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## Policymaking for the PSTN-to-IP transition within federalism: Lessons from US v. Canadian experimentation

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**Policymaking for the PSTN-to-IP Transition within Federalism:  
Lessons from U.S. v. Canadian Experimentation**

By

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**I. Recent Deregulatory Policy Divergence Between the U.S. and Canada**

In many nations, technological changes and continuing economic crises have created challenges for achieving an appropriate balance between the interests of telecommunications industry members and society, as represented by consumers and ostensibly mediated by regulators. A focal point for some of these challenges is the transition from the public switched telephone network (PSTN) to IP-based facilities and services, which presents numerous technical, economic, and policy issues.

In the United States, the apparent urgency of these issues has been triggered, in part, by activities of industry members in policy forums at both federal and state levels. Before the FCC, in November 2012, AT&T filed a petition requesting a proceeding to conduct technical and regulatory experiments for a transition from TDM to IP-based facilities and services. Shortly thereafter, NCTA filed a petition for rulemaking to promote and sustain the ongoing TDM-to-IP transition. Both of these petitions are still pending. In December 2012, after also holding workshops in December 2011, FCC Chairman Julius Genachowski established a Technology Transitions Policy Task Force to provide recommendations to modernize the FCC's policies to encourage technological transition, empower and protect consumers, promote competition, and ensure network resiliency and reliability. Comments were recently filed pursuant to a comment cycle established for this Task Force in a Public Notice, WC Docket No. 13-5, regarding potential trials. Meanwhile, the network neutrality rules adopted by the FCC in December 2010 remain on appeal before the D.C. Circuit Court of Appeals.

Moreover, industry members, prominently through AT&T and the American Legislative Exchange Council (ALEC), have also been pushing state legislatures to keep states from regulating IP-enabled services. "By the end of 2012, 25 states had passed legislation eliminating

or reducing state commission authority over telecommunications (Lichtenberg, 2013, p. 1, footnote omitted), and, by April 2013 bills had been introduced in 17 additional states (Lichtenberg, 2013, p. 6).

Meanwhile, in Canada there have been numerous, related activities. The CRTC has reviewed Internet traffic management practices of Internet service providers, issuing its own network neutrality decision in *Telecom Regulatory Policy 2009-657*. The CRTC also recently released policy decisions as to the obligation to serve in forborne exchanges in *Telecom Regulatory Policy CRTC 2011-291* (2011), and network interconnection for IP voice services in *Telecom Regulatory Policy CRTC 2012-24* (2012). In addition, there is uncertainty as to the constitutionality of the role of provincial regulation regarding mobile wireless services.

The United States and Canada have shared the same common law origins and, beginning in the late 1880's, have developed similar federal, statutory trajectories for antitrust and common carriage regulation. These similarities are described in my legal opinion filed on behalf of the Public Interest Advocacy Centre (PIAC) in the proceeding on the obligation to serve, *Telecom Notice of Consultation 2010-43* (2010), which led to the CRTC's policy decision in *Telecom Regulatory Policy CRTC 2011-291* (2011). However, since the 1990's, the trajectories of their respective federal, deregulatory telecommunications policies have diverged. This divergence relates to regulatory treatment of traditional telecommunications carriers as well as of broadband and ISP service providers.

Cherry (2012b), presented at last year's ITS Biennial Conference, discussed some of the recent differences in the U.S. and Canadian deregulatory policies.<sup>1</sup> It focused on the nations' divergent policy paths as to the meaning of the *obligation to serve* – with origins under the longstanding, common law obligations of common carriers and public utilities – in a competitive, more deregulatory environment. In this regard, telecommunications carriers are raising similar legal arguments in the U.S. and Canada, relying on the fundamental assertion that the obligation to serve arises from monopoly and is thus not applicable in a competitive market. However, the efficacy of this argument differs greatly in these two nations. The CRTC expressly rejected this monopoly theory argument in its decision in *Telecom Regulatory Policy CRTC*

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<sup>1</sup> A comparison of U.S. and Canadian legal history and recent policy differences was also recently discussed in my presentation to the FCC Technology Transitions Task Force in May, 2013. My legal opinion submitted in *Telecom Notice of Consultation 2010-43* (2010) was also attached to my ex parte filing with the FCC as to my presentation to the Task Force (Cherry, 2013).

2011-291 (2011). By contrast, the FCC has not squarely addressed the meaning of the obligation to serve in any formal proceeding, yet large incumbent local exchange carriers (ILECs) have been successful in pursuing a multi-pronged, multi-jurisdictional strategy to eliminate or avoid obligations to serve – relying in significant part on the monopoly argument – before the FCC and in numerous state legislatures and/or commissions.<sup>2</sup>

Why are the policy outcomes regarding the obligation to serve diverging in the U.S. and Canada? Cherry (2012b) offered an explanation. The divergence arises from the nations' differing perceptions of the shared common law history underlying their respective statutory regimes. Moreover, these differing perceptions result, in turn, from use of different administrative and policymaking procedures.

The present paper expands inquiry as to *why* recent telecommunications policy outcomes are diverging between the U.S. and Canada, notwithstanding the similarities in their common law and statutory law histories. The use of different administrative procedures by the FCC and the CRTC is an important factor. However, historical analysis reveals the importance – perhaps more fundamentally – of the role of path dependence from some early differences in U.S. and Canadian policy choices made in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Although the similarities in these nations' early policy trajectories are substantial, some early differences are still resonating to affect policy choices today. These differences in early policy choices emerged from (1) differences in federalism structures between the U.S. and Canada, (2) negation of Bell patents in Canada that triggered an earlier era of telephony competition as well as both federal and provincial policy experimentation, and (3) AT&T's unique public relations campaign in the U.S. in response to this earlier policy experimentation in Canada.

