

**CATHOLIC UNIVERSITY OF AMERICA
COLUMBUS SCHOOL OF LAW**

2005 Spring Symposium

The Telecommunications Act of 1996: A Case of Regulatory Obsolescence?

POSITION PAPER OF T-MOBILE USA, INC.

by

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In this paper, T-Mobile USA, Inc. (“T-Mobile”)** argues for increased preemption of state regulation of wireless services. Thanks in large part to Congress’s determination a decade ago that wireless carriers should be regulated with a light touch, the wireless industry today is intensely competitive, and all major carriers are fighting to attract and retain subscribers. This is accomplished through lower rates, innovative technologies, and superior customer service.

Last year, T-Mobile won all four customer satisfaction awards for the wireless industry from J.D. Power and Associates, including number one in overall customer satisfaction and highest customer care performance. Notably, just a few years ago, T-Mobile was at or near the bottom in each of these categories, but it made a business decision that to compete successfully in the wireless world, it had to raise significantly its level of customer service. These J.D. Power awards and the greatly improved customer service they represent are the result of a business strategy, driven by the competitive imperatives of the wireless marketplace, and not of regulatory mandates or government micromanagement of T-Mobile’s relationship with its customers.

This year, T-Mobile will face increased challenges from other wireless carriers as they attempt to put themselves in the number one position by improving their own consumer services. The bottom line is that competition drives excellent customer service and excellent customer service improves the bottom line. Regulation is unnecessary to ensure that carriers strive to better their performance, and excessive oversight on the state level could actually undermine the wireless industry’s efforts in this area.

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*** T-Mobile is one of the major national wireless providers in the United States, with licenses covering 253 million people and 46 of the top 50 markets. At the end of 2004, T-Mobile served 17.3 million subscribers.

POSITION OF T-MOBILE

Congress should amend section 332(c)(3)(A) of the Communications Act (“Act”) to restrict state and local regulation of commercial mobile radio services (“CMRS”) to enforcement of general laws governing all entities conducting business within the state.

BASIS FOR POSITION

Introduction

In landmark legislation enacted twelve years ago, Congress rejected the traditional federal/state jurisdictional split for telephone service and declared that wireless carriers would be subject to a uniform, federal regulatory regime that relies primarily on market forces instead of governmental mandates to achieve its objectives. In addition, Congress made clear that, absent affirmative showings that consumers would be harmed, states could play no role whatsoever in regulating the rates charged by or the entry of wireless carriers. Notwithstanding this directive, in recent years a number of states have established or proposed complex and burdensome sets of regulations governing wireless services. In addition, state courts are increasingly willing to adjudicate disputes involving wireless carrier practices. These state laws, regulations, and judicial decisions cover virtually every aspect of wireless operations, from font size in advertisements to contract cancellation and deposit requirements.

In stepping into their assumed role as wireless regulators, states uniformly rely on the provision in section 332(c)(3)(A) of the Act that allows states to retain their regulatory authority in one circumstance -- *i.e.*, when overseeing the terms and conditions of wireless service other than rates or entry. These states are exploiting the statute’s failure to provide a clear delineation between “rates and entry” and “terms or conditions” -- in their view, virtually anything counts as a “term or condition” so long as the regulation or complaint is couched in the language of consumer protection.

Given the wireless industry’s remarkably rapid deployment of facilities and services, as well as significant improvements in consumer responsiveness during this decade of minimal government involvement, it makes little sense to allow dozens of individual jurisdictions to set the course for future wireless regulation. Congress, therefore, should eliminate the ambiguity inherent in section 332(c)(3)(A) and clarify that state authority over CMRS is restricted solely to enforcement of laws generally applicable to all companies doing business in the state.

