to initiate an instant rulemaking based upon the allegations. Nevertheless, a "concern[] about the potential discriminatory and anticompetitive effects of certain State and local tax policies"[143] motivated the Commission to announce a further inquiry into state and local taxation of competitive telecommunications providers.[144] Comments received by the Commission during the 1999 NOI

Thoughts on Our System of Federalism in a World of Convergence, 2000 L. REV. M.S.U.-D.C.L. 223, 231-32 (2000), *available at* http://www.law.msu.edu/lawrev/2000-1/Lay.htm (The assumption "that the telecommunications industry truly bears a disproportionately higher tax burden . . . is far from clear. . . . Several other industries are subject to their own special taxes, and not just 'sin tax' industries such as the tobacco and alcohol industries.").

136. *See* Telecommunications Act of 1996, Pub. L. 104-104, tit. VI, § 601(c)(2), Feb. 8, 1996, 110 Stat. 143 (codified as a note to 47 U.S.C. § 152 (2000)).

137. The 1996 Act preempts local taxation of direct broadcast satellite services. *See* Telecommunications Act of 1996, Pub. L. 104-104, tit. VI, § 601(§ 152 (c)(2), Feb. 8, 1996, 110 Stat. 143 (codified as a note to 47 U.S.C. § 152 (2000)).

138. *Id.*

139. Promotion of Competitive Networks in Local Telecommunications Mkts, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 F.C.C.R. 12673, para. 81 (1999).

140. *Id*.

141. *Id*. paras. 82-83.

142. *Id*. para. 84.

143. *Id*.

144. The Commission declined to address taxation issues in the order issuing from the 1999 NOI. *Id*. Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in Cc Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 F.C.C.R. 22983, 22 Comm. Reg. (P & F) 1, para. 1 n.2 (2000). ("In the Notice of Inquiry . . . we requested comment on issues relating to . . . franchise fees, state and local

identified two major disparities in wireless taxation by State and local governments: (1) taxes that are either excessive and discriminate against wireless technology,[145] and (2) taxes that subject wireless providers to outmoded geographical or monopoly-based[146] taxation assumptions. Presumably, comments received during the Commission's 1999 NOI, in part, prompted Congress to address one disparity in state and local taxation beginning in early 2000.

2. The Mobile Telecommunications Sourcing Act

Traditionally, state and local governments premised taxation of wireline networks upon the location of network elements or transactions (e.g., phone calls) within their geographic boundaries.[147] The advent of CMRS challenged these legacy assumptions; determining the origination and termination of calls became increasingly difficult, particularly given the popularity of "flat-rate" calling plans. Many states retained the historic model of taxation, often subjecting CMRS providers to overlapping tax obligations for the same phone call. Congress enacted the Mobile Telecommunications Source Act ("MTSA")[148] in 2000 to "provide customers with simpler billing statements, reduce the chances of double taxation of wireless telecommunications services, and simplify and reduce the costs of tax administration for carriers and state and local governments."[149] The MTSA was the result of a federal government and

taxes, and other means of promoting competitive networks. These issues will be addressed separately at another time." (citation omitted)).

145. *See* Amendment of the Comm'n's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments, *Petition for Rule Making of the Cellular Telecommunications Industry Association* (filed Sept. 26, 1996), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1693940001.

146. *See* Inquiry Concerning the Deployment of Advanced Telecomms. Capability, *Reply Comments of the Personal Communications Industry Association*, CC Docket No. 98-146, p. 11 (filed Oct. 8, 1998), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2170320001 ("[T]he franchise fee was a means for the government to recover some of the monopoly profits earned by a wire-based communications provider . . . when it was awarded an exclusive franchise to provide service in a locality or state. Wireless carriers . . . do not enjoy such a monopoly position. . . .").

147. Goldberg v. Sweet, 488 U.S. 252 (1989) (upholding an Illinois tax on calls originated or terminated in the state and charged to an Illinois service address).

148. Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, 114 Stat. 626 (2000) (codified as amended at 4 U.S.C. §§ 116-26).

149. Kevin P. Thompson, *Prospects Grow Dim: 106th Congress Will Resolve The Thorniest Issues in Internet Taxation Debate*, *in* STATE AND LOCAL TAXATION; WHAT EVERY TAX LAWYER NEEDS TO KNOW, at 133, 144 (PLI Tax Law & Practice, Order No. J0-003J, 2001).

industry effort[150] to resolve consumer confusion and unify the widely divergent taxation of wireless providers by state and local governments.[151] Under the MTSA, taxation of a customer's phone calls are imposed only by the taxing jurisdiction "whose territorial limits encompass that customer's 'place of primary use.'"[152] The legislation also mandated the creation of a national database to indicate what taxes are due from the CMRS provider for calls placed by a customer in any location.

Interestingly, the MSTA challenges the traditional understanding of federalism under the Constitution: "[w]hile the federal government has the authority to regulate conduct throughout the nation, states generally can regulate only that activity occurring within their borders or which produces harmful local effects."[153] In other words, the MSTA allows state or local governments to assess sales or use tax on calls that may originate and terminate entirely outside their respective political boundaries: "[t]he [MSTA] plainly authorizes states to impose extraterritorial taxes."[154]

By the federally-mandated deadline of August 1, 2002, forty-nine states enacted legislation to comply with the MTSA.[155] Notably, "[t]he only state that did not enact MTSA conforming legislation was Montana, whose governor vetoed the legislation because it would have appeared as a tax increase for the state, and Montana does not currently tax mobile telecommunications."[156] While the effects of statewide compliance with the MTSA remain unknown, some commentators laud the MTSA as a model

150. *See id*. at 145.

151. *See id*. Compliance with these various taxing jurisdictions is confusing and expensive for both the carrier and the taxing authority due to the autonomy of each jurisdiction. Aside from the difficulty of accurately determining a tax collection obligation, current taxing systems can result in multiple jurisdictions claiming authority to tax the same wireless transaction, while other transactions may be subject to no taxation, leading to confusion and frustration for consumers, the service provider, and taxing jurisdictions alike. *Id*.

152. *Id*.

153. Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 173 (2002) (citing 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-8, at 1074 (3d ed. 2000) (stating that "the Court has articulated virtually a *per se* rule of invalidity for extraterritorial state regulations—i.e., laws which directly regulate out-of-state commerce, or laws whose operation is triggered by out-of-state events"); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001) (essay) ("Scores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.").

154. Joondeph, *supra* note 153, at 180.

155. Vertex Inc. Tax Cybrary—Telecommunications Tax: Sales Tax Forty-Nine States Meet the August 1 MTSA Deadline, Vertex*, at* http://www.vertexinc.com/taxcybrary/telecom/article_M0.TSA.asp (last visited Mar. 3, 2004).

156. *Id*.

of industry and federal cooperation.[157] Alternatively, the implementation of a simplified and standardized process for state and local government tax assessment of mobile communications may lead to increasing tax burdens that are ultimately passed on to CMRS consumers.

3. Federal Fees

In another action which may generate potentially negative unintended consequences for wireless consumers, the Commission has also increased levies on CMRS carriers to provide universal service for landline telephone users and to provide Internet subsidies to schools and libraries.[158] It is not known whether the consumer benefits flowing from such regulations outweigh the efficiency costs to consumers of such taxation.[159] However, one influential study determined that the Commission

> could estimate the costs to consumers and the economy when they implement tax and subsidy programs and only implement regulatory requirements that lead to commensurate benefits to consumers. This recommendation is particularly important given the finding of this study that the marginal efficiency loss of these taxes increases significantly as the overall tax rates increase.[160]

4. The Inefficiency of Multiple Regulatory and Tax Structures

To unleash the potential of wireless innovation, it is essential that state and local governments recognize the interstate nature of networked industries and the concomitant success wrought by reducing regulatory burdens on businesses. Even in the face of looming budget cuts, state and local governments must resist the temptation to place undue regulatory or tax burdens on CMRS providers, which may subvert the federal framework and create inefficient tax structures. Typically, high taxes decrease the consumption of a good or service and, "in this case, [may] lead to the under-utilization of the infrastructure investment made by wireless providers."[161]

Professor Jerry Hausman's 2000 study comparing wireless taxation to other income and sales tax revenue sources suggests three reasons why

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157. Scott Mackey, *Mobile Telecommunications Sourcing Act*, FTA Revenue Estimating Conference, *at* http://www.taxadmin.org/fta/meet/re_sum02/mackey.pdf (Oct. 1, 2002).

158. *See, e.g.*, Jerry A. Hausman, *Taxation By Telecommunications Regulation*, 12 TAX POL'Y & ECON. 12, 29 (1998); Jerry A. Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Welfare: The E-Rate Policy for Universal Service Subsidies*, 16 YALE J. ON REG. 19 (1999) (discussing the internet subsidy program for schools and libraries).

159. *Efficiency Effects*, *supra* note 128, at 741.

160. *Id.*

161. *Id.* at 735.

"luxury good" or revenue-raising taxes on mobile telephone services engender high societal costs: "(1) the price elasticity of wireless services is relatively high, (2) the taxation of wireless services is high, and (3) the price to marginal cost ratio of wireless services is high."[162] Generally, Hausman concludes that taxation of telecommunications services produces "distortionary effects"[163] when compared to federal, state, and local taxation of income or sales. Specifically, Hausman concludes:

> [T]axation of wireless cannot be justified on income distribution grounds (e.g., the luxury good approach) nor can it be justified on economic efficiency grounds. Government use of wireless as a taxation source to fund expenditure in other areas leads to high efficiency costs to the economy. One reason for increased government taxation of cellular may be that consumers see an overall decreasing price, despite increasing taxes, due to improved technology that decreases costs and increased competition. Nevertheless, the lack of consumer complaints does not provide a valid reason for creating large efficiency losses on the economy, especially for a new and rapidly expanding technology such as cellular telephones.[164]

In a December 2003 article in this Journal,[165] Thomas Hazlett suggests an alternative and highly persuasive argument that decentralized and piecemeal regulatory (and tax) treatment by state and local governments is inefficient compared to a unified federal paradigm. Specifically, Hazlett's article compares the efficiency of state and federal consumer protection standards, [166] akin to California's proposed Consumer Bill of Rights.[167] Hazlett examines two key pieces of marketplace evidence with bearing upon this question: the efficiency of national versus state wireless standards and the failure of states to lower consumer rates prior to federal preemption in the 1993 Act. Ultimately, Hazlett distills a seven-part test for determining optimal regulatory jurisdiction[168] into three fundamental questions that, when answered in the affirmative, support the view that a unified national regulatory structure is more efficient than a decentralized state regulatory structure:

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162. *Id*.

163. *Id*. at 741 ("[T]he distortionary effects of taxation of telecommunications services is significantly higher than the distortionary effects created by income and sales tax revenue sources.").

164. *Id*. at 735 (footnotes omitted) (Hausman estimates that at least fifty-three cents is lost for every one dollar generated, nationally, as tax revenue.).

165. Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155 (2003) [hereinafter Hazlett, *Federal Preemption*].

166. *Id*. at 156.

167. *See infra* Part IV.A.

168. Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1290 fig. 6 (1997).

> First, "[i]s the proposed national regulatory activity justifiably national in scope involving national externalities?" Next, "[i]s the proposed regulatory activity . . . efficiently provided at the national level?" Finally, "[d]o the potential efficiency advantages of the proposed legislation outweigh the likely loss of political participation when policies are decided at the national rather than at the state level?"[169]

Hazlett answers each question in the affirmative in the context of the wireless industry.[170] For questions one and two, Hazlett concludes:

> [T]he [wireless] industry is clearly characterized by strong national network effects, and policies adopted by a company or a state regulatory authority in one part of the country tend to have important implications for consumers and carriers in other parts of the country.
>
> . . .
>
> Mobile wireless services are efficiently provided, packaged, and sold via national service plans.
>
> . . .
>
> Competitive rivalry has pushed all firms to adapt, seizing the efficiencies of national scope to offer the services—and prices—demanded by consumers. Local service provision has been replaced by aggregation of thousands of wireless licenses and nationalization of service plans offered to subscribers. . . . [I]diosyncratic state regulatory regimes threaten such efficiencies.[171]

Describing the third question as essentially a "political judgment,"[172] Hazlett finds that efficiency gains from a national regulatory framework outweigh the loss of political participation at local levels since "market evidence reveals state [rate] regulation failed to protect consumers"[173] prior to the 1993 Act.