The resonance of early differences in American and Canadian federalism structures on their respective, subsequent policy paths is illustrative of the additional complexities faced in pursuing telecommunications policy debates within multi-jurisdictional, legal frameworks. Both

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<sup>2</sup> Large ILECs have succeeded in reclassification by the FCC of broadband Internet access services as Title I information services (and not Title II common carriage, telecommunications services) under the federal Communications Act of 1934. They are now seeking to abandon provision of Title II services over their copper wireline facilities, as well as to abandon the copper wireline facilities themselves under certain circumstances. Moreover, the large ILECs are seeking elimination or forbearance from obligations to serve associated with federal universal service support policy under the Telecommunications Act of 1996 (which amended the Communications Act of 1934). In addition, large ILECs are lobbying, and have successfully achieved in various states, the enactment of state laws that discontinue carrier of last resort obligations.

the U.S. and Canada view their governance systems as based on federalism. Instructive for the European Union is the debate as to what form of governance system its institutions have created. Josselin and Marciano stress that “the European institutional structure has always been characterized by ambiguity, always hesitating between a confederation and a federation” (p. 3), and is “a hybrid (con)federation” (p. 13). Moreover, given that the member states have long histories as independent nations prior to creation of the EU, each has its own pre-EU policy trajectory related to telecommunications technologies that influences its view of acceptable policy choices within the EU. Demonstrative in this regard is the effect of EU governance on ownership of mobile cellular systems. The ensuing policy debate is a manifestation of the EU’s struggles with its institutional form as a hybrid (con)federation. Debate over institutional reform of the euro is yet another. The depth of analysis required to explain recent telecommunications policy divergence between the U.S. and Canada, notwithstanding their many historical similarities, suggests that the EU has fundamental governance issues to address while attempting to further develop its telecommunications policy trajectory. Policy decisions made now are not only the result of prior, but also create new, policy path dependencies.

## **II. Role of Differing Administrative Procedures and Forums**

As explained in depth in prior research (Cherry, 2006 & 2008), the common law obligations of common carriers and public utilities have been misunderstood and mischaracterized in the U.S. The result has been a misattribution of the obligations to the existence of monopoly power and the claim of their inapplicability to a competitive environment. This misattribution has contributed to various policy developments in the U.S., including the FCC’s classification of broadband services as Title I information services (that do not bear the obligation to serve), misleading discourse regarding network neutrality, and exploitation by large ILECs in the states to support passage of state laws that eliminate carrier of last resort obligations for voice services.

Some FCC commissioners, both former and current, have expressed acceptance of this monopoly argument. For example, former FCC Chairman, Michael Powell, stated, “[the] fundamental predicates of common carriage are the presence of a natural monopoly” (*Communications Daily*, p. 1). Similarly, FCC Commissioner Ajit Pai stated before a panel of the Communications Liberty and Innovation Project (*Opening Remarks*):

I believe that the FCC must clearly signal that it will not apply a 20<sup>th</sup> century model of economic regulation to IP networks. That model, based on a monopolist providing voice services over copper-wire networks, is obsolete. The marketplace has changed, and our regulations need to change too. ...Item #1 on our list should be closing the Title II reclassification docket.

By contrast, in *Telecom Regulatory Policy CRTC 2011-291*, the CRTC expressly rejected the ILECs argument that the obligation to serve can only be lawfully imposed for voice services where there is a monopoly.

Certain parties submitted that an obligation to serve can only be lawfully imposed where there is a monopoly. Because there is no monopoly, these parties argued that the Commission does not have the legal authority to impose an obligation to serve in forborne exchanges. The Commission notes its disagreement with this argument. In the Commission's view, it is unduly narrow, is inconsistent with the broad statutory powers granted to the Commission, and fails to recognize the broad policy objectives to which the Commission must have regard. (Par. 46, fn. 33)

Based on this view, the CRTC “conclude[ed] that the obligation to serve and the basic service objective, as they currently apply to voice services, are retained for ILECs in regulated exchanges [in both high cost and non-high cost areas]” (par. 43). As for forborne exchanges, the CRTC concluded “that an obligation for ILECs to provide stand-alone [primary exchange service], subject to a price ceiling, should be retained in forborne exchanges [in both high cost and non-high cost areas] in order to continue to safeguard the interests of consumers” (par. 46, footnote omitted).

It is significant that the FCC Commissioners expressed their views in public remarks made outside of any proceeding before the FCC. On the other hand, the CRTC's view was on the record in a decision resulting from a formal, litigated proceeding. This decision was reached as a result of the CRTC opening a proceeding to squarely address the issue of the obligation to serve under the current statutory regime and its implementation under deregulatory policy developments – a step that the FCC has not taken. In so doing, the CRTC received and considered conflicting legal opinions as to the obligation to serve.<sup>3</sup>

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<sup>3</sup> Michael Ryan provided a legal opinion on behalf of Bell Canada and Bell Aliant. I provided a legal opinion in response on behalf the Public Interest Advocacy Centre (PIAC).

Moreover, the CRTC used procedures in this proceeding that were unlikely to be used in a proceeding – if it existed – before the FCC. The CRTC held a hearing at which all Commissioners were present. Furthermore, parties and witnesses were given opportunity to provide public statements, subject to direct questioning by the Commissioners. By contrast, for many years the FCC has not held hearings but instead relies on “paper” pleadings and comments. Moreover, the FCC permits ex parte communications, often extensively used by industry members with greater resources (than public interest or consumer advocates) to avail themselves of this procedure. The National Association of Regulatory Utility Commissioners (NARUC),<sup>4</sup> in a resolution of its Committee on Telecommunications,<sup>5</sup> recently criticized the FCC’s reliance on ex parte communications in the Connect America Fund proceeding, claiming it unfair as, among other things, ex parte materials did not provide adequate opportunity for response and fatally compromised the written comments. The resolution calls on Congress to reform the FCC’s informal rulemaking procedures to improve fairness.

Thus, the CRTC’s formal proceeding as well as its procedures enabled direct confrontation of conflicting assertions of the obligations to serve, and, in particular, the opportunity to confront the assertion that the obligation to serve is dependent on the existence of monopoly. The FCC has not provided such a focused opportunity or forum to confront and counter large ILECs’ argument. The FCC has thus far failed to open a proceeding to squarely address the matter; and, even if there were such a proceeding, the FCC would likely use procedures that enable obfuscation or avoidance of such confrontation.

It is also more difficult to refute large ILECs’ monopoly argument in the U.S. because telecommunications policymaking is more fragmented among the federal and state forums. As discussed below, given some differences in the evolution of federalism in these nations, there has been greater federal preemption of telecommunications regulation in Canada. As a result, in the U.S. refutation of ILECs’ arguments requires repeated efforts in multiple forums – federal and state, legislative and regulatory – in which the ILECs can exploit their superior resources and foster confusion. This is exemplified by large ILECs’ success in lobbying for deregulatory state laws that eliminate state commission jurisdiction, at least over VOIP, and/or carrier of last resort

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<sup>4</sup> NARUC is an association comprised of the commissioners of utility regulatory bodies in each state.

