

Response to Werbach/Mehta's Response

GERALD R. FAULHABER*

The Wharton School, University of Pennsylvania
Law School, University of Pennsylvania

The editors of this journal have given Kevin Werbach and Aalok Mehta and myself an opportunity to extend their excellent article, "The Spectrum Opportunity: Sharing as the Solution to the Wireless Crunch" into a dialogue that enriches (we hope) this important topic for their readers. Their response to my commentary is both gracious and on point, emphasizing how much we agree upon and focusing on our areas of disagreement. It is gratifying to find oneself in so much agreement with such fine scholars.

There is little for me to add to the dialogue, except to ask our readers to refocus on two issues: (1) Do we expect the public sector or the private sector to do a better job of making the most efficient use of spectrum? (2) While we agree that the current regulatory/political climate of spectrum allocation is seriously broken, Werbach and Mehta focus on working within this system, and I suggest we need to overhaul it before it does even more damage.

Werbach and Mehta review in their response the points in their article: that auctions for licenses and private-sector control of licensed spectrum may result in a less than competitive market, and so we cannot wholly rely on the private sector to optimally utilize spectrum. They are, of course, correct; we can never assume perfect markets in the real world, and we must strive mightily (via antitrust and other public policy measures) to remedy market imperfections. And of course we may minimize but never get rid of transaction costs. But if we view the development of the wireless industry over the past decade as the unfolding outcome of a purely market-driven process (imperfections and all), it is difficult to conclude that the truly amazing growth and innovation that has occurred as a result is not a shining example of how well the market has done its job. Not because AT&T or Apple or Samsung have been motivated by increasing social welfare, but because they are looking out for their own profit. No economist would pretend otherwise,¹ and yet look at what a marvel of a wireless market has been produced by the private sector. It makes one wonder what Werbach and Mehta had in mind when they criticize the private sector.

* Professor Emeritus, Wharton School, University of Pennsylvania, and Penn Law School.

¹ It is worth recalling that Adam Smith (1904, bk. 1, chap. 2, p. 2) himself had no illusions about the benevolence of the private sector: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages."

The record of the public sector, however, is meager, to say the least. Certainly the FCC creation of unlicensed spectrum for WiFi, Bluetooth, and garage door openers (not so much TV white spaces) has been a huge success. But we need only look back at the debacles of LightSquared/GPS (discussed in the Werbach/Mehta article), NextWave,² and the 2008 Auction 73 D-block³ to understand that depending on the public sector to get spectrum right is problematic, to say the least.

So should we depend on the private sector or the public sector to make decisions about how to deploy spectrum?⁴ The reader is invited to examine the record of each and decide.

Since the establishment of the FCC in 1934, the award of radio licenses has been a highly politicized process, in which incumbents gain de facto ownership of their licenses forever and have the power to throttle new entrants who threaten any potential interference. This includes federal users (working through the NTIA), which is the basis of my concerns that PCAST-style sharing of significant portions of federal spectrum with private users is unlikely to occur. Werbach and Mehta are well aware of the problem and cast sharing as the only feasible alternative to clearing, given the political difficulties of clearing spectrum under the current system. I agree wholeheartedly. But my view is that the problem is the current system of political gridlock with both private and federal incumbents unwilling to budge. The question, then, is: How do we break this political gridlock, of entrenched incumbents blocking what we all see as progress? If we do not tackle this problem now, it will only get worse in the coming years.

My suggestion of the spectrum equivalent of a "base closing commission" was a way to work around the parochial interests of entrenched incumbents in spectrum, much as the base closing commission worked around the parochial interests of communities with military bases to accomplish a rationalization of U.S. military deployment. It was designed to work in an imperfect world (indeed, that was the premise of the concept), and we certainly have an imperfect world in spectrum. We are now under tremendous pressure to open up spectrum, and we are held back by a system designed for a distant yesterday. Now is the time to use that pressure to come up with a political solution (such as a base closing commission) to sidestep the gridlock in which we find ourselves. There is too much at stake to settle for a broken system, a position which I am sure all of us can support.

² In 1996, the FCC held a spectrum auction specifically designed to encourage underfunded firms; the big winner, NextWave, soon went bankrupt. The FCC attempted to confiscate the licenses but was thwarted at the Supreme Court. The result was that this spectrum was withheld from the market for a decade. See http://en.wikipedia.org/wiki/NextWave_Wireless.

³ In this auction 10 MHz of prime spectrum was set aside exclusively for use for public safety radio with a reserve price which was not met. As a result, that 10 MHz of spectrum was never deployed. See http://en.wikipedia.org/wiki/United_States_2008_wireless_spectrum_auction.

⁴ Even in the most privatized model imaginable, the public sector is still important. The FCC (and perhaps Congress) needs to establish the technical conditions of licenses, whether receivers must be constrained, rules for adjudicating spectrum interference disputes, and so on. As with every other area of commercial law, the public sector would remain a major force for establishing how markets work.

References

Smith, A. (1904). *An inquiry into the nature and causes of the wealth of nations* (5th ed.). London, UK: Methuen.