Under a decentralized wireless framework, local governments have no incentive to refrain from imposing discriminatory or excessive regulations or taxes on CMRS providers—they raise revenue but experience none of the negative effects of their actions directly (the classic "moral hazard" dilemma). From a limited local perspective, the short-term gains of state and local regulation and taxation offset the long-term price reductions for consumers. These burdens incrementally add up to create a net loss to the consumer that outweighs the revenues brought in by the local

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169. Hazlett, *Federal Preemption*, *supra* note 165, at 221 (citing Inman & Rubinfeld, *supra* note 168).

170. Hazlett, *Federal Preemption*, *supra* note 165, at 221 ("[A]nalysis of the wireless telephone industry provides the answers to these questions—each in the affirmative.").

171. *Id*. at 221-22.

172. *Id*. at 222.

173. *Id*. "[F]ollowing preemption, rates did not increase when caps were removed. Rate regulation had no effect, at best. . . . The federal preemption of state cellular rate regulation shows that decentralized political decisionmaking did not add value for customers." *Id*.

entity. The state and local governments, in effect, free-ride on an apparently inconsequential revenue source whereas indirect taxation of consumers through the CMRS providers mediates the otherwise unsavory aspects of direct taxation. The problems presented by balkanized regulatory and tax structures illustrate exactly why Congress deemed it necessary to step in with a national strategy for CMRS during the 1990s and why the time is now right again for another federal clarification of the telecommunications sector in the national interest: "Today's market, which has generated great increases in efficiency by developing six competing national networks, owes much to regulatory harmonization, suggesting that the results of a reverse experiment today would likewise underscore the deleterious effects of balkanization."[174]

IV. NEW CHALLENGES: "CONSUMER PROTECTION" SENTIMENT, CONVERGENCE & OPTIMIZING COMPETITION

In addition to the conflicting court and Commission decisions and governmental anticompetitive burdens discussed in the previous sections, three other serious problems now confront the wireless industry. First, the recent emergence of short-sighted regulatory consumer protection proposals cloaked as "consumer protection" measures threatens to hinder industry competitiveness by handcuffing innovation and flexible responses to market conditions. A second problem concerns converging communications technologies. Robust end-to-end wireless networks necessarily force reexamination of regulatory structures built upon wireline technologies and economics. Finally, the growth of competition following passage of the 1996 Act is now approaching viral levels in the wireless industry. The Authors believe the CMRS industry's complexity forever relegates government economic regulation to "dead hand" status. A perhaps greater challenge is to recognize the threat of "consumer protection" and social policy regulation to the development, enhancement and financial stability of the wireless industry.

A. Consumer Protection Legislation

In perhaps the leading example of the current consumer protection movement, California Public Utilities Commissioner Carl Wood's recent regulatory proposal has been labeled a "Telecommunications Bill of Rights" bestowing "the most comprehensive and far-reaching set of consumer protections rules . . . released anywhere in the U.S."[175] The stated

174. *Id*. at 223-24.

175. Michael Bazeley, *California Telecom Bill of Rights is Step Closer to Completion*, SAN JOSE MERCURY NEWS (Jul. 25, 2003); *see also*, Cal. Pub. Util. Comm'n, Draft General

purpose of this proposal is to enhance or provide California telecommunications consumers with certain "rights," pertaining broadly to carrier disclosure, marketing practices, service initiation and changes, billing practices, tariff and contract modifications, privacy, and safety.[176]

Despite its laudable stated goals, the expansion of regulation in an already competitive marketplace threatens to raise transaction costs and disrupt effective price competition as regulatory costs are passed on to CMRS subscribers without meaningful gains in service offerings. Indeed, this proposal is really a comprehensive regulatory scheme cloaked in "other terms and conditions" garb. As one analysis of the California "Bill of Rights" argues, the regulatory proposal is "fundamentally misguided . . . . If consumers found the matters covered by these proposed rules useful and worth the cost, carriers would compete on [that] basis . . . ."[177] In particular, the proposed regulations appear likely to negatively impact CMRS competition in at least four ways: (1) increasing mandatory disclosures ratchets up advertising costs which may ultimately cause firms to provide less information to consumers; (2) technological innovation is impeded by restricting how new technologies are offered and advertised; (3) increasing advertising costs raises business costs and reduces opportunities for entry and competition in California's CMRS market; and (4) increased regulation encourages more litigation, thereby further increasing business costs.[178] Finally, at an estimated cost of an additional $3.86 per monthly California CMRS bill,[179] the costs of the California Telecommunications Bill of Rights could exceed "the combined cost of E911, number pooling, number portability, and CALEA."[180]

A restrictive regulatory proposal similar to the California "Bill of Rights" was also recently introduced in both houses of Congress. The federal Cell Phone Users Bill of Rights[181] is almost identical in philosophy to the California bill. Most remarkably, the proposed federal bills would

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Order: The Telecommunications Bill of Rights (July 24, 2003), *available at* http://www.cpuc.ca.gov/static/industry/telco/consumer+information/billofrights/030724_draftdecision.htm.

176. Cal. Pub. Util. Comm'n, Proposed Bill of Rights Rule Summary, Proposed Telecommunications Bill of Rights, Cal. Pub. Utils. Comm'n (July 24, 2003), *available at* http://www.cpuc.ca.gov/static/industry/telco/billofrights.htm.

177. Paul H. Rubin, *The Effects on Consumer Welfare of the Proposed California Regulations of Wireless Communications: Round 2*, PROGRESS ON POINT 10.13 (The Progress & Freedom Found.), Aug. 2003, *available at* http://www.pff.org/publications/communications/pop10.13califwirelessregs2.pdf.

178. Lenard & Mast, *supra* note 25, at 56-57.

179. *Id*. at 57.

180. *Id*.

181. H.R. 1642, 108th Cong. (2003); S. 1216, 108th Cong. (2003).

directly contravene the deregulatory competitive mandate of the 1996 Act and require the FCC to monitor wireless service quality and maintain network and consumer data from each wireless provider. Imposing increased regulation and restrictions on CMRS providers will not only increase costs likely to be passed on to consumers; in addition, such provisions suggest a return to the micro-regulation that has stunted competitive growth in the wireline industry and bode only ill for the creation of an investment climate that will foster the promise of convergence to be realized.

B. Convergence

In a world where "'a bit is a bit is a bit' seems to have become the motto of our digital age,"[182] it seems clear that inflexible reversion to old regulatory models tied to legacy technology stand out as unequivocal roadblocks on the road to the great promise of converging communications technology. Certainly, in the age of instant messaging, picture phones, and wireless video games, it is naïve to suggest that CMRS providers merely provide wireless "telephone service." Technological convergence is occurring at *all* levels of communication—an unavoidable byproduct of Moore's Law.[183] No longer does cable merely provide a broadcast alternative—nor do historical "telephone companies" merely provide "plain old telephone service."[184] Technology has blown through the distinctions of even a decade ago, and the world of communication is increasingly defying old-world classification.[185]

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182. Anant Sahai, *Communicating Unstable Signals*, MIT Electrical Engineering and Computer Science: EECS Special Seminar (Apr. 9, 2001), *available at* http://www.eecs.mit.edu/AY00-01/events/67.html.

183. Moore's Law is attributed to Gordon Moore, who predicted that the number of transistors placed on a computer chip would double every year. Perhaps foreshadowing the tech-sector crash in the late 1990s, he updated his prediction to once every two years in 1995.

184. *See* Ben Charny & Jim Hu, *Time Warner Cable Leans More Heavily on Voice*, CNET NEWS.COM, *at* http://news.com.com/2100-7352-5149564.html (Jan. 28, 2004) ("Time Warner Cable's shortened VoIP … timetable highlights cable's increasingly powerful position as a conduit for all things digital…."); and Jim Hu, *SBC Begins Offering Satellite TV*, CNET NEWS.COM, *at* http://news.com.com/2100-1033-5169545.html (Mar. 3, 2004) ("SBC is offering EchoStar's Dish Network to its local telephone customers in the 13 states in its market.").

185. *See* Daniel F. Spulber & Christopher S. Yoo, *Access To Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 889 (2003) (Technological convergence "has begun to put pressure on the historical regulatory distinction among voice, video, and data communications, in which each type of service was governed by a separate regulatory regime.").

The Authors believe that realization of the quantum shifts offered by convergence ultimately require leadership and dynamic action by the Commission. Some might call for a wholesale overhaul of the current U.S. regulatory and legislative framework by Congress to allow for a more enlightened regime where functionally similar services are treated independent of their historic transmission mediums.[186] While conditions may eventually require such a revisitation of the 1996 Act, the Authors believe that taking this drastic path would be premature and costly. The sixty-two years (1934-1996) it took to marshal political and industry support for overhauling federal communications policy unfortunately suggest that exhaustive regulatory reform at the federal legislative level is unlikely to occur anytime soon.

A more realistic option for handling the problems presented by converging technologies rests squarely in the Commission's hands. As discussed in Part I.B *supra*, Congress granted exclusive plenary power over CMRS services to the Commission. Moreover, Congress also granted regulatory power covering "ancillary" communications services to the Commission.[187] The Authors therefore recommend the Commission take the lead by guiding the telecommunications industry on a path of "regulatory economy" and "regulatory forbearance." Congress established the Commission as an expert agency to implement more specifically the broad policies contained in federal legislation.[188] The Commission must

186. The need for regulatory reform is readily apparent, and may well be under way. In calling for a new regulatory model, Professor Phillip J. Weiser suggests:

> [T]he substantive focus of the FCC will increasingly shift to consider the challenges of technological convergence and the implications of digital technology—be it for the delivery of video, data, or voice. Over time, the FCC will thus need to shift its focus from specific regulatory approaches based on the particular technology platform—say, a distinct regime for satellite, wireless, cable, or telephone networks—to a "layered model" of telecommunications regulation that regulates functionally similar services in the same way regardless of the underlying platform. In its ongoing efforts to reform inter-carrier compensation arrangements, to modernize its spectrum policy, and to develop a new framework for broadband policy, the FCC is moving in exactly this direction.

Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 41-42 (2003) (footnotes omitted).

187. 47 U.S.C. Title I (2000).

188. Enabling legislation by Congress formed the Commission:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority

therefore truly wield its expertise to identify and proactively clarify the appropriate boundaries for state versus federal regulation in the wireless arena, as well as in the new regulatory paradigms in a converging world. The 1996 Act clearly outlines the Commission's role in bringing competition to *all* communications markets. It is time for the Commission: 1) to recognize the unique challenges and opportunities presented by converging communications technology, 2) to act boldly and unequivocally to reestablish the federal preeminence over wireless and 3) to adopt meaningful and modernized categories for new services. As developed below, the necessity of such change is particularly evident when considering the deployment and popularity of wireless networking standards (e.g., 802.11x or Wi-Fi and Bluetooth technology) and VoIP services.

1. Wi-Fi and the Proliferation of Unregulated VoIP Services

From its 1980 origins,[189] Wi-Fi has fast become the "TCP/IP of wireless,"[190] or rather, an almost universally adopted standard for wireless communications that delivers packetized data over a neutral or "dumb" network.[191] Wi-Fi networks are relatively inexpensive and easy to administer, and they provide a spectrum-efficient method for networking computers and sharing Internet connections.[192] Wi-Fi networks now abound

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> with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", [sic] which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 151 (as amended). S*ee also*, Michael K. Powell, Letting Go of the Bike: A Holiday Parable on Communications Mergers in a Season of Competition, Speech Before the Practising Law Institute (Dec. 10, 1998), *available at* http://www.fcc.gov/Speeches/Powell/spmkp820.html ("As I stated . . . , the Commission cannot command respect as an 'expert agency'—one worthy of the broad public interest authority Congress has given us—if our pronouncements turn on subjects in which we are not expert or which do not rely on our unique capabilities.").

189. The first meeting of the IEEE Computer Society "Local Network Standards Committee", Project 802, was held in February of 1980. *See* The IEEE 802.11 Working Group, Overview and Guide to the IEEE 802 LMSC, *at* http://grouper.ieee.org/groups/802/802%20overview.pdf (Dec. 2002).