<sup>5</sup> *TC-3 Resolution Urging Congress to Improve Fairness in the Federal Communications Commission’s Informal Rulemaking Procedures* (Adopted Feb. 3, 2013), Committee on Telecommunications, NARUC Winter Committee Meetings, Washington, D.C.

obligations (Lichtenberg, 2012 & 2013).<sup>6</sup>

### **III. Role of path dependence from prior policy choices**

The previous section discusses why differences in FCC and CRTC proceedings and procedures, as well as the more fragmented policymaking in the U.S., may contribute to differences in the efficacy of the historically erroneous, monopoly theory argument on policy outcomes related to the obligation to serve. Yet, questions remain. *Why* are FCC commissioners, unlike CRTC commissioners, overtly espousing false statements of regulatory and legal history? *Why* are U.S. state policymakers so (relatively) easily misled and/or manipulated to pass legislation that eliminate dimensions of the obligation to serve? This section asserts that *path dependence of prior policy choices* made in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries,<sup>7</sup> derived in part from differences in U.S. and Canadian frameworks of federalism, provide critical insights for answering such questions.

#### **A. Differences in federalism between US and Canada and their effects on policy choices**

Although both the U.S. and Canada have governance structures based on federalism, there are some important differences embedded in their respective federal constitutions. The U.S. Constitution enumerates specific powers to the federal government, and the remaining powers are reserved to the states, or the people, in the Tenth Amendment. Importantly, the federal government has exclusive jurisdiction over interstate commerce, whereas the states have jurisdiction over intrastate commerce. Regulation of common carrier networks – such as railroads, telegraphy, and telephony – that operate in both interstate and intrastate commerce are based on dual federal/state jurisdictional regimes.

The Canadian Constitution Act of 1867, however, has given Parliament greater preemptive powers over provincial legislatures to regulate telecommunications. First, section 92(10)(c) provides that *provincial legislatures' jurisdiction does not extend* to works which, although wholly situate within one province, are declared by Parliament to be for the “general Advantage of Canada”. In 1880, Parliament granted a federal corporate charter to Bell, and in

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<sup>6</sup> In 2012, in meetings at the FCC and with U.S. Senate Commerce Committee staff, Matt Pierce (Indiana state legislator, Bloomington) and I described misleading and erroneous assertions made to state legislators regarding federal and state law that contributed to passage of such legislation in Indiana.

<sup>7</sup> For purposes of this paper, “prior policy choices” is intended to be broadly defined to encompass policy choices embedded in constitutional structures, legislation, commission actions, and judicial decisions.



1882 it granted broader powers, declaring Bell Telephone as “a work for the general advantage of Canada”. Thus, during the early stage of telephony, federal preemption “protected [Bell] against political harassment or confiscation of its property by provincial or municipal governments” (Armstrong & Nelles, 1986, p. 72). As discussed in the next subsection, Parliament’s exclusive jurisdiction over Bell is a significant factor in early Canadian experimentation with telephony regulation.

By contrast, the U.S. Constitution is silent regarding the power of the federal government to create corporations. It was under state authority that corporate charters were granted for the purpose of providing telephony (as well as other public utilities). In addition, local municipalities initially regulated telephony and were gradually preempted by the state legislatures. Federal regulation did not emerge until Congress passed legislation in 1910 to assert its jurisdiction over telephony provided in interstate commerce, under which the states retained jurisdiction over telephony provided in intrastate commerce.

Second, the presumptive allocation of powers between Parliament and the provinces is essentially the reverse of that described above between Congress and the states. During the competitive era of the late 20<sup>th</sup> century, further federal preemption evolved under this Canadian constitutional structure, resulting in less fragmentation of policymaking than in the U.S. Of relevance here, Sec. 92 defines the jurisdiction of the provincial legislatures, and in particular Sec. 92(10)(a) grants exclusive jurisdiction to provincial legislatures over local works and undertakings *other than* the following classes: “Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.” Over time, this provision has been interpreted to include subsequent forms of electronic communications technologies, such as wireline and wireless telephony, radio and television signals, and the internet. Moreover, under Sec. 91(29), *Parliament’s exclusive legislative authority extends* to “Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”. “The combined effect of these provisions, the Privy Council has said, is to read the matters excepted from s. 92(10) into ‘the preferential place enjoyed by the enumerated subjects of s. 91’... with the result that ss. 92(10)(a) and 91 can be said to establish the division of federal-provincial jurisdiction in relation to telecommunications service providers generally” (Ryan, 2005/2012, §100, p. 1-2, footnote omitted).

Thus, a telecommunications service provider clearly falls under federal jurisdiction where its works extend beyond the limits of a province. But, prior to corporate reorganizations that created Telus and Bell Aliant, there were some telecommunications service providers whose facilities were confined to a single province and provided interprovincial services to their customers by virtue of connections to other carriers at provincial and international borders. “Until 1989, the constitutional position of these companies remained in doubt. De facto, all were regulated by provincial authorities” (Ryan, 2005/2012, §101, p. 1-3, footnote omitted). In 1989, the Supreme Court of Canada held in *Alberta Government Telephones v. CNCP, CRTC, and the Attorney General of Canada* that AGT’s transmission and reception of electronic signals at the border of Alberta constituted operation of an interprovincial undertaking and thus subject to exclusive federal legislative jurisdiction.<sup>8</sup> Soon thereafter, in 1994, the Supreme Court further held in *Téléphone Guèvremont Inc. v. Québec (Régie des Télécommunications)* that exclusive federal legislative authority applies to independent telephone companies that had no direct cross-border connections.

As a matter of constitutional construction, such comprehensive federal preemption of telecommunications service providers has not developed in the U.S. Although the Telecommunications Act of 1996 modifies the allocation of federal and state powers as to some specific issues – such as interconnection disputes and competitive entry – the Act still maintains a federal/state dual jurisdictional regime.

## **B. Negation of Bell patents in Canada created an earlier era of telephony competition and policy experimentation**

Within their respective federalism structures, legal telephony competition developed earlier in Canada than in the U.S. In 1885, upon application by the Toronto Telephone Manufacturing Company, the Commissioner of Patents negated Alexander Graham Bell’s Canadian patents on the basis that they hadn’t been used for manufacturing in Canada (Armstrong & Nelles, 1986, p. 73). By comparison, Bell’s U.S. patents expired during the mid-1890’s. As a result, legal telephony competition began prior to the enactment of federal

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<sup>8</sup> Ryan (2005/2012, §100, p. 1-4) further explains that, at this time, the federal statutory regime did not bind the Crown. AGT, as an agent of the Crown in right of Alberta, was thus not bound by the *Railway Act* until it was privatized by the government of Alberta and its Crown immunity removed in 1990. In 1993, the *Telecommunications Act* expressly bound the Crown, and thus subjected SaskTel and MTS – agents of the Crown in right of Saskatchewan and Manitoba – to CRTC jurisdiction.

competition law under the *Competition Act* in 1889 in Canada, but after enactment of antitrust law under the *Sherman Act* in 1890 in the U.S. In this regard, as further discussed in subsection C, it is noteworthy that antitrust law litigation against the Bell system significantly affected the evolution of the early regulatory regime in the U.S. but not in Canada.