Existing Regulatory Framework for Wireless Services

In 1993, Congress amended the Communications Act in several key ways to ensure that the emerging wireless industry would be governed by a uniform, federal regulatory regime and that any regulations applicable to wireless would rely primarily on market forces.¹ First, Congress amended Section 2(b) to eliminate the traditional limitation on federal authority over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service” insofar as they relate to the provision of commercial mobile service.² Second, Congress added a new provision -- section 332(c)(1) -- to the Act, which instructs the Commission to avoid rote application of statutory common carrier provisions to wireless services, and instead to consider (1) whether a particular provision is necessary to ensure that rates are just and reasonable; (2) whether the provision is necessary to protect consumers; and (3) whether the public interest favors enforcement or forbearance.³ Third, Congress enacted section 332(c)(3)(A), which prohibits states from regulating the entry of or rates charged by CMRS carriers unless the state provides concrete evidence that market conditions in that state fail to protect consumers from unjust and unreasonable rates and the wireless service is a replacement for landline telephone service in a substantial portion of the

¹ See Omnibus Budget Reconciliation Act of 1993 (“OBRA”), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392.

² 47 U.S.C. § 152(b). See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev’d on other grounds sub nom.*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

³ 47 U.S.C. § 332(c)(1). Section 332(c)(1) provided the model for section 10, the general forbearance provision added to the Communications Act in 1996. Section 10, however, is broader than section 332(c)(1) because it allows the Commission to forbear from three sections of the Act that were explicitly excluded from the Commission’s forbearance authority in 1993. See *Personal Communications Industry Association’s Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, 16865 (¶ 15) (1998), *recon. denied*, 14 FCC Rcd 16340 (1999) (finding that the section 10 permits forbearance from section 201, which requires rates to be “just and reasonable,” section 202, which prohibits “unreasonable discrimination,” and section 208, which authorizes parties to file complaints about such matters with the FCC). Section 10 also made forbearance mandatory, as opposed to the permissive forbearance in section 332. Compare 47 U.S.C. § 160 (“the Commission shall forbear”) with 47 U.S.C. § 332(c)(1) (the Commission “may specify by regulation” provisions of Title II inapplicable to wireless).

state.⁴ These three provisions, taken together, reflect Congress's recognition that "[s]tate regulation can be a barrier to the development of competition."⁵

Congress included one more provision in new section 332(c)(3)(A) -- it permitted states to continue to exercise authority over the "other terms and conditions" of wireless service. This language did not reserve certain types of regulatory activity for the states, nor did it affirmatively bestow regulatory jurisdiction on the states. Rather, it merely exempted "other terms and conditions" from the broad preemptive effect of section 332. Thus, contrary to the contentions of some state and FCC regulators, section 332(c)(3)(A) is neither a grant of jurisdiction to the states nor a prohibition on FCC preemption under other sections of the Act.⁶

The statute itself does not explain what state activities are considered ratemaking or entry regulation on the one hand and regulation of terms and conditions on the other, but one short entry in the section's legislative history gives several examples of areas in which state oversight of CMRS remains acceptable:

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

⁴ 47 U.S.C. § 332(c)(3)(A). A number of states took Congress up on its invitation to seek continued rate regulatory authority shortly after enactment of section 332. The Commission denied all the petitions on the ground that the states had failed to make the requisite showings under section 332(c)(3)(A). See, e.g., *Petition of the People of the State of Cal. and the Pub. Utils. Comm'n of the State of Cal.*, 10 FCC Rcd 7486 (1995); *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Servs.*, 10 FCC Rcd 7842 (1995); *Petition on Behalf of the State of Haw.*, 10 FCC Rcd 7872 (1995); *Petition of Behalf of the State of Conn.*, 10 FCC Rcd 7025 (1995) ("*Connecticut Petition Order*"), *aff'd*, *Connecticut Dep't of Pub. Util Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996).

⁵ *Connecticut Petition Order*, 10 FCC Rcd at 7034 n.44 (citing H.R. Conf. Rep. No. 103-213, at 480-81 (1993), *reprinted in* 1993 U.S.C.C.A.N 378, 1169-70).

