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**Don't Let "Bill Shock" Regulation End
Light-Touch Treatment of Wireless**

by

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On October 14, the FCC proposed a set of EU-inspired regulations to protect consumers from so-called "bill shock."¹ Now, when considering any new regulation it always makes sense to ask whether there is an existing or likely harm sufficient to warrant government involvement. And when it comes to "bill shock," there is a serious question as to whether there is any sort of problem serious enough to require government intervention to fix it. There is also an even more serious question as to whether "bill shock" regulation should be an occasion for the FCC to begin unraveling the light-touch regulatory approach to wireless that has done so much to help foster innovation and competition in the U.S. wireless market.

The FCC's proposed "bill shock" regulations include requiring wireless carriers to provide some kind of warnings to consumers – perhaps voice alerts or text alerts – when consumers exceed their respective plan's monthly mobile use limits and begin to incur overage charges for voice, data, and text. In fact, the proposed regulations also mandate warnings when customers "are approaching an allotted limit" on their monthly mobile use limits.² However, the proposed rules don't clearly say how close to their limits customers should be before mandatory warnings are triggered. And if a consumer is within the last few days of a monthly billing cycle, one wonders if a

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mandatory warning even makes any sense at all. If anything, a consumer who pushes right up to the edge of his or her monthly usage limit is receiving maximum value for his or her payment.

In addition, proposed "bill shock" regulations include requiring warnings from wireless carriers when consumers are about to incur domestic roaming charges or international roaming charges that are not covered by their monthly plans. There is a proposed requirement that wireless carriers clearly disclose any tools they offer consumers to set usage limits or review usage balances (though many of them already do this). In its proposed rulemaking notice, the Commission also mulls whether to require wireless carriers to include information specific to individual consumers in their warnings or to require wireless carriers to offer a use-cap option for consumers.

Along the way, the Commission's proposed rulemaking seeks comment on whether it can learn anything from the EU's wireless experience, and in particular the EU's own imposition of "bill shock" regulation. But there are reasons why the respective approaches to regulatory policy and to the wireless marketplace dynamics of the U.S. and the EU are sufficiently different so as to counsel against U.S. importation of EU regulation.

On the one hand, the U.S. has taken a light-touch regulatory approach to wireless since 1993. But on the other hand, as I wrote last spring in a blog post titled "No Need for 'EU-Style' Wireless Mandates":

Europe is much more prone to adopt a regulatory answer than enable pursuit of marketplace solutions to competition issues. The European wireless market is still working itself out from a telecom industry past characterized by national, government-owned operators. Unlike the U.S., Europe standardized GSM technology for its wireless market, primarily operates on a 'caller pays' system rather than a both parties pay system, and it tends towards a 'competitor welfare' emphasis for competition regulation and antitrust over a consumer welfare model.³

On its own terms, the U.S. wireless "ecosystem" is a shining example of a dynamic, innovative, competitive marketplace. Wireless consumers now have more choices among mobile services, devices, and applications than ever before. As the FCC's *Wireless Competition Report* from earlier this year points out, "[t]housands of different mobile applications – software programs that can be used on a mobile device – are now available to consumers through various channels."⁴ Also, "[f]rom 2006 to 2009 the number of mobile wireless handset manufacturers that distribute in the U.S. market has increased from eight to sixteen," and "the average number of handset models offered by the eight largest facilities-based mobile wireless service providers increased from 28 in November 2006 to 43 in December 2009."⁵

In addition, more and more wireless consumers can choose from up to four nationwide carriers as well as regional carriers. As this year's *Wireless Competition Report* states: "[t]he percentage of the population served by three or more providers increased from 51 percent in May 2008 to 76 percent in November 2009," and "approximately 58 percent of the population is served by at least four mobile broadband providers."⁶

Wireless innovation and competition have also prompted declines in prices for consumers. In the words of the *Wireless Competition Report*: "[T]here is ample evidence of a sharp decline in mobile wireless prices in the period since the launch of PCS service."⁷ The FCC estimates that "Revenue per Voice Minute" or "Voice RPM" – one indicia of consumer pricing trends – has steadily trended downward from an average of \$0.44 in 1993 down to an average of \$0.05 in 2008.⁸ Although a different, data services-inclusive indicator used by the FCC suggested revenue per minute "increased slightly in 2008," (while nonetheless trending from an average of \$0.44 in 1993 down to \$0.07 in 2008), "the average price per text messages has been declining as more subscribers have shifted to unlimited or bucket messaging plans."⁹ And the FCC itself recognizes that "[t]he focus of price competition now appears to be shifting to unlimited service offerings" that many consumers may find gives them greater value per minute of use.¹⁰

