EDITOR'S NOTE

Welcome to the second Issue of Volume 66 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

This Issue presents pieces on a variety of important topics in the communications field. The Issue opens with an Article discussing the continued viability of the public switched telephone network ("PSTN") by Kevin Werbach, associate professor of Legal Studies and Business Ethics at the Wharton School in the University of Pennsylvania. Professor Werbach analyzes the public policy principles that have historically justified regulation of the PSTN and develops a conceptual framework for charting a regulatory path as this "network of networks" transitions to an all-IP environment.

Next, the Issue presents an Article from the Phoenix Center for Advanced Legal & Economic Public Policy Studies authored by Chief Economist George S. Ford, President Lawrence J. Spiwak, and Senior Fellows T. Randolph Beard and Michael Stern. The Article discusses the perennial question of efficient spectrum allocation, specifically addressing the mechanisms for managing government spectrum holdings.

In addition to these pieces, this Issue contains three student Notes and one Comment. In the first Note, Meredith Shell examines whether broadband service providers enjoy free speech protections that preclude their regulation under network neutrality principles. Next, Milena Mikailova examines the viability of broadcast advertising restrictions of certain food products during children's programming as a possible solution to the nationwide childhood obesity problem. Then, my Note investigates the state of a circuit split on federal preemption in wireless tower siting, concluding that the Commission is owed deference on its interpretation of section 332 of the Act. The Issue concludes with a Comment by James Chapman that analyzes the Ninth Circuit's recent decision concerning advertising on public broadcast stations in *Minority Television Project, Inc. v. Federal Communications Commission* and identifies shortcomings in the court's intermediate scrutiny analysis.

The *Journal* is committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Andrew Erber
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and the George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

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Established in 1865, the George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The Law School is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

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ARTICLES

The set of arrangements known as the Public Switched Telephone Network ("PSTN") is the foundation for the modern global communications system and the myriad benefits it delivers. Today, the era of the PSTN is swiftly coming to a close. The transition to a broadband network of networks is the most important communications policy event in at least half a century, yet its significance is not fully appreciated. The time has come to address the situation squarely. What we call the PSTN is actually six different concepts: a technical architecture, a regulatory arrangement, a business and market structure, universal connectivity, strategic national infrastructure, and a social contract. The earlier elements on the list are rooted in the particular historical, legal, and technical circumstances that gave birth to the PSTN. They are anachronistic in the current environment and should be restructured or, when appropriate, eliminated. The later elements are public policy obligations that should be satisfied regardless of the historical circumstances. Separating the dimensions of the transition in this way highlights the central importance of interconnection and coordination mechanisms to meet enduring public interest objectives. By adopting a forward-looking plan for the PSTN transition, the FCC can ensure that the shift to a digital broadband world reinforces, rather than undermines, the achievements of the past century of communications policy.

Today, the federal government has assigned about half of what is considered to be "beachfront" spectrum. However, most agree that government agencies, and the government as a whole, use and manage spectrum resources inefficiently. As such, much attention is now focused on improving the federal government's efficiency in the use and management of its spectrum resources with the aim of freeing up spectrum that can be repurposed for use by the spectrum-constrained commercial sector. In this article, we first tackle government spectrum use and demonstrate that the

"ghost market" approaches commonly proposed to enhance public sector efficiency in spectrum—such as a General Services Administration-type model to the recent spectrum sharing proposal by the President's Council of Advisors on Science and Technology use—may not, in the long-term, be effective. Next, we turn to government spectrum management, and present a general equilibrium model addressing spectrum assignment between public and private users, whether allocated through auctions or leasing. We find that government management of spectrum resources is not desirable beyond some minimum level. In fact, any proposal that contemplates the leasing of government-managed spectrum to the private sector may be presumed to include "too little" auctioning of government spectrum to the private sector in the form of exclusive licenses. We conclude that if the goal of spectrum use and management is economic efficiency, then policymakers should expand the private sector's management of the nation's scarce spectrum resources.

NOTES

Network Neutrality and Broadband Service Providers' First Amendment Right to Free Speech

In 2010, the Federal Communications Commission issued the Open Internet Order, a regulation that sought to preserve the "free and open Internet." The Order's core provisions, the "No Blocking" and "No Unreasonable Discrimination" Rules, generally barred broadband service providers from prioritizing, degrading, or blocking Internet traffic based on its content, source, or destination. Although the Commission believed that it had the authority to promulgate these rules, Verizon and other providers challenged the legality of the Order in federal court. Verizon argued, among other things, that the FCC lacked the statutory jurisdiction to impose "open Internet" regulation on broadband service providers, and that the Order violated broadband service providers' First Amendment right to free speech. In 2014, the U.S. Court of Appeals for the District of Columbia Circuit vacated the No Blocking and No Unreasonable Discrimination Rules, agreeing with Verizon's contention that the Communications Act does not authorize the FCC to impose common carrier regulation on information services such as broadband providers. The D.C. Circuit did not address Verizon's First Amendment arguments.