190. *Wi-Fi Industry Basics: The Wi-Fi Invasion*, Boingo Wireless, *at* http://www.boingo.com/wi-fi_industry_basics.html (last visited Mar. 4, 2004) (quotation omitted).

191. Professor Lessig distills the essence of the TCP/IP protocol, noting that "[the TCP/IP protocol] reveal[s] nothing about the user of the Internet, and very little about the data being exchanged. . . . Like a daydreaming postal worker, the network simply moves the data and leaves interpretation of the data to the applications at either end [of the network]." LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 32 (1999) [hereinafter LESSIG, CODE AND OTHER LAWS].

192. Edward J. Markey, *Electronic Oases Take Root in Mr. Minow's Vast Wasteland*, 55

in private homes, airports, coffee shops, commercial businesses, libraries, and bookstores. Such wide acceptance suggests that Wi-Fi networks may even offer resolution of the last mile bottleneck for broadband networking.[193] Others suggest that Wi-Fi is a necessary ingredient for achieving pervasive or ubiquitous computing—"the creation of environments saturated with computing and wireless communication, yet gracefully integrated with human users."[194] This last application suggests the turbulent and challenging future that continued Wi-Fi deployment may hold for CMRS providers[195]—pervasive deployment of Wi-Fi "hotspots" combined with the further convergence of telephony and data services across competing networks may enable the "Napsterization"[196] of subscriber-based CMRS services. Moreover, the success of unregulated Wi-Fi and spread-spectrum technology underscores the boundless character of wireless technology and again suggests the necessity for traditional regulatory paradigms in competitive markets.

Technological convergence has already established a means for providing heretofore subscriber-based services for free or at substantially lower rates than on public regulated networks. The optimized packetization of telephony services, commonly referred to as VoIP, allows networks to transmit and receive calls from other computer users or wireline customers (assuming interconnection) without noticeable degradation in quality of

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FED. COMM. L.J. 545, 551 (2003) ("From 'wi-fi' technology and low-power 'Bluetooth' wireless connections, to so-called '802.11b' protocols, utilization of publicly available airwaves can help connect people and businesses in cost-effective and spectrum-efficient ways.").

193. Zoë Baird, *Promoting Innovation to Prevent the Internet from Becoming a Wasteland*, 55 FED. COMM. L.J. 441, 444 (2003) ("Wireless technologies (e.g., cellular and Wi-Fi), which are cheaper to install in the local loop, can play a crucial role in ensuring universal, ubiquitous access, particularly access to broadband.").

194. IEEE Computer Society, *About IEEE Pervasive Computing*, IEEE PERVASIVE COMPUTING MAGAZINE, (last visited Mar. 4, 2004) *available at* http://www.computer.org/pervasive/about.htm?SMSESSION=NO.

195. The future of 3G deployment itself may depend upon the proliferation of Wi-Fi:

> [T]here are fears that the one clear advantage of 3G over existing [European] mobile networks—the capacity for users to send and receive data at high speeds—will be undermined by the emergence of wireless local area networks (WLANs) . . . . [European m]obile operators argue that WLANs will be complementary to 3G networks, and in some cases they are pursuing both initiatives in parallel. But critics say that anything that diverts revenue away from 3G networks could undermine their fragile business case.

Neil McCartney, *Can Wireless Deliver?*, THE FINANCIAL TIMES, Oct. 16, 2002, at UNW 2.

196. Risking overuse of an en vogue word, the Authors use this term to signify a situation whereby technological innovation forces established business models to change or become obsolete in a very short period of time. Use of this term is not intended to encompass the copyright issues associated with Napster, Inc.

service.[197] Some firms are even experimenting with stand-alone Wi-Fi phones that take advantage of similar protocols.[198]

Two recent cases highlight the uncertain regulatory treatment currently facing converging technologies and specifically bring into question future regulatory treatment for VoIP. While addressing non-wireless technology, these cases illustrate the need to reframe the American approach to telecommunications through concerted use of tools Congress has provided the FCC.

In *Brand X Internet Services v. FCC*,[199] the Ninth Circuit Court of Appeals reviewed an FCC Order ("Order")[200] that stated that cable broadband Internet service was not "cable service" but was instead an interstate "information service" within the meaning of the 1996 Act. Congress used the 1996 Act to establish a "pro-competitive, de-regulatory national policy framework" designed to promote the "deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[201] However, at that time, Congress did not specifically address how nascent cable modem technology would be regulated. Congress's framework maintained substantial common carrier obligations

197. *See e.g.*, Jon Arnold, *I Want My VoIP*, CNET NEWS.COM, *at* http://news.com.com/2010-7352-5145999.html (Jan. 27, 2004) (explaining why 2004 is the year for proliferation of VoIP services); Mark McClusky, *VoIP: Here, There, Everywhere*, WIRED NEWS, *at* http://www.wired.com/news/infostructure/0,1377,61551,00.html (Dec. 12, 2003) (discussing increasing deployment of VoIP by cable and local telephone companies) ; Matt Richtel, *A Debate on Web Phone Service*, NEW YORK TIMES.COM, Technology Section, (Jan. 5, 2004) *available at* http://www.nytimes.com/2004/01/05/technology/05voip.html?ex=1080018000&en=38bf93851b70a44b&ei=5070 (describing the current fervor surrounding VoIP services). *But see* Fred Goldstein, *VoIP Needs a Reality Check*, CNET NEWS.COM, *at* http://news.com.com/2010-7352-5153538.html (Feb. 5, 2004) (suggesting deficiencies in VoIP will not force abandonment of circuit-switched networks); Dameon D. Welch-Abernathy, *Is Security Holding VoIP Back?*, VOXILLA.COM, *at* http://www.voxilla.com/modules.php?op=modload&name=News&file=article&sid=56&mode=nested&order=0&thold=0 (Mar. 12, 2004) (discussing security problems complicating the proliferation of VoIP services).

198. *See* Stephen Lawson, *Nextel Plans Smartphone, Wi-Fi Phones*, INFOWORLD, (Mar. 17, 2003), *available at* http://www.infoworld.com/article/03/03/17/HNnextel_1.html ("Nextel and . . . Motorola . . . are working on a mobile phone with integrated Wi-Fi wireless LAN capability, which will allow users to make calls over a home or office Wi-Fi network . . . ."); *see also* ZyXEL, *Prestige 2000W, VoIP Wi-Fi Phone, at* http://www.zyxel.com/product/P2000W.html (last visited Apr. 15, 2004) (announcing development of a combination Wi-Fi and VoIP cordless phone).

199. Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).

200. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Ruling*, 17 F.C.C.R. 4798 (2002) [hereinafter *Declaratory Ruling*].

201. H.R. REP. NO. 104-458, at 113 (1996).

on "telecommunications services" providers, while significantly reducing the regulatory commitments for providers of "information services." Given conflicting interpretations[202] as to whether cable broadband service was in fact "cable service" (and therefore subject to "telecommunications services" obligations in the 1996 Act), the Order found cable modem service as an "information service" with no "telecommunications service" component.[203] The Ninth Circuit disagreed with the interpretation of the Order, in part, and reversed by reasserting its holding in *City of Portland*, that cable broadband service was not "'cable service' but instead was part 'information service and part telecommunications service.'"[204]

The recent decision by the United States District Court for the District of Minnesota in *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*,[205] confronts the question of how to classify VoIP services, particularly given the highly categorized regulatory framework of the 1996 Act. The plaintiff in *Vonage* provides VoIP services over high-speed Internet connections that permit its customers to access public-switched telephone networks.[206] Upon receiving a complaint by the Minnesota Department of Commerce demanding that *Vonage* comply with state fees and rules for the provision of telephone service, the Minnesota Public Utilities Commission held a hearing and issued an order declaring *Vonage* must "comply with Minnesota statutes and rules regarding the offering of telephone service."[207] The district court upheld *Vonage's* subsequent motion for a permanent injunction, concluding that

> the VoIP service provided by Vonage constitutes an information service because it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The process of transmitting customer calls over the Internet requires Vonage to "act on" the format and protocol of the information. . . . [T]his Court finds that Vonage *uses* telecommunications services, rather than provides them.[208]

202. *Compare* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000) (cable modem service is not "cable service," but has information and telecommunications service components), *with* MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 714-15 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001) (holding that cable modem service is "cable service" because it involves a telecommunications component).

203. *Declaratory Ruling*, *supra* note 200, at 4802 ("[C]able modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service.").

204. *Brand X Internet Servs.*, 345 F.3d at 1132.

205. 290 F. Supp. 2d 993 (D. Minn. 2003).

206. *Id*.

207. *Id*. at 996.

208. *Id.* at 999 (citation omitted); 47 C.F.R. § 64.702(a) (1996).

The *Vonage* holding is instructive in that the district court was presented with a converged technology that does not fit into a classification within the 1996 Act. Despite enabling phone-to-phone communication via the exchange of TCP/IP packets of data, the district court concluded that the services provided by *Vonage* did not even satisfy the FCC definition of phone-to-phone IP telephony promulgated in its Universal Service Report.[209] The court stated:

> In applying the FCC's four phone-to-phone IP telephony conditions to Vonage, it is clear that Vonage does not provide phone-to-phone IP telephony service. . . . Use of Vonage's service requires [consumer premises equipment] different than what a person connected to the PSTN uses to make a touch-tone call. Further, a net change occurs when Vonage's customers place a call. If the end user is connected to the PSTN, the information transmitted over the Internet is converted from IP into a format compatible with the PSTN. Vonage's service is not a telecommunications service because "from the user's standpoint" the form of a transmission undergoes a "net change."[210]

The district court therefore concluded that Vonage's service did not fit within the FCC's framework because "Vonage never provides phone-to-phone IP telephony (it only provides computer-to-phone and phone-to-computer IP telephony)."[211] Placing great weight upon the technical structure of Vonage's services, the district court held that "from a '*functional standpoint*,' Vonage's service is distinguishable from the scenario the FCC considered to be telecommunications services."[212] Finally, the court refused to over simplify[213] classification of VoIP by adopting the "quacks likes a duck"[214] argument furthered by the Minnesota Public Utilities Commission. The *Vonage* court, despite acknowledging the attractiveness of the argument, found that departing from Congress' statutory intent would work to the "detriment of an accurate understanding of this complex question."[215]

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209. *Vonage Holdings Corp.*, 290 F. Supp. 2d at 999 (citing *In re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, para 21, 11 Comm. Reg. (P & F) 1312 (1998) [hereinafter *Universal Service Report*]. The FCC refused to institute IP telephony regulation, concluding it was not "appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." *Id*. para. 14.

210. *Vonage Holdings Corp.*, 290 F. Supp. 2d at 1000 (citing *Universal Service Report*, *supra* note 209, para. 88).

211. *Vonage Holdings Corp.*, 290 F. Supp. 2d at 1000.

212. *Id*. at 1000-01.

213. *Id*. at 1001.

214. The logic of the Minnesota Public Utilities Commission is not easy to dismiss. "[B]ecause Vonage customers make phone calls," VoIP must be a telecommunications service. *Vonage Holdings Corp.*, 290 F. Supp. 2d at 1001.

215. *Id.*

2. Would Regulation of VoIP Sound the Death Knell for Wi-Fi and/or TCP/IP?

While the *Brand X* and *Vonage* cases ultimately appear destined for the Supreme Court, each presents interesting questions for the treatment of converging technology and the development of wireless technology. While ultimately rejected in *Vonage*, the "quacks like a duck (and therefore it's a duck)" argument has been adopted by many an exasperated jurist or regulator when attempting to assess converging technology. The *Vonage* court, however, aptly realized that this argument can go both ways. In the constantly morphing world of new technology, what quacks like a duck may very likely also swim like a fish—so judges, business people and policymakers may argue ad nauseum which genus really fits (with their arguments almost inevitably colored by who will win or lose based on the ultimate classification). Convergence defies classification and challenges regulators to rethink the assumptions underlying current regulatory boundaries.

The increased proliferation of VoIP, Wi-Fi, and other new technologies only heightens the need to reexamine regulatory structures.[216] Commendably, the Commission recently initiated a comment period for determining whether to regulate VoIP services.[217] While the constantly changing effects of converging technology on existing communications providers may necessitate rapid changes to current business models (and access to investment capital), the burdens imposed by preserving failing regulatory models may significantly decrease the ability of CMRS providers to adapt to or embrace such new technology.