Against that competitive backdrop, when one considers possible regulation of wireless such as "bill shock" rules, one should ask whether such regulation is in keeping with the light-touch regulatory approach that has helped give rise to the competitive market that we now enjoy. In particular, does "bill shock" regulation address wrongs caused by market power, economic or other externalities imposed on third parties, or lack of necessary technical expertise by the public? Of these three categories that are traditionally understood as bases for regulation, there is no evidence that "bill shock" implicates either of the first two. And the case for regulation under the third is a far stretch. Also keep in mind that the FCC's proposed "bill shock" mandates aren't targeting any wireless carrier's deception or fraud – wrongs that are readily addressable consistent with any light-touch approach. Instead, the targeted activity involves consumers' use of services beyond the limits that they contracted for, whether it's due to their own confusion, forgetfulness or whatever.

The Commission needs to take seriously the competitive and innovative wireless market's ability to provide alternatives for meeting consumer demands -- including consumer demands for dealing with usage and overage. For starters, a number of carriers already provide consumers with a variety of tools for monitoring their use of voice, data, and text services.

What's more, consumers can avoid all or almost all "bill shock" concerns simply by choosing to take advantage of unlimited plan offerings. As I wrote in my prior blog post, "[i]n terms of roaming fees or charges resulting from exceeding wireless plan use limits, the issue is fading due to the number of wireless carriers now offering free

domestic roaming, unlimited calling, and unlimited texting plans."¹¹ To quote the FCC's *Wireless Competition Report* once again: "Today, all of the nationwide service providers, and many smaller operators, offer some version of a national flat-rate pricing plan in which customers can purchase a 'bucket' of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges."¹² Also, "many service plans now include nationwide roaming at no additional cost to subscribers."¹³ And "changes in the wireless industry over the last decade have resulted in larger geographic coverage areas, which may have affected roaming arrangements in some instances."¹⁴

More still, consumers who have worries over end-of-the-month "bill shock" can even skip end-of-the-month bills altogether by signing up for prepaid wireless services. Under the prepaid model, consumers pay for wireless service prior to making calls. "Prepaid service providers have been the most aggressive in cutting the price of unlimited service offerings," thereby expanding the consumer base for the prepaid wireless market segment.¹⁵

Curiously, rather than treating prepaid calling plans as a primary alternative for consumers to avoid "bill shock," the FCC subsumes prepaid into its proposed regulatory ambit. For it proposes to require usage alerts even for prepaid wireless customers. In so doing, the FCC's proposed "bill shock" regulation extends beyond actual "bill shock." Because prepaid wireless customers purchase their usage amounts up front (whether at a set amount of minutes or for an unlimited amount during a month's time, for instance), they don't even have a recurring monthly bill to be "shocked" by. Nonetheless, the FCC is considering extension of regulation to prepaid wireless services simply to better allow consumers to monitor their own use.

Going beyond prepaid wireless service, the Commission's proposed rulemaking explicitly contemplates extending regulation to entities that provide mobile data services but that are not wireless carriers: "Should providers of mobile data services that do not also offer Commercial Mobile Radio Service (CMRS) be included? Although mobile data services may be provided by companies that are also CMRS carriers, such services may also be provided by entities that do not offer any CMRS."¹⁶ A growing number of non-CMRS mobile app developers are offering subscription services that are delivered to customers' handsets, such as Bitpop, an app that provides Hulu-like access to a variety of TV content. Similarly, a music app called MOG has a subscription option that gives consumers access to music via their handsets or PCs. Whether or not the FCC will subject those kinds of mobile app developers to new mandates, the proposed "bill shock" regulation looks like a first step for even further FCC intervention in the wireless market.

Seen in this light, the issue is much bigger than just "bill shock" – it's about freedom to innovate and compete free of government restraints. Here, the primary concern raised by "bill shock" regulation isn't necessarily that the new mandates would incur not insignificant compliance costs that will be passed on to all the providers' customers. Rather, in addition to the additional cost burden, the concern is that

imposing regulation inconsistent with a light-touch approach will serve as a precedent for future regulatory intrusion. Unnecessary or (as discussed below) at least premature "bill shock" regulation could create expectations that regulators expand their controls over additional aspects of the dynamic wireless marketplace.

For the same reason, in asking whether proposed regulation is consistent with a light-touch approach, one should also put proposed "bill shock" regulation in the context of all the other wireless regulation proposals that have recently been floated at the FCC or Congress. Those proposals include: early-termination fee regulation, handset exclusivity regulation, text messaging and common short code regulation, wireless network neutrality regulation, smartphone app regulation, and smartphone manufacturing regulation (such as FM chipset mandates). Seen in a larger context, it is important to consider the broader question of whether "bill shock" regulation would mark the beginning of the end of the light touch regulatory approach, paving the way for many or all of those other regulatory proposals.