In both nations, the period of telephony competition occurred during the rise of civic populism against monopolies and large corporations in the late 19<sup>th</sup> to early 20<sup>th</sup> centuries. Given its earlier development in Canada, “[t]he U.S. management [of the Bell system] took a direct hand in shaping a new policy for Canada, and subsequently kept a close eye on the Canadian experiment to see what the future held for a telephone system facing competition” (Armstrong & Nelles, 1986, p. 107).

“The politics of telephone regulation in Canada produced two outcomes. At the federal level, public choice was guided toward an independent regulatory commission, one of the earliest in North America. But in Western Canada the campaign for telephone regulation ended in provincial public ownership” (Armstrong & Nelles, 1986, p. 185). Armstrong and Nelles (1986) describe the evolution of these outcomes in depth, elements of which are briefly summarized here.

At the federal level, in 1905 the Prime Minister authorized a Select Committee of the House of Commons to Investigate the Telephone. The Bell Telephone Company of Canada was surprised by this action. “Bell Telephone was one of the first AT&T operating companies to come under a serious threat of regulation, and the head office therefore took a keen interest in events in Canada” (Armstrong & Nelles, 1986, p. 170). Bell Telephone, having conferred with AT&T in the U.S., testified before the Committee. It asserted that its act of incorporation was a contract that could not be interfered with barring compensation. It also denied the existence of monopoly, pointing to hundreds of independent companies, and rejected the demand for government regulation. Bell’s lobbying was successful in the short-run in that the Committee ultimately made no report (Armstrong & Nelles, 1986, p. 171). In consultation with AT&T, Bell Telephone then devised a strategy for the next session of Parliament. Public ownership was feared the most. Although “[t]he Bell Telephone Company did not seek regulation [it] certainly sought to shape it once public pressure made it inevitable. When faced with what the company considered a near-hysterical opposition movement, Bell determined to obtain whatever regulation would do it the least harm” (Armstrong & Nelles, 1986, p. 185). In 1906, Parliament

passed legislation, placing federally chartered telephone companies under the jurisdiction of the Board of Railway Commissioners (Armstrong & Nelles, 1986, p. 174) – presaging Congress’ 1910 amendment to the Interstate Commerce Act of 1887 that placed telephony in interstate commerce under the jurisdiction of the Interstate Commerce Commission (originally established to regulate railroads). Telephone companies were also required to submit to municipal supervision of stringing wires and placing poles. In the end, Armstrong and Nelles assert that Bell’s close connections to power structures at the federal level resulted in an independent commission that was acceptable to it, although with powers less restrained on the issue of interconnection than it desired (pp. 185-186). Thus, importantly from Bell Telephone’s perspective, Parliament chose a regulatory commission rather than public ownership.

The passage of federal legislation did not end the debate; “it merely changed the theatre, driving advocates of intervention back to the provincial and municipal levels of government” (Armstrong & Nelles, 1986, p. 175). Although Bell Telephone had been able to meet most of the telephone needs of Western Canadians during the 1880s and 1890s, by 1900 it could no longer keep up with demand for telephones, particularly in the countryside.<sup>9</sup>

In the alchemy of western politics, complaints about faltering service converted the telephone into a symbol of something thought to afflict the entire prairie economy: eastern monopoly. And it was on this level of political metaphor that the ensuring struggle over telephone regulation was waged. (Armstrong & Nelles, 1986, p. 175).

Political options for provincial and municipal governments, however, were limited. Because Bell Telephone had been granted a federal charter and declared “for the general advantage of Canada” by Parliament, it was subject to exclusive federal jurisdiction and its property could not be expropriated by provincial government. However, nationalization of telephony by the British Post Office greatly inspired Canadian critics of Bell Telephone (Armstrong & Nelles, 1986, p. 167). In addition, “[t]he notion of public ownership of trunk lines had a particular resonance in the Canadian context”, as both the federal government and Ontario had already authorized some publicly owned railways and Edmonton had already taken over a failing local telephone company (Armstrong & Nelles, 1986, p. 168). Ultimately, “In the west ... where Bell had

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<sup>9</sup> Bell Telephone’s financial resources were strained for various reasons: the western region was experiencing extraordinary growth but investment earned lower returns, and Bell Telephone was approaching the upper limit of its authorized capital (Armstrong & Nelles, 1986, p. 176).

neither shareholders nor local directors, and where it was thought to be an alien, exploitive presence like banks, railroads, and elevator companies, political entrepreneurs were able to seize control over the telephone” (Armstrong & Nelles, 1986, p. 186). This political game led to the sale of Bell Telephone Company’s facilities and public ownership of telephony in the provinces of Manitoba, Alberta and Saskatchewan.

Over time, various provincial tribunals were also created to regulate telephony (for companies not subject to exclusive federal jurisdiction), as well as other utilities. Provincial commissions were created to regulate telephone companies in Quebec and Nova Scotia in 1909 and in New Brunswick 1910. In addition, given problems under public ownership, Manitoba created a public utility commission (PUC) in 1912 after the Attorney General made inquiries as to the role of PUC’s in the U.S. The cabinet viewed such a commission as useful to sanction unpopular decisions by insulating the government from tough political choices (such as rate increases) (Armstrong & Nelles, 1986, pp. 194-196). “Gradually, utility operators learned that while regulation might seem dangerous in principle, in practice it could have its uses... [R]egulation might be made to work in favour of entrepreneurs and deflect criticism by legitimizing unpopular decisions” (Armstrong & Nelles, 1986, p. 198). Generally, both federal and provincial regulators tended to intervene lightly – based on a judicial conception of equity and respect for property rights (Armstrong & Nelles, 1986, p. 210).

### **C. AT&T’s unique, public relations campaign in response to earlier policy experimentation in Canada**

In the early 20<sup>th</sup> century, the politics of telephony regulation in the U.S. also produced federal and state outcomes. However, these outcomes differed from those in Canada for several reasons. One is the difference in federalism structures whereby Congress had jurisdiction only over interstate commerce, which for telephony was limited to AT&T’s interstate long distance service. For this reason, at the federal level, greater energies were devoted to enforcement of federal antitrust law as opposed to industry-specific regulation. Another is that the political debate developed first in Canada, given its earlier period of telephony competition. AT&T learned from the Canadian experience, and consciously chose a different strategy to block public ownership of telephony in the U.S. Finally, to accomplish its political goals, AT&T’s strategy invoked a new form of communications – a public relations campaign to shape a new corporate image.