⁶ In a ruling on state jurisdiction of Voice over Internet Protocol ("VoIP") services, the FCC held late last year that state regulations governing VoIP are restricted to enforcement of "general laws" that govern "all entities conducting business within the state." *Vonage Holdings Corporation Petition for Declaratory Ruling*, 19 FCC Rcd 22404, ¶ 1 (2004). Although the Commission concluded that applying traditional regulation to VoIP service "directly conflicts with our pro-competitive deregulatory rules and policies" (*id.* ¶ 20), much of the legal analysis in the *Vonage Order* was devoted to section 2(b) – which the Commission properly viewed as the primary obstacle to preempting state regulation of VoIP. See *id.* ¶¶ 16-18. Because section 2(b) does not apply to wireless service, the FCC's preemptive authority is broader in the context of CMRS than it is with VoIP. Nevertheless, some regulators continue to argue that the narrow exemption in section 332(c)(3)(A) for state regulation of "other terms and conditions" somehow precludes the FCC from carrying out the preemptive intent of Congress.

to preclude other matters generally understood to fall under "terms and conditions."⁷

Although Congress intended the 1993 legislation to promote wireless growth through two interdependent avenues -- federal forbearance from enforcement of many statutory provisions applicable to telecommunications carriers and a strict prohibition on state regulation of wireless rates and entry -- the language of the statute itself and the legislative history cited above fail to provide a clear line between permissible and prohibited state action. The Federal Communications Commission ("FCC" or "Commission") generally has upheld its part of the bargain by regulating CMRS with a light touch but, as discussed more fully below, a number of states are rushing in to fill what they perceive as a regulatory void on the federal side. Not only has this created regimes in some jurisdictions that look much more like incumbent telephone company regulation than the market-oriented system Congress intended for CMRS, the state-specific rules are hampering the efficient roll out of nationwide wireless services.

The Problem with State Regulation

The wireless industry and regulators have had ten years' experience with a statute that, albeit ambiguous in certain aspects, is clear in its general thrust -- wireless services should be permitted to grow unfettered by intrusive and unnecessary regulation. A number of states nevertheless have chosen to exploit the law's ambiguities and ignore its intent. Some states are plainly delving into prohibited rate or entry regulation, some have adopted regulations that deal solely with the "other terms and conditions" of wireless service, and some straddle the line between the two categories. A common factor of all the state regimes, however, is the significant burden they impose on wireless carriers, competition, and innovation. Congress should take this opportunity to remove the language from section 332 that has provided a pretext for these state initiatives.

Recent examples of state rate regulation include the establishment of waiting periods and other conditions before wireless carriers may increase charges to customers, including increases designed to recover new costs imposed on carriers by the government. In opposing a Minnesota statute last year that did exactly that,⁸ the FCC explained to the U.S. Court of Appeals for the Eighth Circuit that section 332(c)(3)(A) preempts states from limiting the ability of wireless carriers to raise rates.⁹ By enacting its statute without prior authorization from the FCC, the Commission asserted that "Minnesota has sought to regulate directly the level of the rates that CMRS carriers may charge their customers, as well as the carriers' rate structures."¹⁰

⁷ H.R. Rep. No. 103-111, at 260-61 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

⁸ On May 29, 2004, the governor of Minnesota signed into law the Wireless Consumer Protection Act, Art. 5, 2004 Minn. Sess. Law Serv. 261 (West).

⁹ *Cellco Partnership d/b/a Verizon Wireless v. Hatch*, No. 04-3198, *Amicus Curiae* Brief of the Federal Communications Commission at 1-2 (8th Cir. filed Nov. 12, 2004).

¹⁰ *Id.* at 17-18.

The second category of state regulation covers primarily billing and advertising format issues, such as the allowable font size for rate information and the language required to describe various charges. AARP's model legislation (which it is encouraging states to adopt), for instance, provides that all notices to customers must be in writing (on bills, bill inserts, or separately by first class mail) and in 12-point type or greater. California's "Consumer Bill of Rights" stipulates 10-point font, and requires notices of any changes in subscriber agreements to include the exact phrase, "Your Rates, Terms or Services Have Changed." Legislation introduced in New York would require wireless carriers to prepare and distribute maps detailing the wireless coverage area on a county-specific basis, identifying all geographic areas larger than four square miles where wireless service is not provided and showing whether or not a customer can receive wireless service at the customer's primary residence.