The uncertainty about what is or is not an information or telecommunications service serves as merely one example of why further regulation is not the best answer for technological convergence.[218] Blindly

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216. *See* Randolph J. May, *VoIP Regulation: A Plea for Procedural Modesty*, CNET NEWS.COM, *at* http://news.com.com/2010-7352-5152699.html (Feb. 3, 2004) (explaining why VoIP is a tempting regulatory target and suggesting that regulatory process itself may inhibit technological development and deployment).

217. IP-Enabled Servs., *Notice of Proposed Rulemaking*, WC Docket No. 04-36 (Mar. 10, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf. The Commission succinctly justified the institution of this inquiry, stating:

> This Commission must necessarily examine what its role should be in this new environment of increased consumer choice and power, and ask whether it can best meet its role of safeguarding the public interest by continuing its established policy of minimal regulation of the Internet and the services provided over it.

Id. para 2 (footnote omitted).

218. Discussing this very point, Commissioner Powell suggests:

> When I am presented a proposed public interest obligation . . . , I ask myself five simple questions: (1) Does the Commission have the authority to do what is asked? (2) Even if we do have authority, is it nonetheless better to leave the matter

forcing converging technology into existing regulatory buckets is fraught with the danger of unintended and highly negative consequences.[219] For example, if VoIP is ultimately found to be a telecommunications service subject to common carrier obligations, how can VoIP be regulated without unalterably changing the Internet or current regulatory paradigms?[220] Presumably, regulating VoIP would require accounting for regulated "voice" bits versus unregulated "data" bits—thus, unavoidably changing the end-to-end ("dumb") nature of the TCP/IP protocol. "[R]egulable code is closed code."[221] Alternatively, a truly open network, defies regulation.

As recently illustrated by the progeny of Napster, attempts to curtail unauthorized file-sharing applications have created a new "Cold War" between an industry clinging to old categories (music sold only on CDs) and young consumers hungry to adapt new technologies (downloading only desired songs and bypassing tangible formats).[222] Given the persistence of

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> to Congress or await more specific instruction? (3) Is the issue best addressed by another Federal Agency? (4) Should we address the matter at all? And, (5) Is it Constitutional?

Remarks of Michael K. Powell, Commissioner, FCC, at the Freedom Forum (Apr. 27, 1998) (as prepared for delivery), *available at* http://www.fcc.gov/Speeches/Powell/spmkp809.html.

219. The Commission's recent "pulver.com" decision is an encouraging step in this direction of addressing new technology. Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, WC Docket No. 03-45 (Feb. 12, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-27A1.pdf (approving a request, in a split decision, for regulatory forbearance by a computer-to-computer VoIP provider) [hereinafter *Pulver.com Opinion and Order*]. Also encouraging was an accompanying acknowledgement by Chairman Powell of the heavy burden that regulation may place upon developing technology and the importance of regulatory clarity and forbearance in developing industries:

> Our ruling formalizes the Commission's policy of "non-regulation" of the Internet and, in so doing, preserves the Internet as a free and open platform for innovation. Just as important, today's ruling removes barriers to investment and deployment of Internet applications and services by and ensuring that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels.

Pulver.com Opinion and Order, *supra*, at 20 (statement of Chairman Michael K. Powell).

220. Some observers have pointed out that some de facto regulation of the Internet and VoIP already exists. *See, e.g.*. Konrad Trope, Perspectives, *Hey Michael Powell, You're Too Late!*, CNET NEWS.COM, *at* http://news.com.com/2010-7352_35146559.html?tag=guts_bi_7352 (Jan. 27 2004) ("[T]he Internet—and voice over Internet Protocol . . . in particular—is already subject to myriad government statutes and court decisions."). *See also* Leonard J. Kennedy & Lori A. Zallaps, *If it Ain't Broke . . . The FCC and Internet Regulation*, 7 COMMLAW CONSPECTUS 17, 34 (1999).

221. LESSIG, CODE AND OTHER LAWS, *supra* note 191, at 106.

222. John Logie, *A Copyright Cold War? The Polarized Rhetoric of the Peer-to-Peer Debates*, 8 FIRST MONDAY 7 (Jul. 2003), *at* http://www.firstmonday.dk/issues/issue8_7/logie/ (The President of the Motion Picture Association of America, quoting Jack Valenti, stated, "We're fighting our own terrorist war.").

Moore's Law, VoIP may soon be a viable alternative over Wi-Fi networks. Will regulators and courts treat mobile VoIP as a regulated "telecommunications service," or will the 1996 Act's deregulatory and competitive mandates for wireless ultimately justify its classification as an "information service"? These current and pending quandaries cry out for broad reassessment and firm action by the Commission. Hopefully, the comments in the pending IP-Enabled Services Rulemaking proceeding will reflect the best and brightest thinking in this complicated arena, and the Commission will lead the way to a new taxonomy of convergence based on neutral pro-competitive principles—including a light-handed federal regulatory framework for wireless. Only by abandoning artificial and categorical assumptions of the past can the Commission fulfill its mission as an expert agency and promulgate Congress's deregulatory and public interest mandates.

C. Optimizing Competition

In addition to the convergence of new technologies, the consolidation and commoditization in the wireline long-distance sector may hold another important lesson for the wireless industry. The mergers of many long-distance companies suggest a return to vertical-integration and great difficulty in maintaining any semblance of financial viability for an entity engaged in commoditized competition. Two lessons have emerged: (1) selling unbundled services makes it difficult to maximize profits—particularly when technology changes at an incredibly rapid pace and (2) the risk of "creative destruction"[223] increases exponentially whenever government steps in to act as a "handicapper" in competitive markets. Schumpeter's theory of "creative destruction" may reveal why it is difficult for the telecommunications sector to stabilize—each company is unable to optimize its offerings by combining vertically-related services.[224] When newer technology supplants existing service offerings, and consumers cannot foretell what services a provider will offer them, they may switch to another provider (particularly now that line-number portability ("LNP") is

223. "Creative destruction" refers to an evolutionary process of short-term monopolies where "firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements." *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 10-11 (2001) (footnote omitted). *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (3rd ed. 1950).

224. Many commentators deplore vertical integration as a socially undesirable tool used to preserve a monopolist's market power by encouraging uncompetitive behavior that includes predatory-pricing, tying arrangements, and cross-subsidies. The Authors do not discount the wisdom of these critiques, but rather wish to note the current reality of providing telecommunications service.

underway). Thus, while competition is the goal, too much cut-throat competition and commoditization may ultimately limit service offerings to consumers and investment in infrastructure and handsets because firms find it impossible to operate as profitable entities. The Microsoft vertically-integrated model[225]—while reviled on many fronts—certainly has proven viable and profitable in the tumultuous world of technology and may[226] represent the right path for the future for CMRS.[227]

V. REGULATION'S IMPACT ON INVESTMENT: LESSONS FOR AMERICAN WIRELESS FROM EUROPE'S SPECTRUM MISADVENTURES AND U.S. AIRLINE DEREGULATION

In evaluating the necessity of regulatory harmonization[228] for converging wireless services, regulators must remain cognizant of the investment incentives necessary for the technological advancement and expansion of wireless networks. As discussed in Part I, *supra*, the demand for spectrum bandwidth seems limitless given the increasing consumption of next-generation wireless Internet and data services. Historically, U.S. spectrum allocation and ownership policy divided spectrum into relatively static technological categories (e.g., radio, CMRS, television). Today, the advent of converging digital wireless technology increasingly questions the

225. The Authors note, however, that the 1996 Act "imposes conditions to ensure that *de facto* monopoly power is not exported to vertically-related (complementary) markets." Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, (Dec. 4, 1997) (Presented at the Annual Telecommunications Policy Conference, Tokyo, Japan) (on file with the Journal).

226. *See, e.g.*, Thomas W. Hazlett, *Regulation and Vertical Integration in Broadband Access Supply* (Feb. 15, 2002) (paper presented at AEI-Brookings Joint Center for Regulatory Studies Conference, Broadband Communications: Overcoming the Barriers), *available at* http://www.manhattan-institute.org/hazlett/Regulation%20and%20Vertical%20Integration%20in%20Broadband%20Access%20Supply.pdf ("[D]epending upon the circumstances of the particular market (including regulatory constraints), vertical integration may prove either efficient or anti-competitive.").

227. Wireless Voice to Data: The Impact on the Consumer, *at* http://www.ksg.harvard.edu/project6/ (last visited Apr. 15, 2004) ("Looking into the future, the vertical integration and limited customer choice caused by WAP [wireless application protocol] will become an important policy and regulatory concern in the Internet and telecommunications convergence space.").

228. Lenard & Mast, *supra* note 25, at 57.

wisdom of preserving these historic distinctions,[229] particularly given increasing demands for additional CMRS spectrum allotments.[230]

In answering the difficult questions raised by converging technology, however, we must not abandon what has worked well for American spectrum allocation and licensing policy. Resoundingly, U.S. experience reaffirms the success of neutral, market-based spectrum allocation and licensing policy for encouraging network investment and technological advancement. The Authors discuss this principle below by contrasting U.S. and European experiences in allocating spectrum. The Authors further emphasize the relationship between regulatory consistency and network-industry investment incentives by evaluating the incomplete deregulation plaguing the American airline industry. This examination suggests that, in contrast with multiple jurisdictions imposing different rules on carriers in the same industry, minimal regulation, consistently and uniformly applied, creates investment incentives and promotes network improvement and expansion. Thus, the Commission's recent licensing policies in the wireless spectrum arena illustrates just what federal regulators may do best—creating and implementing an overarching framework to allow free-market breezes to energize a previously static system.

A. Two Models of Licensing "Scarce" Spectrum

The current U.S. regulatory system for allocating and managing spectrum, while recently overhauled, has come under attack for raising barriers to the efficient transferability of spectrum and preventing innovative uses of spectrum and the promulgation of new technology.[231]

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229. *See generally* Kevin D. Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863 (Mar. 2004); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 2 (2004) (forthcoming) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=470221; Nobuo Ikeda & Lixin Ye, SPECTRUM BUYOUTS: A MECHANISM TO OPEN SPECTRUM (RIETI Discussion Paper Series 02-E-002) (Rev. ed. Dec. 2003), *available at* http://www.rieti.go.jp/jp/publications/dp/02e002.pdf; Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STANFORD TECH. L. REV. 2 (2002), *at* http://stlr.stanford.edu/STLR/Articles/02_STLR_2/article_pdf.pdf.

230. *See* MOTOROLA, A WHITE PAPER ON FUTURE FEDERAL COMMUNICATIONS COMMISSION SPECTRUM POLICY 14 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513290052 ("Motorola remains confident that there will continue to be an increasing demand for very high speed, reliable, nearly ubiquitous wireless communications by mobile and nomadic users and that additional spectrum will be required to meet this demand.").

231. *See* Buck, *supra* note 229.

> [T]he auction "solution" only masks an underlying problem, which is that spectrum is misconceived in the first instance as a form of property that necessarily requires individualized allocation. The spectrum auction regime

Coordinated by the Commission, spectrum allocation and management refer, respectively, to the current system of initially assigning licenses to spectrum and the renewal, transfer or reallocation of licensed spectrum. The historic regulatory model, originating from the early Commission assumption that spectrum was a "scarce" resource,[232] established a centralized "command-and-control" regulatory architecture, whereby the uses and users of spectrum are restricted.[233] The Commission's adoption of a market-based regulatory model for spectrum management has greatly improved efficient and desirable outcomes for both consumers and the industry.

Recent critics, however, most notably Chairman Powell,[234] have questioned the utility of even this revised regulatory framework, given significant technological advancements and the demand for more spectrum.[235] Noting the high administrative costs and alleging the protection of incumbent spectrum holders, some commentators urge the

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> retains the government in its traditional role of providing centralized allocation and bureaucratic enforcement of monopoly rights to the spectrum. This regime functions as a barrier to entry for those mid-level companies that might have the most innovative ideas about spectrum usage. Additionally, by requiring that all spectrum users buy access to the spectrum, either from the FCC or from middlemen [i.e., MCI or cellular phone companies], the auction regime makes it more expensive for rural and poorer users to participate in modern media. . . .