“There is little question that corporations’ initial efforts to influence public opinion were a direct response to the Progressive Movement and related public pressures for restraints on the ‘trusts’ at the turn of the twentieth century” (Smythe, 2011, p. 669, footnote omitted). In the early 1900s, this response gave birth to corporate publicity campaigns and public relations as a profession (Marchand, 1998; Smythe, 2011). AT&T was one of the first major corporations to establish an in-house public relations department and to experiment with new public relations techniques (Smythe, 2011, pp. 673-674).

Marchand explains how “[f]resh leadership and a corporate reorganization at AT&T in 1907 precipitated the new [public relations] strategy” (p. 49, footnote omitted). By 1907, after a decade of intense competition by independent telephone companies and cooperative systems:

AT&T was ‘strapped by burgeoning financial obligations, troubled by intense competition, haunted by a reputation as an insensitive, ruthless monopoly, and hounded by the specter of regulation and municipal ownership.’ To cap this inglorious epoch in AT&T’s career, the financial panic of 1907—which further inflamed anti-monopoly sentiments—brought the corporation to the brink of disaster. (Marchand, 1998, pp. 49-50, footnote omitted).

J.P. Morgan interests were successful in taking over AT&T, and brought back Theodore Vail as head of the company.<sup>10</sup>

Meanwhile, advocacy of public ownership of utilities was intensifying, and “Vail deplored the dangerous example set for American reformers by government ownership of nearly all the telephone systems of Europe” (Marchand, 1998, p. 50). Moreover, AT&T feared that the political movement for public ownership in some Canadian provinces would contaminate opinion in the U.S.

AT&T had looked to extend its natural monopoly throughout Canada as well as in the United States, but Canada had terminated the company’s patent rights earlier, ushering in a season of severe competition. Its experiences in Canada made AT&T highly conscious of the power of grassroots resistance and of potential threats from the kinds of ‘large-scale ventures in public ownership’ that had forced it into retreat in the prairie provinces of Manitoba, Saskatchewan, and Alberta. Fears that Canadian models of public ownership would contaminate opinion in the Midwest and plains states continued to perturb AT&T executives for nearly two decades. (Marchand, 1998, p. 51, footnote omitted).

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<sup>10</sup> Vail served as president of AT&T from 1885 to 1888, and again from 1907-1919.

For this reason, Vail committed AT&T to a corporate, public relations campaign of image building. AT&T thus conducted an institutional advertising campaign for political purposes in order to influence the development of the U.S. regulatory regime in the telephone industry.

In 1908 ... began the first, most persistent, and most celebrated of the large-scale institutional advertising campaigns of the early twentieth century. *Its primary purpose was political—to protect a corporation with an odious public reputation against threats of public ownership or hostile regulation.* Among the methods deployed to publicize Vail's new emphasis on quality and service were measured argument, emotional appeal, and transformed corporate behavior. Certainly AT&T was not the first major American business corporation to recognize, for good or for ill, that it had an image, and that its image could affect its long-term welfare. But never had a major corporation so systematically and decisively set out to create a new corporate image for itself as did AT&T in 1908. (Marchand, 1998, p. 48, emphasis added).

AT&T's public relations campaign was multi-layered and multi-jurisdictional. AT&T, the parent corporation signed a contract with an established advertising agency, N.W. Ayer & Son, to prepare a national campaign. AT&T also built a program of image building through local experiments and publicity advisors. Within two years, AT&T executives "viewed the deliberate shaping of a corporate image no longer as an experiment [but] rather as a policy they would doggedly pursue" (Marchand, 1998, p. 49). Given its political vulnerability, AT&T was sensitive to tell its story in a non-threatening way. "Other large corporations would soon benefit from observing AT&T's tactics for brandishing impressive size while ignoring, understating, or ennobling corporate power" (Marchand, 1998, p. 6).

To protect AT&T's long-term interests, Vail's corporate strategy was to *accept public regulation rather than competition* based on an image of corporate monopoly committed to serving the public. Critically, under this strategy, *monopoly would be a policy choice* resulting from legally imposed entry barriers in exchange for which the sole provider would commit to serving the public through its submission to regulation. The policy choice of monopoly would be made in both federal and state jurisdictions – at the federal level for interstate long distance service, and in each of the states for both local exchange service and intrastate toll. This strategy shaped AT&T's – now famous – universal service philosophy.

Although the very mention of monopoly stirred deep public fears and resentments, Vail concluded that AT&T should meet that issue head-on, although with one discreet concession. The inescapable reality of monopoly would be cloaked in more palatable language, with phrases like 'a single system' and 'universal service' invoked. (Marchand, 1998, p. 50).

Vail's corporate strategy also underlaid AT&T's acceptance of regulation by state commissions, as an alternative to public ownership, as well as the Kingsbury Commitment of 1913 to settle a federal antitrust case. Under the Kingsbury Commitment, in order to avoid further antitrust prosecution, AT&T agreed to divestiture of its stock in Western Union, to interconnect with independent telephone companies, and to cease acquisition of independent telephone companies without prior approval of the Department of Justice.

In many respects the 1913 commitment represented a logical unfolding of Vail's corporate strategy. Certainly it paved the way for further cultivation of AT&T's new corporate image of fairness, stability, and paternalistic responsibility. Vail had consistently accepted the validity of public regulation. Far from attempting to evade such control, he had contrived to foster regulation at the state level (by expert commissions, not political bodies) as a backfire against local regulation or municipal ownership. As early as 1908 Vail had chosen to submit to regulation rather than incur public disapproval. Instead of fighting a proposed state regulatory commission, the company had used its energies to obtain 'as good a Commission law as possible.' Cooperation and interconnection with the independents actually served this strategy better than competition. Not only did all the telephone companies acquire the same interests, but the decline of competition removed some of the internal controversies in the industry that could attract public attention. During an era characterized by a corporate search for stability and rationalization, AT&T stood at the forefront of this pursuit. (Marchand, 1998, p. 57, footnote omitted).

Given that its jurisdiction was limited to interstate commerce, the federal government shaped the development of intrastate telephony under antitrust law through the terms of the Kingsbury Commitment in a manner that was not possible under direct, industry-specific legislation. This may explain why, just a few years earlier, "ICC regulation over telephones came about almost as an afterthought. The primary focus of the Mann-Elkins Act was on railroads" (Stone, 1991, p. 185).<sup>11</sup> Proponents and opponents debated whether a floor amendment to the legislation was the appropriate way to bring communication under regulation, and whether the ICC should be burdened with further duties. But, "the most striking aspect of the floor debate was what was not said. No one suggested that telephone companies should not be

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<sup>11</sup> The Mann-Elkins Act of 1910 amended the Interstate Commerce Act of 1887 to extend the ICC's jurisdiction to telegraphy and telephony. Interestingly, the National Independent Telephone Association favored the extension of ICC to telephony as "federal regulation (unlike state regulation) would be directed almost entirely against AT&T because it was one of the very few telephone companies in interstate commerce" and claimed that AT&T discriminated in rates (Stone, 1991, p. 185).



subject to federal regulation” (Stone, 1991, p. 186, footnote omitted).