There is also reason to wonder whether the supposedly serious problem with "bill shock" has been exaggerated. One indication can be found in a recent post by Diane Katz at Heritage's *The Foundry* blog, which points out that "complaints to the FCC related to billing and rates for wireless telephone service accounted for a mere 3 percent of complaints overall in 2009—a significant *decline* from 17 percent in 2002."¹⁷ (The FCC, however, relies heavily on a staff paper and survey it commissioned, which was disputed by CTIA and followed by a heated response by FCC staff in a dust-up back in July.¹⁸ An expert consulting for Verizon has also criticized aspects of the survey in reply comments to the Commission.¹⁹)

Given the rapid pace of innovation in the wireless market that has only recently introduced us to smartphone devices and mobile apps, there is also reason to think that regulation of the dynamic wireless market based on a snapshot view of a narrow segment of market activity could be premature or become quickly irrelevant. Again, a number of wireless carriers already provide a number of tools for consumers to monitor usage, with some even providing updates or alerts about usage. And market trends in wireless network expansion and wireless calling plans also suggest that roaming costs and overage charges for text messaging are increasingly becoming a non-issue for more and more consumers.

In sum, when it comes to the Commission's proposed "bill shock" regulation, the primary policy issue is less about the particulars of overage charges and alerts than about the larger matters of how quickly and how deeply government regulation should reach into the dynamic wireless market. A pro-market orientation entails letting the market work itself out through innovation and competition rather than resorting to regulation – at least where monopolies, informational asymmetries, externalities or fraud are lacking. And for over fifteen years, wireless has thrived thanks to a regulatory approach largely consonant with pro-market philosophy.

"Bill shock" is one of many recently proposed regulatory interventions in the wireless market. If it is adopted it could signal a shift from the U.S.'s existing light-tough regulatory approach to a more heavy-handed EU-style regulatory approach. The FCC should stick to its light-touch approach.

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¹ See Notice of Proposed Rulemaking ("NPRM"), *In the Matter of Empowering Consumers to Avoid Bill Shock*, CG Docket No. 10-207, No. 09-158 (October 14, 2010), available at: http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1014/FCC-10-180A1.pdf.

² *Id.* at 19 (Appendix A).

³ Seth L. Cooper, "No Need for 'EU-Style' Wireless Mandates, *FSF blog* (May 19, 2010), available at: <http://freestatefoundation.blogspot.com/2010/05/no-need-for-eu-style-wireless-mandates.html>.

⁴ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services ("*Wireless Competition Report*"), WT Docket No. 09-66 (May 20, 2010), at 173, para. 319, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf.

⁵ *Id.* at 166-167, para. 308.

⁶ *Id.* at 39-40, para. 47.

⁷ *Id.* at 109, para 185.

⁸ *Id.* at 112, para 190, Table 19.

⁹ *Id.* at 109, para. 185; *id.* at 112, para. 192.

¹⁰ *Id.* at 58, para. 91.

¹¹ Cooper, *FSF blog*, *supra* note 2.

¹² *Wireless Competition Report*, at 57, para. 87.

¹³ *Id.* at 74, para. 124.

¹⁴ *Id.*

¹⁵ *Id.* at 63, at para. 102.

¹⁶ NPRM. at 15, para. 27.

¹⁷ Diane Katz, "Wireless Consumers Aren't Complaining to the FCC," *The Foundry* (October 28, 2010), available at: <http://blog.heritage.org/2010/10/28/a-regulatory-shock-from-the-fcc/>.

¹⁸ See John Horrigan & Ellen Satterwhite, "Americans' perspectives on early termination fees and bill shock" (May 26, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298414A1.pdf; Christopher Guttman-McCabe, "Peeling the Onion on the FCC's 'Bill Shock' Survey: Part I," *CTIA Blog* (July 14, 2010), available at: <http://www.ctia.org/blog/index.cfm/2010/7/14/Peeling-the-Onion-on-the-FCCs-Bill-Shock-Survey-Part-I>; Joel Gurin & John Horrigan, "Denying Bill Shock by Distorting the Facts," *Blogband* (July 15, 2010), available at: <http://blog.broadband.gov/?entryId=577810>.

¹⁹ See Reply to Comments of Verizon, Docket No. 09-158 (July 19, 2010), at 10 *et seq.*, (Joel B. Cohen, Ph.D., "The FCC Survey: What the Data Can Tell Us About 'Bill Shock and Early Termination Fees'"), available at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020549743>.