Id. para. 5.

232. *See* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

233. Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 Harv. J.L. & Tech. 335, 452 (2001) ("The FCC determines bandwidth use top-down. Entrants wishing to compete or innovators attempting to develop new wireless technologies must apply for permission . . . .") [hereinafter Hazlett, *Wireless Craze*]; Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 402 (1989) ("The Commission's invalidation of the spectrum scarcity rationale as a basis for content regulation cannot logically be limited to content alone. Spectrum scarcity serves as the essential underpinning of almost every FCC regulation and is the principal factor said to distinguish broadcasting from the print media.") (footnotes omitted).

234. Chairman Powell stated that wireless innovation is "inhibited by the 'mother may I' phenomenon—businesses must go to the FCC for permission before they can modify their spectrum plans to respond to consumer demand." Remarks of Michael K. Powell, Chairman, FCC, at the Silicon Flatirons Telecommunications Program, Broadband Migration III: New Directions in Wireless Policy (Oct. 30, 2002), *available at* http://www.fcc.gov/Speeches/Powell/2002/spmkp212.html.

235. *But see* Hazlett, *Wireless Craze*, *supra* note 233, at 425("One can casually stroll when claiming an abundant resource. There will be plenty for everyone without charge. On the contrary, the 'race for bandwidth' is furious.").

adoption of an open or commons property rights model.[236] Even the FCC has officially called for reform, albeit of a much less revolutionary nature.[237] This reform, however, must tread cautiously to preserve investment incentives for network build-out and maintenance by new entrants and incumbent CMRS providers. While the goal of making more efficient use of spectrum is laudable, legislators and regulators alike should ensure that the desire for a "spectrum commons" does not justify sacrifice of wireless operator investment for the sake of academic or libertarian idealism. Regulators must not abandon the market-based spectrum allocation and ownership approach that permitted the United States to move ahead of European wireless network development and expansion in recent years.[238] The following two parts discuss spectrum allocation and management and analyze the importance of establishing a regulatory framework that preserves investment incentives in wireless markets by implementing substantively neutral market-based allocation processes.

1. The American Market-Based Spectrum Allocation Model

The current U.S. spectrum allocation model originated in response to the increasing popularity of wireless telecommunications, the success and ability of early CMRS providers to pay for spectrum, the transition from

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236. KEVIN WERBACH, OPEN SPECTRUM: THE NEW WIRELESS PARADIGM 19 (New America Found., Working Paper No. 6, 2002) ("Promoting open spectrum is the most democratic, deregulatory, pro-investment and innovation-friendly move the U.S. Government could make.") [hereinafter WERBACH, OPEN SPECTRUM].

237. SPECTRUM POL'Y TASK FORCE, FCC, ET DOCKET NO. 02-135 65 (2002), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc (calling for the expansion and use of both exclusive and commons property rights models); *see also* Cara Garretson, *Defense Department May Back Off Wireless Spectrum*, INFOWORLD, *at* http://archive.infoworld.com/articles/hn/xml/01/07/24/010724hnspectrum.xml (Jul. 24, 2001) ("A major hurdle to deploying [3G] technology, which promises high-speed, wireless communication of voice and data, is a scarcity of available spectrum to launch new services. . . . "). *But see* Bob Brewin, *Cellular Carriers, DOD Debate Spectrum Needs*, COMPUTERWORLD (Apr. 4, 2002), *available at* http://www.computerworld.com/mobiletopics/mobile/story/0,10801,69844,00.html ("The Department of Defense . . . would gladly consider sharing its portion of the radio-frequency spectrum with commercial wireless operators—if those companies assume liability for any problems that might result, including the possibility of a test missile going astray and hitting a populated area because of interference.").

238. *See, e.g.*, David Sosa, *Your Turn: Look to Market for Next-Gen Success*, WIRELESS INTERNET MAGAZINE (Sept./Oct. 2001).

> Pundits have argued that the United States is doing something wrong because wireless penetration is lower here than in other industrialized countries. However, wireline rates and account set-up charges elsewhere are generally higher. Lower U.S. penetration rates, relative to Europe and Asia, reflect greater competition between wireless and other communications services, not a failure of public policy or poor execution by service providers.

Id.

analogue to digital ("Second Generation" or "2G") cellular systems and, most importantly, the failure of alternative spectrum assignment mechanisms.[239] Responding to a rapidly increasing demand for spectrum in the early 1980s, the Commission replaced an expensive and inefficient competitive hearing system[240] with a lottery system for cellular spectrum allocation.[241] Less than a decade after its implementation, however, the Commission realized that a lottery system did not efficiently allocate spectrum in the public interest.[242] The lottery system failed to ensure that the firm valuing the spectrum and most likely to build and operate the system reasonably could obtain that spectrum.[243]

As part of the 1993 Act, Congress established a new spectrum allocation process, whereby the Commission would auction certain licenses to the highest bidder. Congress further responded by expanding the scope

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239. *See* GRUBER, SPECTRUM LIMITS, *supra* note 18, at 2-3.

> In the early days, mobile telecommunications was considered as a natural monopoly precisely because frequency spectrum availability was so scarce and the efficiency in using the spectrum resource so poor. . . . Only during the 1990s, along with the deployment of efficient digital cellular systems in markets with two or more firms, the idea of license fees determined by competitive allocation mechanisms became popular.

Id. at 3 (citing Peter C. Cramton, *Money out of Thin Air: The Nationwide Narrowband PCS Auction*, 4 J. ECON. & MGMT. STRATEGY 267 (1995); John McMillan, *Selling Spectrum Rights*, J. ECON. PERSPECTIVES, Summer 1994, at 145).

240. *See* GRUBER, SPECTRUM LIMITS, *supra* note 18.

241. *See* Land Mobile Radio Serv., *Second Report and Order*, 46 F.C.C.2d 752, 30 Rad. Reg.2nd (P & F) 75 (1974); Cellular Comm. Sys., *Report and Order*, 86 F.C.C.2d 469, 49 Rad. Reg.2nd (P & F) 809 (1981).

242. FCC Report to Congress on Spectrum Auctions, *Report*, 13 F.C.C.R. 9601, 9609 (1997) (discussing how a secondary market developed whereby firms could resell their spectrum for a "windfall," thus transferring receipt of initial spectrum market value from the government to private/third parties.). Recently, the Commission instituted proceedings to examine and streamline shortfalls in secondary markets that inhibit efficient transfer or use of spectrum. *See generally* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 00-230 (2003); Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, 15 F.C.C.R. 24178, 22 Comm. Reg. (P & F) 791 (2000); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 24203 (2000); Spectrum Policy Task Force, *Report*, ET Dkt. No. 02-135 (Nov. 15, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.

243. Dale N. Hatfield, Spectrum Issues for the 1990s: New Challenges for Spectrum Management, Centre for International Research on Communication and Information Technologies (CIRCIT) Conference (Nov. 23, 1993) ("[L]otteries to a large extent have become the victims of their own success . . . Because of the high volume of applications, the ostensible benefits of lotteries, that is, timeliness and lower costs to applicants and the FCC, were lost."), available at http://www.annenberg.nwu.edu/pubs/spectrum/default.htm.

of auctionable spectrum in the Balanced Budget Act of 1997[244] to cover "full power commercial radio and analog television stations."[245] Almost a decade after Congress's promulgation of the auction model, the Commission concluded that auctions "[m]aximize benefits to consumers by assigning licenses to the parties that value them most highly and foster[] efficient spectrum use."[246] Economists and other commentators generally agree that "[a]llowing for the play of market forces in the allocation of spectrum and allowing spectrum licensees greater leeway in choices of technologies used and services provided will open up new possibilities in increased efficiency and innovation in one of our economy's most dynamic sectors."[247]

Today, history suggests that scarcity is more a function of technological innovation than a physical constraint inherent in the radio spectrum.[248] Nowhere is the rationale supporting market-based spectrum allocation, versus a command-and-control "scarcity" regulatory model, more apparent than by examining European spectrum allocation.

244. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in 47 U.S.C. §§ 309(i)-(j) (1998)).

245. Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 F.C.C.R. 15920 para. 9, 13 Comm. Reg. (P & F) 279 (1998).

246. EVAN KWEREL & WALT STRACK, FCC, AUCTIONING SPECTRUM RIGHTS 2 (2001), *available at* http://wireless.fcc.gov/auctions/data/papersAndStudies/aucspec.pdf.

247. Evan R. Kwerel & John R. Williams, *Moving Toward a Market for Spectrum*, CATO REGULATION, *available at* http://www.cato.org/pubs/regulation/reg16n2e.html; *see also* PETER HUBER, LAW AND DISORDER IN CYBERSPACE (1997); John McMillan, *Why Auction the Spectrum?*, 19 TELECOMMUNICATIONS POLICY 191 (1995), *available at* http://www.market-design.com/files/mcmillan-why-auction-the-spectrum.pdf; Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87 (1997); Adam D. Thierer, A Policy Maker's Guide to Deregulating Telecommunications Part 6: A Free-Market Future for Spectrum, TALKING POINTS No. 11 (Heritage Foundation, 1996) (on file with Journal); Brian C. Fritts, Note, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 FED. COMM. L.J. 849 (1999). Alternatively, others urge regulators to reconsider spectrum auctions in favor of a commons property framework. *See* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000); Lawrence Lessig, *Keynote Address: Commons and Code*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405 (1999); Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STAN TECH. L. REV. 2 (2002); WERBACH, OPEN SPECTRUM, *supra* note 236; Hazlett, *Wireless Craze*, *supra* note 233.

248. *See* Rob Frieden, *Balancing Equity and Efficiency Issues in the Management of Shared Global Radiocommunication Resources*, 24 U. PA. J. INT'L ECON. L. 289, 314-17 (2003) (discussing technological solutions to spectrum scarcity).

2. The European State-Sponsored Spectrum Allocation Model

Whereas the U.S. spectrum allocation experience offers many success stories for regulators, the recent history of western European wireless regulation[249] and spectrum allocation reads like a classic Shakespearean tragedy. Once regarded as the model for American wireless deployment, one commentator recently described the European wireless marketplace as "a hole in the form of billions of dollars in debt issued to pay for new licenses and networks."[250] The lessons learned from wireless development in Europe inform broadband wireless deployment in America and suggest that rushing to build high-capacity networks, without regard to consumer demand or investment cost, is fraught with peril.[251] In addition, Europe's mistakes are due, in part, to poor government licensing decisions and a desire to exploit demand for new services and to reap huge revenue rewards at the expense of a successful network implementation.

In 1998, digital wireless network expansion by European CMRS providers appeared ready to outpace expansion by their American counterparts.[252] This growth was fueled, in part, by technological advancements that prompted many European CMRS providers to convert legacy analog networks to digital networks. [253] In 1998, the arrival of next-generation wireless networks seemed imminent—as well as significant demands for increased spectrum capacity.[254] To meet increasing demands for spectrum, the European Commission ("EC") embarked upon a new regulatory framework for allocating spectrum. During the later 1990s and

249. The Authors recognize that European wireless development is divided by post-Cold War boundaries. *See See* Jay Wrolstad, *Report: The Rising Tide for Wireless Internet*, WIRELESS NEWS FACTOR (Feb. 23, 2001), *available a*t http://wirelessnewsfactor.com/story.xhtml?story_id=7718 ("[C]ellular penetration [in Eastern Europe] is lower than in Western Europe."). For purposes of this Article, we shall examine wireless development in western Europe due to the proliferation of a uniform and digital ("GSM") network.

250. Suzanne Kapner, *Europe's Wireless Vision is Dashed*, N.Y. TIMES, Dec. 17, 2001, at C15.

251. Jonathan Moules, *Happy to Wait For Cheaper And Easier Solutions: 3G in the US*, FIN. TIMES (LONDON), June 18, 2003, at 9 ("[W]hen it comes to the next generation of 3G wireless services, the US carriers have been happy to follow.").

252. Harald Gruber & Frank Verboven, *The Diffusion of Mobile Telecommunications Services in the European Union*, 45 EUR. ECON. REV. 577, 578 (2000) (By 1998, Europe had already achieved an "average penetration rate of 23.5 mobile phone subscribers per 100 inhabitants. In Finland, the penetration rate ha[d] even reached 58%.").