AT&T public relations campaign was successful in shaping the resultant U.S. regulatory regime for telephony that omitted any public ownership. All telephone companies were privately owned. Their intrastate operations were subject to state regulation; and, by 1920, all but 3 of the 48 states had established commissions to regulate telephone companies (Stone, 1991, p. 205). Interstate operations, essentially only the long distance lines of AT&T, were subject to ICC jurisdiction.

It was not until 1934 that ICC jurisdiction was transferred to the Federal Communications Commission, which was created by the Communications Act of 1934. “The Communications Act was not a true landmark policymaking effort, for in effect, it was an administrative consolidation of regulatory functions into a single independent regulatory agency” (Sterling, Bernt & Weiss, 2006, p. 105, footnote omitted). Regulation of telegraphy, telephony, and radio (telegraphy and broadcasting) were brought until the jurisdiction of the FCC. But the dual federal/state jurisdictional framework for telephony regulation had already been established, with many provisions of the Interstate Commerce Act copied verbatim into the Communications Act of 1934 (Cherry, 2012a). This dual jurisdictional regime was maintained, although modified, in the Telecommunications Act of 1996.

### **III. Lingering Effects of AT&T’s historical regulatory monopoly campaign in the U.S.**

AT&T’s early public relations campaign has continued to influence subsequent policy development in the U.S. AT&T extended its institutional advertising and public relations campaign through the 1930’s, which enabled it to evade repercussions from an extensive antitrust investigation by the recently established FCC.

American Telephone and Telegraph Company ... launch[ed] an advertising campaign touting the virtues of a private monopoly—...amid the political atmosphere of muckraking exposés and trust-busting rhetoric.... And never did a corporation so triumphantly accomplish that task—at least that was the verdict of experts some three decades later. At the end of the 1930s, as large corporations again faced intense public suspicion, AT&T emerged virtually unscathed from an extensive antitrust investigation by the Federal Communications Commission. When observers asked why investigations of the telephone monopoly had elicited almost no public support during the perilous mid-1930s, corporate analysts almost unanimously gave credit to AT&T’s thirty-year campaign of coordinated

institutional advertising and public relations. They marveled at AT&T's astute integration of multiple elements of successful public relations and the effectiveness of its various rhetorical strategies in countering the mistrust of business bigness. (Marchand, 1998, pp. 48-49, footnote omitted).

AT&T's early public relations campaign also appears to have been so memorable and successful that it continues to influence policy debates occurring in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. However, unlike the 1930's, with the passage of such a substantial period of time the policies are necessarily being debated by people who did not experience AT&T's campaign in its original context in the early 20<sup>th</sup> century. It appears that most Americans associate telephony with monopoly, but have no (or little) awareness of the early competitive era or *that regulated monopoly was a policy choice*. As a result, the original political purpose for AT&T's public relations campaign – to prevent public ownership and to convince government to legally bar telephony competition in order to reap the (alleged) benefits of a regulated monopoly – has been largely forgotten. An important consequence has been that many of the important policy developments preceding the enactment of the Communications Act of 1934, as well as their underlying reasons, are no longer of common knowledge.

This historical amnesia appeared, for example, in the universal service debate of the 1990's with regard to the original meaning and purpose of universal service. "A common misconception about the 1934 legislation is that it codifies the idea of 'universal service' as that term came to be understood beginning in the 1970s" (Sterling, Bernt & Weiss, 2006, pp. 105-106). Mueller wrote a book to correct U.S. policymakers' belief, in recent decades, "that universal telephone service was an achievement of regulated monopoly" (1997, p. 1). By restoring the understanding that "[t]he idea of universal service served as the linchpin of the Bell System's argument for transforming the telephone industry into a regulated monopoly," Mueller sought to redirect contemporary telecommunications policy debate regarding universal service in a competitive environment (1997, p. 4).

By contrast, the original meaning of universal service in the U.S. as an AT&T marketing strategy is well recognized in Canada. "In AT&T's Annual Report of 1910, Theodore Vail, Chairman of AT&T, identified the establishment of a 'universal, interdependent and intercommunicating' telephone system as the goal of the Bell System. What was for AT&T a marketing objective became by 1934 a central feature of the U.S. regulatory policy" (Ryan,

2005/2012, §620, p. 6-67).

#### **A. Historical amnesia of the origin of the federal statutory regime in the U.S. but not Canada**

In the U.S., a similar form of historical amnesia permeates the debate on network neutrality, as discussed at length in prior research (Cherry 2006, 2008a, 2012a), and now infects the debate on the PSTN-to-IP transition. In these debates, critical issues include the extent to which common carriage and public utility obligations should continue to be imposed on more traditional telecommunications services and/or applied to broadband services.

With regard to federal law, the *federal* statutory framework of common carriage under the Communications Act of 1934 has been inappropriately characterized as the original regulatory regime from which to consider further federal policy development in this more recent “deregulatory” era (Cherry, 2006, 2008, 2012a). Using the 1934 Act as the point of reference for further policy consideration leads to several analytical errors by obscuring the earlier legal regimes and reasons for their change. First, that the English common law origin of common carriage obligations dating from medieval times – including the reasons for their development and the function they served over time – were codified in the federal regime is totally ignored (Cherry, 2008b). Thus, the historical fact that these common law obligations are *not* based on the requirement of monopoly or market power is also ignored, although its recognition would rebut the monopoly theory argument espoused by large ILECs and even some FCC commissioners. Second, the origin of the federal statutory regime of common carriage in the Interstate Commerce Act of 1887 and not in the Communications Act of 1934 – thus predating the competitive telephony era in the U.S. and AT&T’s public relations campaign – is also ignored (Cherry, 2006, 2008, 2012a). Correspondingly, the fundamental reason for creating a federal regulatory regime based on independent agency oversight – *to address the rise of corporate power in a common carriage industry* – is unacknowledged.<sup>12</sup>

In Canada, such historical amnesia as to the origin of the federal statutory framework of common carriage does not exist. It is well recognized that this framework was developed

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<sup>12</sup> One dimension of the corporate power problem was the tendency for consolidation of railroad companies – albeit not necessarily to the point of monopoly – within the industry. However, other critical factors included the importance of the railroad infrastructure to commerce, the inadequacies of common law remedies, the lack of states’ jurisdiction in interstate commerce, and the need for uniformity of regulation in interstate commerce for a network industry (Cherry, 2012a).

initially for railroads and later applied to telegraphy and telephony, as exemplified in Ryan (2005/2012, §109). This recognition is likely facilitated by the fact that telegraphy and telephony remained under jurisdiction of a railway commission<sup>13</sup> until transferred to the CRTC in 1975.<sup>14</sup> This transfer in jurisdiction occurred within the past forty years – and thus within the lifetimes of most current policymakers and telecommunications lawyers (including Ryan (2005/2012)) – compared to almost eighty years ago in the U.S. Thus, Canada does not have a knowledge gap of federal statutory history to fill comparable to that in the U.S. However, as to common law underpinnings, the next section explains how the tendency to misattribute the requirement of monopoly to common carriers’ duty to serve has also arisen in Canada.