In the past, the Supreme Court has evaluated the extent to which distributors of speech in other media—such as newspapers, radio stations, and cable television providers—enjoy a First Amendment right to modify or block the content they transmit. However, the Court has yet to determine whether the First Amendment protects the right of broadband service providers to filter the traffic on their networks. After carefully applying the precedent set in the prior cases to the current debate over the rights of Internet providers, this Note concludes that First Amendment protections do not extend to broadband service providers because they do not engage in protected speech activity. Instead, they are mere conduits for the speech of others.

Furthermore, even if a court were to determine that Internet providers do enjoy First Amendment protection, the FCC would still retain the power to regulate broadband service providers' speech because of the government's substantial social interests in maintaining an open Internet.

Advertising and Childhood Obesity: The Role of the Federal Government in Limiting Children's Exposure to Unhealthy Food Advertisements

The obesity rate among children aged two to eleven has continued to rise in the United States over the past several decades. Consequently, more children in this age group are being diagnosed with obesity-related health conditions such as type 2 diabetes, high cholesterol, and high blood pressure. Exposure to television advertisements for foods that are high in fat, sugar, and sodium has been recognized as a risk factor for childhood obesity because it influences children's dietary preferences and intake. Consequently, both the federal government and the food and beverage industry have attempted to curb children's exposure to such advertisements. However, these efforts have been largely unsuccessful. The federal government should therefore reconsider its role in decreasing the prevalence of childhood obesity by following the example set by the governments of Québec, Canada, the United Kingdom, and other European countries.

Specifically, this Note argues that Congress should instruct the Federal Communications Commission ("FCC") to restrict the advertisement of unhealthy foods during children's programming. To ensure that the FCC can accomplish this, Congress should also direct the Food and Drug Administration to establish nutritional standards identifying which foods are unhealthy for consumption by children between the ages of two and eleven. Because advertising is a form of commercial speech, any regulation that seeks to restrict it will be subject by the courts to the *Central Hudson* four-step analysis to determine its constitutionality. This Note applies the *Central Hudson* test and concludes that the courts are likely to uphold the proposed regulation restricting the advertisement of unhealthy foods during children's programming.

The Effective Prohibition Preemption in Modern Wireless Tower Siting

The American telecommunications landscape is shaped by many factors inherited from the nation's unique constitutional structure. Authority over critical inputs in the wireless industry is distributed among federal and state regulatory bodies. Public policies are set by legislative bodies at both the federal and state level, but are ultimately reviewed by courts uninvolved in the creation of the rules they enforce. The Telecommunications Act of 1996 adopted a new legal framework to govern the siting of cellular towers that

attempted to balance these competing interests. The mechanisms for this balancing were a narrow set of federal preemptions of state law which limited the discretion of local zoning authorities to deny wireless carriers the ability to deploy cellular towers locally. This Note concerns one such preemption that requires that a state "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

Since the passage of the Act, a circuit split has developed on what it means for a local government act to have "the effect of prohibiting the provision of personal wireless services." This Note addresses this circuit split, walking through the legislative history of the Telecommunications Act of 1996, the initial circuit splits on the meaning of the Effective Prohibition Preemption codified at 47 U.S.C. section 332(c)(7)(B)(i)(II), and the Commission's 2009 Declaratory Ruling on the subject. Keeping the competition-enhancing goals of the Act in mind, this Note analyzes the deference owed to the Commission under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. After concluding that the Commission deserves interpretive deference in its support of the "multiple provider rule", this Note identifies splits unresolved by the Commission's 2009 Declaratory Ruling. The Note concludes by recommending that Congress should amend the Effective Prohibition Preemption to incorporate a clear statutory preference for multi-firm competition and that the Commission should supplement its 2009 Declaratory Ruling to resolve the remaining splits.

COMMENT

The First Amendment and Public Television Advertising: The Need for Clarity After *Minority Television*

In *Minority Television Project, Inc. v. Federal Communications Commission*, a divided en banc Ninth Circuit upheld the content-based restrictions on advertisements broadcast on public television stations contained in 47 U.S.C. section 399b, which prohibits three specific types of advertisements: (1) for goods and services, (2) regarding public issues, and (3) supporting or opposing any political candidate. This Comment examines the factual and procedural history of this case and critically evaluates the en banc court's opinions. Then, the Comment argues that even within the unique analytical framework of First Amendment scrutiny of regulations of broadcast media, the Ninth Circuit failed to take adequately into account three considerations: (1) the full range of relevant First Amendment interests; (2) the proper rigor needed in a *League of Women Voters* intermediate scrutiny analysis, informed by *Turner I* and *Turner II*; and (3) the impact of recent First Amendment case law, especially concerning issue and political advertisements. Finally, after reviewing other questions implicated by the Ninth Circuit's decision, this Comment concludes with an analysis of the implications of *Minority Television* in future cases and the prospects for Supreme Court review.