253. *Id*. Gruber & Verboven do not dismiss the introduction of competition into the European wireless market, but instead conclude that competition was a less reliable indicator of European mobile telecommunications diffusion than technological innovation. *Id*. at 578 ("The impact of introducing competition was significant, during both the analogue and the digital period, though the effect was smaller than the technology effect.").

254. *Id*. at 580 ("As demand for mobile telecommunications services increased, pressure to grant additional licenses for mobile communication services increased.").

early 2000s, the EC initiated a series of spectrum auctions to spur build-out for 3G networks. As many European governments eyed the spectrum auctions as a potentially significant revenue source, however, European regulators created a "beauty contest" auction process, whereby preconceived revenue goals prevented or impaired independent market valuation of spectrum.[255] As noted by a former Director of the European Telecommunications Network Operators' Association:

> Europe used to have a two-year lead on the United States in mobile phones, but that lead is being lessened largely because of the severe debt companies fell into paying for their 3G licenses . . . .
>
> It is easy to blame the operators, but the governments that reaped the rewards of the highly priced licenses are equally to blame. . . . They were greedy, and they didn't consider the impact such high license prices would have on the telecoms [sic] industry.
>
> . . .
>
> Until our members have certainty that broadband won't be over regulated they won't make the necessary investments . . . . The question of who is going to pay for broadband is missing from the debate.[256]

The recent experience of European spectrum auctions suggests that, to ensure spectrum allocation in the public interest, government regulators must resist the temptation to manipulate policy for revenues in an auction system for which the government is the recipient of funds paid. Even now, the future of European wireless is uncertain because much of the capital to "feed Europe's growth industries . . . disappeared down the 3G sinkhole."[257] Europe's failure to establish a commercially sensible spectrum allocation procedure produced a business climate making investment uncertain and ultimately delaying rollout of next generation services.

255. *See* D. Daniel Sokol, *The European Mobile 3G UMTS Process: Lessons From the Spectrum Auctions and Beauty Contests*, 6 VA. J.L. & TECH. 17 (2001), *available at* http://www.vjolt.net/vol6/issue3/v6i3-a17-Sokol.html (detailing the process and outcome of auctions and beauty contests in various European nations).

256. Paul Meller, *New Economy: European Wireless Telecommunication Faces a Hard Choice: Greater Regulation or Freedom to Develop New Technologies*, N.Y. TIMES, Late Edition, June 24, 2002, at C4 (quoting Michael Bartholemew, former Director of the European Telecommunications Network Operators' Association).

257. Kapner, *supra* note 250.

B. Promoting Competition and Encouraging Network Investment: Deregulation and Regulatory Consistency in Nationally-Networked Industries—The Case of Airlines

Politicians in both parties hailed the deregulation of networked industries in America (e.g., airlines and electricity), particularly in the telecommunications sector, as the antidote to "[t]he economic stagnation of the 1970s."[258] Deregulation, it was claimed, would "loosen federal control over crucial economic sectors"[259] and lead to increased competition and technological innovation, thus placing all consumers in a pareto-optimal position. Particularly in the area of telecommunications, policymakers forcefully made such optimistic claims in the proceedings leading to passage of the 1996 Act. For example, one Senator stated:

> [The 1996 Act] will result in many things for consumers. . . . [I]t will accelerate an explosion of new devices, an explosion of new investment. . . . [I]t will lower prices on local telephone calls through competition. It will lower prices on long-distance calls through competition. It will lower cable TV rates through competition. It will provide an explosion of . . . services and inventions.[260]

In the end, many of "[t]hose good things did happen. Deregulation and low interest rates spurred a burst of technological investment that accelerated the growth of the economy and slashed the unemployment rate."[261] Wireless services, in particular, provided many "explosions" as the premier example of the benefits made possible by deregulation.[262]

Notwithstanding the varied and tangible benefits for consumers, deregulation of network industries also engenders negative, and sometimes severe, consequences for the consumer. As Federal Reserve Chairman Alan Greenspan has suggested, even "the savviest [policymakers] knew they

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258. Jacob M. Schlesinger, *The Deregulators: Did Washington Help Set Stage For Current Business Turmoil?*, WALL ST. J., Oct. 17, 2002, at A1. Schlesinger won the 2003 Pulitzer Prize for "Explanatory Journalism" for authoring this article.

259. *Id.*

260. 142 CONG. REC. 2009 (Feb. 1, 1996) (statement of Sen. Pressler).

261. Schlesinger, *supra* note 258, at A1.

262. Hazlett, *Wireless Craze, supra* note 233 ("Cellular and PCS growth is explosive in comparison with the comparatively stable revenue picture in broadcasting."). *See also* Glenn Bischoff, *Wireless Industry Adopts Code of Conduct*, TELEPHONYONLINE.COM (Sep. 9, 2003), *at* http://www.wirelessreview.com/ar/telecom_wireless_industry_adopts/ ("The wireless industry is the best example of deregulation working for consumers in the telephone industry. This industry is doing a helluva job. I just wish other industries would pay attention.") (statement of Rep. Billy Tauzin); Michael J. Wojcik, *The Telecommunications Industry After Deregulation: What Happened and Where We Are Headed*, 2003 THE TELECOMM. REV. 1, 2 ("Wireless service has seen the greatest increase in competition since the Telecommunications Act of 1996 was signed."), *available at* http://www.mitretek.org/publications/2003_telecomm_review/01_wojcik_2003.pdf.

were making a choice 'between economic growth with associated potential instability, and a more civil . . . way of life with a lower standard of living.'"[263] Chairman Greenspan's reference to the "potential instability" of decentralized economic growth tacitly acknowledges what the Authors believe are three necessary components for industry deregulation and healthy competition within the wireless marketplace—an effective referee, acknowledgement of deep regulatory effects on supposed deregulated industries, and regulatory certainty.

First, the avoidance or removal of an ex ante regulatory system does not obviate the need for a system of ex post checks and balances to address, for example, anticompetitive behavior. In place of centralized industry-specific regulatory oversight, a decentralized means of addressing wrongs is appropriate. Typically, ex post regulatory enforcement occurs via two mechanisms: (1) public administrative agencies (e.g., the Securities & Exchange Commission and the Justice Department) charged with enforcing antitrust and securities law, or (2) private litigation. Both mechanisms, however, may prove to be expensive (and therefore inefficient)[264] corrective measures if the taxpayer or consumer ultimately incurs the costs of deregulatory litigation.[265] Discussing the ramifications of the recent corporate accounting scandals, journalist Jacob M. Schlesinger notes:

> The decision in the 1990s not to regulate the arcane financial instruments known as over-the-counter derivatives made it tougher to uncover accounting tricks favored by Enron Corp. And it is now obvious that investors, and the stock analysts who advised them, [were not] up to the task of making sure that corporate executives kept their priorities and books straight.
>
> In short, it's clear in hindsight that the marketplace's own "checks," . . . weren't enough to prevent the upheaval roiling the business world today.
>
> Blame for business's recent troubles has been assigned to everyone from greedy executives to naive investors. But there were singular moments when [the federal government] also made decisions with serious consequences.[266]

263. Schlesinger, *supra* note 258, at A1 (quoting Alan Greenspan).

264. Amy Hunt, *Assault on the Airline Industry: Private Antitrust Litigation and the Problem of Settlement*, 59 J. AIR L. & COM. 983 (1994) (discussing the problems of private litigation as a guard against unfair competition in the airline industry).

265. Alternatively, some may argue that passing the costs of dispute resolution on to customers is an economically efficient means of quickly resolving otherwise regulatory conflict. Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127 (1997) (noting benefits of private litigation to counter antitrust violations).

266. Schlesinger, *supra* note 258, at A12. Schlesinger refers to the 1987 comments by former vice-chairman of Citicorp, Thomas Theobald, in which he identifies the three alleged

Schlesinger's argument also suggests a second necessary component for deregulated industries: regulators must act with knowledge that they can (and often do) implicitly regulate a deregulated industry through nonregulatory channels. Certainly, deregulation in the telecommunications industry is no exception. As Willis Emmons notes:

> Deregulation . . . produce[s] a number of paradoxes. First is the persistence of regulation in the wake of deregulation. The United States, for instance, has experienced an enormous amount of regulatory change in the telecommunications sector since the early 1980s, impacting local telephone, long-distance, wireless, cable television, and a variety of other communications services. Overall there has been a significant opening up of markets in the sector. Despite this, as a regulatory agency the [Commission] has seen annual increases in its budget, staff, and number of rules issued. In fact, the [Commission] is probably mentioned more frequently in the press today than when the telecommunications industry was "regulated."[267]

Emmons characterizes this paradox as an ongoing "bargain" or relationship between business enterprises and government regulators—"as litigation substitutes for more direct forms of regulation, the notion of deregulation leading to 'less government' becomes quite murky in practice."[268] In the case of the "deregulated" wireless industry, federal and state oversight of pricing controls, entry regulation, licensing, and taxation serve to impose unintended regulatory consequences on market structure and performance. Furthermore, as an example of "neoregulation," federal or state adoption of a "consumer bills of rights" may impose further government scrutiny and restrictions.[269]

Building upon the recognition that deregulation redirects, but does not erase, the regulatory pressure felt by network industries, the final component necessary for a healthy and competitive wireless marketplace is regulatory consistency. Particularly for industries exhibiting strong demand-side "economies of scale," "network effects," or "network externalities,"[270] regulatory consistency is critically necessary for firms

checks on corporate misconduct as a "very effective" Securities and Exchange Commission, knowledgeable investors and "very sophisticated" rating agencies. *Id.*

267. WILLIS EMMONS, THE EVOLVING BARGAIN: STRATEGIC IMPLICATIONS OF DEREGULATION AND PRIVATIZATION 3 (2000). Professor Emmons states three other paradoxes common to deregulation: (1) freedom of market entry and customer choice is often restricted by mandatory access requirements; (2) whereas deregulation theoretically presumes development of more competition, history teaches that deregulation often leads to industry consolidation; (3) government involvement remains relatively constant, despite litigation substituting for more direct forms of regulation. *Id*. at 3-4.

268. *Id*. at 4.

269. *Id*. at 7-8 (introducing the concept of neoregulation).

270. For an excellent analysis of networks and positive feedback cycles, see, e.g., CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK

trying to build long-term capital-intensive networks. The threat of future regulation or regulatory inconsistency substantially increases the investment risks in an already highly tumultuous technological market. Addressing this point, Warren Lavey notes:

> For businesses in regulated industries, uncertainty about future regulations can add to difficulties of companies in attracting capital and making investments in infrastructure, products, and services. Business plans are developed with long-term assumptions about a wide range of factors, some of which are heavily influenced by regulators. While regulators require or induce carriers to spend billions of dollars annually on networks and offerings, regulators also often preserve the flexibility of present and future commissioners to shape future regulations, which will determine in substantial part the carriers' returns on these investments. The business uncertainty for carriers resulting from such regulatory flexibility can impose costs on carriers in terms of less productive use of resources and lost opportunities. Costs can be imposed on consumers in terms of higher prices and lower service quality.[271]

Federal and state regulators must remain cognizant that for industries with large investments in long-lived assets and long cycles for product and service development, regulatory uncertainty or churn has substantial costs.[272] The creation and maintenance of long-term or multi-year regulatory promises,[273] not merely "getting out quick [regulatory]

ECONOMY 173-225 (1999). Shapiro & Varian explain the importance of demand-side economies of scale, saying:

> [N]etworks have a fundamental economic characteristic: the value of connecting to a network depends on the number of *other* people already connected to it.
>
> This fundamental value proposition goes under many names: network effects, network externalities, and demand-side economies of scale. They all refer to essentially the same point: other things being equal, it's better to be connected to a bigger network than a smaller one.

Id. at 174-75.

271. Warren G. Lavey, *Making and Keeping Regulatory Promises*, 55 FED. COMM. L.J. 1, 3 (2002).

272. *Id*. at 10.

273. *See id*. at Parts III-IV (discussing multi-year promises).

decisions,"[274] will help the wireless industry avoid costly churn and provide substantial incentives to invest in next generation networks and technology.