### **B. Misattribution of the duty to serve to monopoly is more easily corrected in Canada**

Under the common law, telephone companies are both common carriers and public utilities, although the common law of public utilities did not develop until the 19<sup>th</sup> century (Cherry, 2008b). Common carriers bear obligations under tort law merely by virtue of their status as public employments (or public callings); whereas entities acquire the status of public utilities by virtue of franchises granted by government to “businesses affected with a public interest”. Public utility franchises have also been granted for many types of “businesses affected with a public interest” that are not common carriers, such as those providing water, gas and electricity. Thus, not all common carriers are public utilities, and not all public utilities are common carriers – although the more general term of public service companies includes both common carriers and public utilities.

An entity’s acceptance of the franchise, which may or may not be exclusive, carries with it the duty to serve (whether expressly stated in the franchise agreement or implied by law). This duty to serve is similar to that of common carriers, but public utilities may also have an affirmative duty to extend facilities to provide service coupled with a barrier to exit. In the U.S., the telephony franchises were granted by state (usually municipal) governments. In Canada, franchises were granted by provincial governments but also in some cases by federal charter, such as to the Bell Telephone Company.

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<sup>13</sup> The relevant commission changed names over time from the Board of Railway Commissioners to the Board of Transport Commissioners, and was then replaced by the Canadian Transport Commission in 1967.

<sup>14</sup> The jurisdiction of the Canadian Radio and Television Commission was extended to include telecommunications and was renamed the Canadian Radio-television and Telecommunications Commission (CRTC).

As explained in my legal opinion submitted to the CRTC and recently filed with the FCC,<sup>15</sup> this dual legal status for telephone companies has sometimes caused confusion. Unfortunately, this confusion has arisen in telecommunications policymaking forums in both the U.S. and Canada. One source of confusion is the claim of an early commentator (Wyman, 1903) that the original reason for the status of certain callings as public callings is because they were virtual monopolies. Other early as well as modern commentators (Burdick, 1991; Adler, 1914; Payton, 1981; Stone, 1991) disagree with this conclusion because it is simply factually wrong. By relying on Wyman (1903), Ryan incorporated this erroneous conclusion into his legal analysis submitted on behalf of Bell Canada and Bell Aliant to the CRTC in *Telecom Regulatory Policy CRTC 2011-291* (2011).

Another source of confusion is the tendency for modern commentators' to impute a monopoly requirement to the duty to serve. Stone (1991) offers an explanation for this modern tendency. He stresses that the *social* characteristics of an industry is of primary importance in defining it as a public service.

The starting point, then, in distinguishing public service companies from others is that the most important consideration is the kind of service involved and not the number of firms or potential firms in an industry. ... [A]lthough the economic characteristics of an industry play important roles in shaping policy (or no policy) toward it, *the social characteristics of an industry are primary in determining whether or not a firm is a public service company.*" (Stone, 1991, pp. 26-27, emphasis added)

But, contemporary policymakers and commentators tend to employ only economic criteria.

The point is an extremely important one because many contemporary policymakers and commentators employ *only* economic criteria in making their policy recommendations. Under their view, if an industry can be shown not to be a natural monopoly — an industry in which production is done most efficiently by a single firm — it should no longer be subject to economic regulation. ... But under public service liberalism the framework for policymaking involves far more than economic criteria.

*Monopoly ... plays an important role in the policy toward public service companies, but it is not the defining characteristic. ... Most important ... telephone systems were considered public service companies even when they were engaged in vigorous competition.* (Stone, 1991, p. 27, emphasis added)

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<sup>15</sup> See note 1, *infra*.

This sole focus on economic criteria has led to the mistaken assumption that monopoly is the defining characteristic of public service companies and their duty to serve. It is unclear to what extent this modern tendency may have also influenced Ryan's opinion that existence of monopoly is a requirement for imposition of the duty to serve on telecommunications carriers. In any event, the CRTC ultimately rejected this monopoly argument in *Telecom Regulatory Policy CRTC 2011-291*.

This myopic overreliance on economic criteria, and particularly the misattribution of a monopoly or market power requirement for economic regulation, is repeatedly invoked in the U.S. as justification for deregulation. This view underlies the assertions of numerous economists and large ILECs in filings before the FCC in the network neutrality proceeding. It is also at the heart of AT&T's petition to the FCC for a TDM-to-IP transition, as evidenced by assertions such as:

AT&T believes that this regulatory experiment will show that conventional public-utility-style regulation is no longer necessary or appropriate in the emerging all-IP ecosystem (pp. 6 & 22).

It makes no sense to treat ILECs as dominant providers in an all-IP broadband marketplace that other providers currently lead (p.6).

ILEC's remain subject to an array of monopoly-era regulatory obligations (p. 10).

...And reinforced by frequent use of the adjective "legacy" to describe historical rules, regulation, network, facilities, and services.

Through the use of such language, AT&T is tapping into Americans' collective memory of its early 20<sup>th</sup> century public relations campaign that touted the public benefits of a regulated monopoly. However, in so doing, AT&T is now leveraging its prior investment in a corporate image of monopoly for the opposite political purpose – to tout the benefits of competition and free itself of regulatory obligations. Such a strategy is further bolstered by the historical amnesia of the common law and pre-1934 federal statutory regime.

As we've seen, however, in Canada there was no prior investment by the Bell system in a comparable public relations campaign to leverage and thus no such collective memory to tap. Moreover, in Canada there is no comparable historical amnesia of the pre-CRTC statutory regime. For these reasons, refuting the legal opinion of Ryan filed on behalf of Bell Canada and Bell Aliant required neither overcoming the legacy of an earlier advertising campaign nor

restoring recollection of a pre-CRTC history.