Although the third group of state regulations appear to implicate directly wireless rates, a number of states contend that they are merely regulating contract formation issues. California, for example, would preclude the assessment of an early termination fee ("ETF") if a customer cancels his contract within 20 days after receiving his first bill. New York's legislation would allow cancellation within 15 days after the last day of the first billing cycle for any reason and without fee or additional charge. And, Massachusetts has introduced a bill that would prohibit wireless carriers from issuing contracts in Massachusetts lasting more than one year and would give subscribers 30 days to cancel new contracts without assessment of an ETF.¹¹

Many of these state requirements conflict with one another and have significant effects far beyond any one state's boundaries. A group of state commissioners from both rural and urban states recently explained to the FCC why they believe allowing each state to establish its own billing guidelines is unworkable:

The recent California Bill of Rights experiment went so far as to dictate the font size providers were to use. Imagine Florida requiring a font size of Times New Roman 12 but New York requiring Arial 11. As a more substantive example, imagine Maryland permitting the disclosure of a certain fee pursuant to state authority but Texas prohibiting such disclosure. The very real potential for conflicting state regulations, and the impact (financial and otherwise) of

¹¹ Many states ignore the FCC's admonition that section 332(c)(3)(A) prohibits them from regulating a wireless carrier's chosen rate structure (*e.g.*, flat, per-minute, recurring, or one-time charges) as well as the actual level of the rates charged to consumers:

[W]e find that the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.

Southwestern Bell Mobile Systems, Inc., 14 FCC Rcd 19898, 19907 (¶ 20) (1999).

complying with a patchwork of rules does not serve the consumers' interest. *Regulators may feel good about having addressed an issue -- but consumers don't necessarily win when multiple jurisdictions, with the best of intentions, impose additional regulatory hurdles that ultimately cost consumers.*¹²

Nor have the states demonstrated that any actual problem exists that calls for oversight of this scope. Given the level of competition in the wireless market, CMRS carriers have a very strong business incentive to keep subscribers – existing and prospective – satisfied. Many of the proposed or enacted state consumer protection provisions, including the establishment of trial periods before termination fees apply, clear delineation and explanation of charges on bills, and honoring the rates, terms, and conditions of existing contracts, are part of virtually every wireless carrier's current practices. Moreover, in response to customer demand, wireless carriers are regularly instituting new consumer-friendly policies designed to provide customers and prospective customers with more information about the services they are purchasing. T-Mobile, for example, requires all its sales agents to share with prospective purchasers -- *before* they sign any contracts -- computer-generated coverage maps that show signal quality down to the neighborhood level.

To the extent any additional consumer protection regulation of wireless carriers is necessary (which T-Mobile strongly disputes), Congress has given the FCC full authority to promulgate and enforce those rules.¹³ The larding on by states of new, burdensome,

¹² Letter to Marlene H. Dortch, Secretary, FCC, from Ella Germani, Chairman, Rhode Island Public Utility Commission; Robert K. Sahr, Vice-Chairman, South Dakota Public Service Commission; Ellen C. Williams, Vice Chairman, Kentucky Public Service Commission; Randy Bynum, Commissioner, Arkansas Public Service Commission; James Connelly, Commissioner, Massachusetts Dept. of Telecommunications & Energy; Kevin Cramer, Commissioner, North Dakota Public Service Commission; Charles M. Davidson, Commissioner, Florida Public Service Commission; Susan P. Kennedy, Commissioner, California Public Utility Commission; Connie Murray, Commissioner, Missouri Public Service Commission; Anthony Rachal, Commissioner, District of Columbia Public Service Commission, CG Docket No. 04-208, at 8 (March 3, 2005) (emphasis in original).