The following Part's examination of "Laissez Faire Era"[275] deregulation in the airline industries shows that an acutely focused competition policy may offer the best means for facilitating network investment.

1. Deregulation and Consolidation: The Airline Industry

As one of the first national network industries to deregulate in America,[276] the airline industry is particularly noteworthy for the communications industry, generally, and CMRS providers, specifically. Despite the best efforts of Congress to bring price competition to airline consumers, the resulting deregulation of airlines was incomplete and left several avenues open for extra-regulatory pressure. These types of extraregulatory pressures felt by the airline industry provide insight into the negative consequences of the persistent regulatory burdens felt by CMRS providers.

Passage of the Airline Deregulation Act of 1978 ("ADA")[277] abolished the Civil Aeronautics Board ("CAB"), a close regulatory cousin of the original Interstate Commerce Commission and the FCC.[278] Congress established the CAB in 1938 to address the "near chaos" and "uneconomic, destructive competition and wasteful duplication of services" in the airline

274. Remarks of Michael K. Powell, Chairman, FCC, at the Association for Local Telecommunications Services (Nov. 30, 2001) (as prepared for delivery), *at* http://www.fcc.gov/Speeches/Powell/2001/spmkp111.pdf. While avoiding the issue of multi-year regulatory objectives, Chairman Michael Powell noted that:

> [W]e have committed ourselves to *driving out uncertainty, by getting out decisions*. There is no greater threat to an entrepreneur, or any business, than uncertainty. A key government decision that hangs in suspended animation will kill the best-laid business plan. Competitors are risk takers and are incredibly agile in their ability to adapt to change, but they must know what to adapt to.

Id.

275. Schlesinger, *supra* note 258 (describing the period spanning from the late 1970s to early 2000s as the "Laissez-Faire Era").

276. PAUL STEPHEN DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 3 (1990) ("[A]irline deregulation was the prototype for a decade of aggressive deregulation throughout the economy. . . .").

277. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

278. Passage of the Airline Deregulation Act was "the first major rolling back of the New Deal system." DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 345 (1998).

industry.[279] Before passage of the ADA, the CAB "regulated all domestic air transport, controlling fares and setting routes and schedules."[280] The beginning of the end for airline deregulation notably began with President Carter's 1976 appointment of Cornell economics professor Alfred E. Kahn as Chairman of the CAB. Kahn openly criticized CAB regulation as having: (a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocation of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency towards excess capacity in the industry.[281]

Shortly after his appointment, Kahn successfully instituted several liberal entry and pricing reforms that created a deregulatory fervor culminating in passage of the ADA.[282] The intention of the ADA was to provide "a gradual transition to deregulated entry and rates"[283] that would allow the market to set the price, quantity, and quality of domestic air service. However, "[w]hat had begun as a program of modest liberalization became an avalanche of abdication of responsible government oversight."[284] The ADA thus set forth a partial,[285] but "comprehensive,"[286] deregulatory framework ultimately calling for the sunset of CAB regulatory responsibility by 1985.

Airline deregulation resulted in price competition that lowered real average fares, by as much as thirty-three percent, and improved and expanded service frequency.[287] The elimination of entry barriers stimulated competition from incumbent and entrant airlines that "spurred innovations in marketing, operations, technology, and governance that enabled firms to

279. *See id*. at 342 (quotations omitted). Yergin and Stanislaw report that creation of the CAB was to curb the "rampant instability in the fledgling airline industry," to enable provision of airmail by the U.S. Postal Service and to ensure "stability in a civilian aviation industry that would be a very important foundation for [World War II]." *Id*.

280. *Airline Deregulation Act*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, *at* http://www.4reference.net/encyclopedias/wikipedia/Airline_Deregulation_Act.html (last visited Mar. 4, 2004).

281. Alfred E. Kahn, *The Theory and Application of Regulation*, 55 ANTITRUST L.J. 177, 178 (1986).

282. *See* DEMPSEY, *supra* note 276, at 5-6.

283. *Id*. at 6.

284. *Id*.

285. Airline safety remained the province of the Federal Aviation Administration.

286. DEMPSEY, *supra* note 276, at 6.

287. Clifford Winston, *You Can't Get There From Here: Government Failure in U.S. Transportation*, BROOKINGS REV. 36, 39(Summer 1999), *available at* http://aei-brookings.org/admin/pdffiles/Winston.pdf ("Air travelers, enjoying a 33 percent decline in real average fares, as well as greater service frequency, have reaped annual net benefits of nearly $20 billion (1996 dollars).").

become more efficient, improve their service quality, introduce new services, and become more responsive to consumers' preferences."[288] Yet, despite lower fares and increased passenger utilization, many experts regard airline deregulation as an incomplete or partial success story at best.[289]

One major consequence of airline deregulation involved the rapid consolidation or bankruptcy of new entrants "competing" in the deregulated airline markets. Many incumbent and new entrant airline providers did not weather the deregulatory storm of (partially) unfettered competition. By 1996, "[s]ome of the most established carriers have gone bankrupt, although some operated through bankruptcy and came out on the other side. Instead of ten trunk (i.e., major) carriers in the United States, there are now six."[290]

Even today, airline consolidation makes entry difficult.[291] The recent history of airline deregulation suggests that airline provider networks, which display economies of scale over a limited infrastructure, will consolidate to a market-chosen equilibrium. In other words, demand-side economies of scale—that value consolidated networks more than independent or less-connected networks—act as a natural limit for entry in deregulated competitive markets. The success of Southwest's point-to-point business model illustrates this concept. In the 1980s, "Southwest Airlines, whose origins predate deregulation, was freed by deregulation to offer its then-unique type of short-haul, no-frills, low-priced, interstate service."[292] As noted by Poole and Butler:

> The obvious appeal of the Southwest model led to a host of startup airlines attempting to replicate its success. Many have failed or have pursued other niche market strategies (e.g., Alaska and Midwest Express with more-frills, point-to-point service). Most recently, several of the major airlines—including Continental, Delta, United, and US

288. *Id.*

289. *See e.g.*, *id.* (calling for complete privatization of the airline industry); Stephen M. Rutner & Ray A. Mundy, *Hubs Versus Hub-Nots: A Comparison of Various U.S. Airports*, 1 J. OF AIR TRANSP. WORLD WIDE 1 (1996), *available at* http://ntl.bts.gov/data/jatww1-1rutner.pdf ("Many of the benefits are positive.").

290. YERGIN & STANISLAW, *supra* note 278, at 345.

291. Alex Williams, *Superfly*, NEWYORKMETRO.COM, *at* http://www.newyorkmetro.com/nymetro/news/bizfinance/biz/features/1879/index.html Jan. 31, 2000. ("This is an industry where the failure rate is very high for new entrants. I keep a book on my coffee table called Deregulation Knockouts, about 82 airlines which came and went in the first ten years of deregulation—people like New York Air and Air Florida.") (quoting Patrick Murphy, former Department of Transportation assistant secretary who granted JetBlue landing slots at JFK).

292. Robert W. Poole, Jr. & Viggo Butler, *Airline Deregulation: The Unfinished Revolution*, 22 REG. 44, 45 (Spring 1999), *available at* http://www.cato.org/pubs/regulation/regv22n1/airline.pdf.

> Airways—have created subsidiaries offering low-fare, low-frills, point-to-point service using a single type of aircraft and lower-paid crews.
>
> The low-fare, point-to-point revolution has succeeded thus far despite the constraints of bureaucratic, non-market aviation infrastructure. . . . But the very success of this type of service is putting stress on the airports it serves and on the [ATC] system. Its *continued growth depends critically on freeing up the infrastructure* to respond to increased *future demand*.[293]

Despite Southwest's success, continuing expansion of their business model by other entrant and incumbent airline providers depends critically upon infrastructure and consumer demand. As offered by Frontier Airlines' senior manager of government relations, "You can't take an SUV and expect to turn it overnight into a Honda Accord."[294]

Another major consequence of airline deregulation was the accelerated transition into a hub-and-spoke architecture for the airline networks. Hub-and-spoke architecture refers to the centralization of airline providers in a "hub" city that serves "spoke" or satellite cities. The consolidation of the airline network into a hub-and-spoke architecture was not anticipated,[295] and general disagreement exists as to the expediency of such a system. Some claim that the hub-and-spoke architecture is a direct economic result of reducing government control that accounts for consumer demand.[296] Others claim that "shifting to a hub-and-spoke system . . . may cause various problems, such as increased delays, additional noise, and dissatisfied customers."[297] The incompleteness of airline deregulation, and the perniciousness of regulation in "deregulated" industries, may itself explain this disagreement. As one commentator notes:

> [T]he changes in service that resulted from the hub-and-spoke system were constrained by the limitations of the aviation infrastructure—airports and [air traffic control ("ATC")]—which had not been altered by deregulation. Huge increases in landings and takeoffs at hub airports put enormous stress on the [ATC] system. Unlike an investor-owned network utility (e.g., the telephone system), the [ATC] system is not paid for directly by fees charged to customers. Thus when traffic soared the system's revenues did not. The [Department of Transportation] still had to go to Congress every year to request

293. *Id*. at 45-46 (emphasis added).

294. Greg Griffin, *United Flies into Low-Fare Battle*, THE DENVER POST, Sept. 13, 2003, *available at* http://www.denverpost.com/Stories/0,1413,36%257E33%257E1639002,00.html (quotation omitted).

295. Winston, *supra* note 287, at 39 ("Other surprises included airlines' accelerated development of hub-and-spoke route structures to increase flight frequency. . . .").

296. Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 344 (1990).

297. Rutner & Mundy, *supra* note 289, at 1.

> funding for capital investments and for additional controllers. Its top-down, bureaucratic management style led to serious problems in developing and implementing technological modernization to cope with an airline system whose growth was now taking off in unpredicted ways.
>
> . . .
>
> That system remains in place today, seriously constraining aviation growth.[298]

The "pernicious effects"[299] of regulation in an unregulated industry induced early critics of deregulation to call for a return to pre-1978 government regulation.[300] As noted by one regulatory proponent:

> Neither government control nor unregulated competition are perfect environments. *The real choice is between imperfect regulation and imperfect competition*. . . . [I]f applied with a gentle touch, economic regulation ought to be able to yield the best of both worlds—the economies and efficiencies of private ownership, and the accomplishment of social and economic policies in the highest public interest. . . . [A]ir transport . . . has too vast a social and economic impact in communication and commerce to leave it to the whims of a dwindling club of unconstrained monopolists. . . . The time has come to roll back deregulation.[301]

Others, however, conclude that the problems resulting from imperfect competition suggest less regulation:

> There are, of course, serious problems remaining. But these problems stem not from too much reliance on market forces, but from too little. In deregulating the airlines in 1978, Congress unleashed market forces on one segment of the air-travel system—but failed to free up the critical infrastructure on which the airlines depend, namely the airports and the air traffic control (atc) system. . . . Not surprisingly, problems emerged when a consumer-responsive airline industry placed demands on an infrastructure still bureaucratically controlled.[302]

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298. Poole & Butler, *supra* note 292, at 45.

299. Winston, *supra* note 287, at 40.

300. Poole & Butler, *supra* note 292, at 44 ("Various solutions have been proposed, including, for the first time since 1978, federal control over some of the prices charged and routes served by major airlines.").

301. DEMPSEY, *supra* note 276, at 62.

302. Poole & Butler, *supra* note 292, at 44. Winston also calls for more competition and less regulation, noting:

> The Department of Transportation, for example, claims to want more competition in the deregulated airline industry, but the cumulative actions of its own agency, the Federal Aviation Administration, are restricting competition. FAA perimeter rules prohibit long-distance flights to or from Washington's Reagan National and New York's La Guardia airports. Slot controls limit the number of take-offs and landings per hour at La Guardia, National, Kennedy, and Chicago O'Hare. The FAA's inefficient and outdated technology prevents carriers from expanding their operations because it constrains airport and air space capacity. And by suspending ValuJet after initially defending it in the wake of a 1996 crash in the Florida

Given the proliferation of new business models, such as point-to-point service by Southwest, Frontier, and JetBlue, and the concomitant equilibrium reached by market-based carrier consolidation, a return to regulation is premature. Instead, as in telecommunications, regulators must increasingly acknowledge that deregulation is imperfect and continually strive to reduce regulatory burdens upon competitive providers.