At the state level, “AT&T has been the most active of the ILECs in seeking deregulation” (Lichtenberg, 2012, p. 6), and “Verizon has been the least active of the major ILECs in proposing the deregulation of its retail services, appearing to focus more on its wireless services” (Lichtenberg, 2012, p. 10). These carriers, “have focused on [state] deregulation as a means of leveling the playing field among carriers ... by eliminating what they see as disparate rules for incumbent providers and competitive suppliers” (Lichtenberg, 2012, p. 28).

Importantly, ILEC’s lobbying efforts in the states post-date the FCC’s classification of broadband internet access services as Title I information services under the Telecommunications Act of 1996, rather than as Title II telecommunications services subject to statutory common carriage regulation. In this way, the FCC’s classification of broadband services as Title I services has contributed to the asymmetry of regulatory obligations between broadband and telecommunications services subject to the dual federal/state jurisdictional regime under Title II.

The ILECs lobbying efforts have been successful in numerous states. By the end of 2012, at least 25 state legislatures had enacted deregulatory statutes, many of which “cite competition as the reason for deregulation” (Lichtenberg, 2012, p. 9). The provisions of these laws vary among the states, but include elimination of quality-of-service metrics, modification or elimination of carrier of last resort obligations, limited state commission authority to review and resolve consumer complaints, and no state commission jurisdiction over broadband services including VOIP (Lichtenberg, 2012).

By contrast, broadband internet access services are still common carriage services under the Canadian *Telecommunications Act* of 1993. In addition, the CRTC has exclusive federal jurisdiction over telecommunications services.<sup>16</sup> Consequently, there is no regulatory asymmetry as to the legal status of providers as common carriers under federal statute – nor is there a provincial regime to be disrupted by a federal asymmetry, if such asymmetry existed.

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<sup>16</sup> This statement is certainly true for wireline services. Although beyond the scope of this paper, there is some ambiguity as to whether provincial jurisdiction remains for wireless services. In a legal opinion prepared for PIAC in 2013, the firm Heenan Blaikie firm concludes that regulation of wireless service contracts is outside the constitutional jurisdiction of the provinces. In any event, the CRTC recently established a Wireless Code in *Telecom Regulatory Policy CRTC 2013-271*.

#### IV. Conclusion

This paper examines *why* recent telecommunications policy outcomes regarding the obligation to serve are diverging between the U.S. and Canada, notwithstanding the similarities in their common law and statutory law histories. The use of different administrative procedures by the FCC and the CRTC is an important factor. The CRTC, unlike the FCC, has squarely addressed the issue of the obligation to serve in a formal proceeding, using procedures that permit direct confrontation of ILECs' claim that the obligation to serve requires the existence of a monopoly.

In addition, historical analysis reveals the importance – perhaps more fundamentally – of the role of path dependence from some early differences in U.S. and Canadian policy choices made in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Although the similarities in these nations' early policy trajectories are substantial, some early differences are still resonating to affect policy choices today.

First, differences in federalism structures between the U.S. and Canada have led to greater federal preemption of telecommunications regulation in Canada. The Bell system has been under exclusive federal jurisdiction by virtue of its federal charter in Canada, whereas the Bell companies were granted state charters in the U.S. The allocation of federal and state/provincial powers also differs, leading over time to federal preemption of telecommunications regulation in Canada but retention of dual federal/state regulation in the U.S. As a result, deregulatory policy debates are taking place within a more fragmented policymaking structure in the U.S.

Second, negation of Canadian Bell patents in 1885 triggered an earlier era of telephony competition and both federal and provincial policy experimentation. The federal policy outcome was extension of the statutory common carriage regime originally established for railroads to telegraphy and telephony. In the provinces, the Bell Telephone Company facilities were sold and public ownership established in Manitoba, Alberta and Saskatchewan. Provincial commissions were created for provincially chartered telephony companies.

Third, in response to this earlier policy experimentation in Canada, in the early 20<sup>th</sup> century AT&T developed a new political strategy in the U.S. to prevent public ownership or hostile regulation. This corporate strategy was to accept public regulation rather than competition. To effectuate this strategy, AT&T created a unique public relations campaign,



touting the benefits of corporate monopoly committed to serving the public, for the purpose of encouraging government to make monopoly a policy choice. This strategy underlaid AT&T's acceptance of intrastate regulation by state commissions as well as the Kingsbury Commitment of 1913 to settle federal antitrust litigation. The extension of federal interstate regulation under the Interstate Commerce Act (originally established for railroads) to telephony – essentially only applicable to AT&T's long distance lines – developed almost as an afterthought. It was not until 1934 that jurisdiction over interstate telephony was transferred to the FCC under the Communications Act.

AT&T's early public relations campaign has continued to influence subsequent policy development in the U.S. throughout the 20<sup>th</sup> and now into the 21<sup>st</sup> century. Americans continue to associate telephony with regulated monopoly, with apparent historical amnesia of the common law origins of common carriage and public utility obligations, the early era of telephony competition, the origin of the federal statutory framework for common carriage in the Interstate Commerce Act of 1887, and the political purpose underlying AT&T's early 20<sup>th</sup> century universal service policy. Such historical amnesia as to the origin of the federal statutory framework for common carriage does not exist in Canada.

The dual status of telephone companies as common carriers and public utility has also been a source of confusion. As a result, misattribution of the duty to serve to the existence of monopoly has permeated policy debate in both the U.S. and Canada. But, given the preceding historical differences, this misattribution is more difficult to correct in the U.S. AT&T's lobbying efforts invoke this misattribution, attempting to tap into Americans' collective memory of a regulated monopoly under its early 20<sup>th</sup> century public relations campaign – but now for the opposite political purpose of touting the benefits of competition and freeing itself of regulatory obligations. In Canada there was no comparable public relations campaign to leverage and corresponding collective memory to tap. Moreover, the regulatory asymmetry created by the FCC's classification of broadband Internet access services as Title I information services complicates the implementation of the dual federal/state jurisdictional regime for telecommunications services under Title II. By contrast, broadband internet access services are still common carriage services under the Canadian *Telecommunications Act* of 1993, and there is no provincial regulatory regime to disrupt.

The lingering effects of differences in U.S. and Canadian federalism structures and their early telecommunications policy trajectories on current policy outcomes are instructive of the challenges facing the EU and its member states as they struggle to further their policy trajectories. Unlike the U.S. and Canada, the EU faces an ongoing debate as to what form of governance system it is, leading to a description as a hybrid (con)federation. This debate is a more fundamental one underlying efforts to further telecommunications policy development. Historical amnesia of the member states' as well as the EU's earlier policy trajectories can not only distort near-term policy development but also increase the complexity of redirecting policy development further in the future.

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\* Ryan's book is published in a loose-leaf format, and is periodically updated. The citations in this paper are based on Ryan's 2005 edition that is supplemented by updates up to 2012.