¹³ The FCC demonstrated its willingness to regulate consumer issues involving wireless services in an Order issued March 18, 2005 extending its truth-in-billing rules to CMRS carriers. *See Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket 98-170; CGB Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking (rel. March 18, 2005). The FCC held that it is misleading to represent that discretionary line item charges on consumer bills are taxes or mandated by the government, and it clarified that carriers retain the burden to demonstrate that their fees conform to the amount authorized by the government to be collected. The FCC also asked for comment on a number of issues, including whether it is unreasonable for carriers to combine cost recovery charges into one fee on customers' bills and whether carriers should be required to disclose at the point of sale the discretionary charges and taxes that will appear on bills. Although the order concludes that state regulations requiring or prohibiting the use of line items by CMRS carriers constitute prohibited rate regulation, the FCC left for future consideration the question of how far states may go in regulating wireless billing practices.

and conflicting CMRS policies only frustrates Congress's deregulatory intent while doing nothing to safeguard the interests of consumers.

Benefits of a Uniform, Federal Policy for CMRS

Failure to curtail intrusive state action, whether technically permissible under section 332 today, ignores the myriad benefits that Congress's light touch regulation has engendered. By changing the framework for wireless regulation in 1993, Congress hoped to accelerate the development of competition in the wireless marketplace. That goal has been accomplished far beyond the expectations of any market observer at that time. In 1994, the FCC had issued only two licenses to provide wireless service in each geographic area and wireless service had only a "ten percent penetration rate."¹⁴ In 1999, the Commission reported that wireless penetration had increased to 26 percent.¹⁵ That upward trend continues today -- by year end 2003, the wireless penetration rate was at almost 55 percent and approximately 150 million people, or 87 percent of the U.S. population, lived in counties with five or more wireless service providers; 216 million people, or 76 percent of the population, lived in counties with six or more choices; and 84 million people, or almost 30 percent of the population, could choose from seven or more different providers.¹⁶

The pro-competitive, deregulatory environment for CMRS mandated by Congress has benefited consumers through affordable rates and innovative pricing plans, such as free night and weekend minutes and free mobile-to-mobile calling. In addition, wireless carriers regularly offer incentives, including free phones and discounts on airtime charges when subscribers enter into one or two-year plans. While some state representatives apparently believe that consumers are clamoring for their paternalist oversight, there is no evidence that consumers would willingly give up the rewards of the free market in exchange for more regulation. To the contrary, ask customers in Massachusetts, where the legislature has proposed a prohibition on wireless contracts exceeding one year, whether they are happy to forgo the \$100 (or greater) markdown on handsets available in neighboring states, and the answer is unlikely to be positive. Consumers do not need individual state-by-state "protection" and, if they understood the costs, they would be clamoring to oppose it.

¹⁴ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8866-67 ¶¶ 3, 65 (1994).

¹⁵ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 14 FCC Rcd 10,145, 10,150 (1999).

¹⁶ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 2004 FCC LEXIS 5535, *54 (¶ 49) (2004).

T-Mobile's Proposed Solution

Congress's 1993 call for a uniform, national, hands-off approach to wireless regulation has helped the industry provide consumers with significant benefits in the form of lower prices, vastly expanded coverage, new technologies and improved customer care. Congress's decision, however, to allow states to continue to regulate the "other terms and conditions" of wireless service poses a real danger to the statute's pro-consumer and pro-competition objectives. T-Mobile therefore urges Congress to eliminate this tension by amending section 332(c)(3)(A) to strike the sentence: "Notwithstanding sections 2(b) and 221(b), 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." That language should be replaced with the following:

Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of, the rates charged by, or the other terms and conditions of any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from enforcing its general laws that govern all entities conducting business within the State.

CONCLUSION

A congressional resolution to the problem of proliferating and potentially conflicting state regulatory regimes is sorely needed. T-Mobile's proposed amendment to section 332(c)(3)(A) would make clear that states enjoy jurisdiction over wireless carriers only to the extent that they have authority over all other businesses operating in their states. Uniform, federal rules that rely primarily on market forces to protect consumers and competition is the outcome Congress intended in 1993 and, to sustain the exceptional growth of the wireless industry that has occurred over the past decade, it is the regime Congress should insist upon today.