2. Lessons for CMRS from Airline Deregulation

These experiences in the airline industry underscore the difficulty of achieving satisfactory economic and public policy results when only a single regulatory actor exists. CMRS faces a far more difficult challenge with the possibility of varying regulations according to political jurisdiction. Consequently, the three deregulatory requirements first discussed at the beginning of Part B, *supra*, are even more important in the CMRS context. First, ex post enforcement measures are necessary to curb government and private opportunism. To date, the CMRS experience shows:

> [M]any consumers likely will be substantially better off in terms of lower prices and increased choices. But, these potential savings and innovations will not appear automatically. Proper application and enforcement of antitrust principles are necessary to ensure that the benefits of competition reach consumers.[303]

Second, it is critical that regulators acknowledge and actively try to reduce other less overt forms of regulation. The aviation industry, like wireless, is subject to continuing regulation that can frustrate competition. Similar to the persistent "regulatory effect" of state taxation and zoning in the CMRS industry, this type of extra-regulation place burdens upon competition and may raise significant barriers to entry for new firms. Finally, regulators must strive to keep existing regulatory burdens consistent. As Lavey observes:

> The industries and consumers affected by regulations make decisions on investments and other actions which are inherently multiyear, forcing them to make assumptions about future regulatory conditions, and to adopt strategies with some losses in effective uses of productive resources. Markets reflect regulatory uncertainties even if regulators do not weigh these consequences. Regulatory uncertainties can harm consumers and be contrary to the public interest. Regulators should

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> Everglades, the FAA appeased the media but set back the reputation of all start-up carriers.

Winston, *supra* note 287, at 40.

303. *Competitive Issues in Electricity Deregulation: Hearing Before the House Comm. on the Judiciary*, 106th Cong. 18-33, 20 (1999) (statement of Mozelle W. Thompson, Commissioner, Federal Trade Commission) (footnotes omitted).

> more frequently recognize the large efficiency enhancements of decreasing the uncertainty surrounding future regulations and strive to adopt well-defined sequences of regulatory changes with clear timing.[304]

Third, preserving certainty in the wireless marketplace, a goal missed by so wide a margin in the airline industry, should be a paramount concern for regulators. Because fluctuating regulatory treatment undermines expansion and improvement of large capital-intensive networks that require "multi-year" contractual obligations, regulators should strive to remove short-term politics from long-term regulatory paradigms.

VI. THE ROAD AHEAD: REGULATORY ECONOMY, FACILITATED INVESTMENT, LIMITED TAXATION

The creation and maintenance of investment incentives is critical for the immediate and future success of the CMRS marketplace. As developed in the previous parts of this Article,[305] regulatory uncertainty begets investment uncertainty. Alarmingly, the specter of excess regulation no longer lingers only on the periphery of the wireless marketplace. Instead, regulation at multiple levels creeps closer to the one industry lauded as "deregulatory" and "competitive." State and local regulation of wireless providers, including calls for heavy-handed "consumer protection" legislation, is often rooted in the misguided view that Section 332 fails to completely preempt non-federal regulation. Similarly, state and local taxation ignores the national and pervasive character of wireless service. Too often, CMRS consumers must shoulder state and local taxes improperly based on geographic boundaries for an otherwise nationally competitive network industry. Perhaps the single greatest source of regulatory uncertainty stems from the inability of the current legacy regulatory framework to truly unleash technological convergence.[306] A regulatory system ill-equipped to reconcile convergence between existing wireless service and other forms of communication creates significant regulatory uncertainty.

As explored by this Article, Europe's experiences in the spectrum allocation arena teach that ill-considered licensing policies can quickly undermine good results for both consumers and carriers. The story of U.S. airline deregulation demonstrates that a national network industry can benefit from limited and uniform regulation, especially when freed from the vagaries of discerning and complying with fifty different state

304. Lavey, *supra* note 271, at 59.

305. *See* Part V, *supra*; *see also* Lavey, discussed *supra* note 271.

306. *See* Part IV.B, *supra*, for a discussion of converging wireless technologies.

regulatory theories. In applying these lessons to the wireless industry (potentially, the "new entrant" competitive spur for the next technological leap), we must remain mindful of the huge up-front investments in the national CMRS network already made by investors and carriers. Policymakers and regulators can reap the greatest benefit for American society from this massive and privately financed build-out by permitting new spectrum to be deployed for new purposes while still allowing competition to evolve without the heavy hand of regulation. Most importantly, emerging technologies (including VoIP) must not be categorized or regulated in any way that would be antithetical to the best use of the competitive nationwide wireless infrastructure now in place.

As argued above, the time has come for the Commission to act boldly as a national referee to allow CMRS providers to innovate and compete on a broad and level national playing field free from multiple state and local penalties, taxes and regulations driven mainly by narrow local interests. While acknowledging the validity of local political concerns, the Commission will serve markets, consumers, industries state regulators best through: 1) clear and proactive decisions which clearly and rationally address the technological and jurisdictional issues presented by wireless and other emerging technologies and 2) explicit and frequent statements and signals that a "regulatory forbearance" will be the Commission's watchwords and strategy for addressing the converging technologies of the 21st century.

Former Counsel for New Technology Policy at the Commission, Kevin Werbach, bases his call for regulatory reform upon the convergence problems presented by the Internet's reformulation of traditionally isolated and geographically-restricted services.[307] Specifically, Werbach notes:

> [T]he days when legislators and regulators could simply ignore the Internet's unique demands are over. With over 100 million active U.S. Internet users and Internet protocol (IP)-based offerings competing directly with traditional services, the time for a coherent Internet policy framework is fast approaching.[308]

Regulation of the Internet, according to Werbach, suggests two regulatory responses.[309] The first response is to "parse existing laws and regulations"[310] and force regulation of the Internet into or away from those

307. *See* Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. TELECOMMS. & HIGH TECH. L. 37 (2002) [hereinafter Werbach, *Layered Model*]. *See also* Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMMS. & HIGH TECH. L. 1, 11 (2002) ("Put simply, it makes no sense to regulate telecommunications and leave the Internet unregulated.").

308. Werbach, *Layered Model*, *supra* note 307, at 38 (citation omitted).

309. *Id*. at 45.

310. *Id*.

categories. This response, favored by the Commission, has resulted in regulatory hair-splitting between "enhanced" and "information" services to avoid regulation of the computer industry.[311] Recognizing the failings of this partitioned approach and trumpeting the call for regulatory reform, Professor Philip J. Weiser notes:

> Over time, the FCC will . . . need to shift its focus from specific regulatory approaches based on the particular technology platform—say, a distinct regime for satellite, wireless, cable, or telephone networks—to a "layered model" of telecommunications regulation that regulates functionally similar services in the same way regardless of the underlying platform.[312]

This reformulation is akin to Werbach's proposed second regulatory response: "to start from the policy goals that undergird the legal structure, and from an understanding of the technological changes that the Internet heralds."[313] To support why this second regulatory response should be favored, Werbach observes:

> The Internet is going to swallow telecommunications. Data traffic is growing much faster than voice, and promises to dominate future capacity demands on all major networks. . . . [T]here is no doubt which way the wind is blowing.[314]

In tandem with the rapid-development of the Internet, wireless technology enables everyday opportunities for increased convergence of telecommunications technology. The end-to-end open architecture of the Internet, combined with rapid proliferation and technological advancements in wireless technology, allow CMRS providers to expand traditionally voice-centric service packages to include data, video, messaging, entertainment, and business applications.

Thus, the need for new leadership by the Commission as expert agency becomes increasingly clear as we near a decade since passage of the 1996 Act. Converging communications platforms, the proliferation of ubiquitous end-to-end networks and crossover technologies challenge the assumptions underlying the current legacy regulatory regime. Creating new containers for new technologies is cumbersome. While perhaps less cumbersome, forcing technologies into old buckets does not address unique

311. *See* Weiser, *supra* note 307, at 11 ("A classic distinction that the FCC employed to avoid regulating the computer industry was its judgment that 'enhanced' services were ancillary to communications and could be left unregulated by the FCC.").

312. Weiser, *supra* note 186 (citing Werbach, *A Layered Model*, *supra* note 307); Douglas C. Sicker & Joshua L. Mindel, *Refinements of A Layered Model For Telecommunications Policy*, 1 J. TELECOMMS. & HIGH TECH. L. 69 (2002); Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMMS. & HIGH TECH. L. 1, 4-15 (2002) (discussing layering and "information platforms" concept).

313. Werbach, *Layered Model*, *supra* note 307, at 45.

314. *Id.*

qualities that the technology may possess. These old regulatory buckets often leak or may inadvertently capture more than was originally intended. While the 1993 and 1996 Acts are both laudable for their procompetitive goals, implementation of these laws by the Commission have fallen well short of the ideal of the "expert agency" by preserving the old regulatory bucket brigade of sequestering new technologies into old regulatory categories. Only by discarding these outdated analogies and clearly and proactively enunciating the right boundaries for state and federal action will the Commissioners find their way to a new regulatory system that intelligently protects consumer interests, encourages investment, and recognizes the unique and essential characteristics of individual services and technologies.

At a minimum, establishment of a new regulatory framework for CMRS requires a system that acknowledges the borderless character of wireless technology. Tying wireless regulation to artificial regulatory buckets frustrates achievement of Congress's deregulatory vision set forth in Sections 332 and 2(b). Furthermore, failure to account for convergence erodes investment incentives that could otherwise spark a struggling communications sector. Towards this end, the Authors recommend the following policy prescriptions to serve as a guide for Congressional regulatory reform:

- Reaffirmation of a comprehensive federal plenary regulatory scheme predicated on the national borderless character of wireless technology.
- Removal of state and local government regulatory and tax burdens that conflict with this federal plenary regime.
- Creation of regulatory parity that accounts for converging technology, removes regulatory uncertainty from wireless development and innovation, and captures related services for regulation within specified nets as opposed to generalized buckets.
- Frank acknowledgment that network industry investment depends critically upon regulatory certainty and consistency.
- Proactive and early Commission involvement at the state PUC and court level (in the form of filed comments and amicus briefs) through unequivocal and rational emphasis on the imperative for minimal state regulatory involvement in wireless matters.
- Unambiguous and well-argued Commission decisions advocating the federal framework for wireless likely yielding

greater judicial deference to the decisions of the telecommunication's "expert agency."

The road to convergence and healthy competition lies through this challenging terrain of regulatory economy and paradigm-busting. While removing the obstacles to sustainable competition, regulatory predictability, facilitated investment, and limited taxation identified in this Article will not be simple—the tremendous technological and economic promises for both the wireless industry and the U.S. economy as a whole make this is a journey worth pursuing to its very best end.

APPENDIX 1

Mobile Telephony Growth						
Year	**Analog Rate**	**Digital Rate**	**Gross Revenue**	**Subscribers**	**Nationwide Penetration Rate**	**Average Minutes of Use (MOUs)**
1998[315]	71%	29%	$33 billion	69.2 million	26%	143 billion
1999[316]	49%	51%	$40 billion	86.0 million	32%	229 billion
2000[317]	38%	62%	$52.5 billion	109.5 million	39%	303 billion
2001[318]	20%	80%	$65 billion	128.5 million	45%	338 billion
2002[319]	7%	93%	$76 billion	141.8 million	49%	492 billion
2003[320]	N/A	N/A	$87.6 billion	158.7 million	N/A	813 billion

315. *See* Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fourth Report*, 14 F.C.C.R. 10145, 16 Comm. Reg. (P & F) 289 (1999).

316. *See* Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fifth Report*, 15 F.C.C.R. 17660, 21 Comm. Reg. (P & F) 1320 (2001).

317. *See* Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Sixth Report,* 16 F.C.C.R. 13350, 24 Comm. Reg. (P & F) 170 (2001).

318. *See* Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Seventh Report*, 17 F.C.C.R. 12985 (2002).

319. *See* Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Eighth Report*, 18 F.C.C.R. 14783 (2003).

320. *See* Press Release, Cellular Telecomm. & Internet Ass'n, Wireless Industry Posts Winning Numbers (Mar. 22, 2004), *available at* http://www.wow-com.com/news/press/body.cfm?record_id=1386. At the time of publication, 2003 FCC data was not available.