

OPENING STATEMENT

of

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Federal Communications Commission

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on

The Telecommunications Merger Act of 2000

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Good morning, Mr. Chairman and other distinguished members of the House Subcommittee on Telecommunications, Trade and Consumer Protection. Thank you for inviting me here to testify on the “Telecommunications Merger Review Act of 2000.”

The FCC’s “merger” review process is rightly the subject of various reform efforts. It is the topic of several pending bills in the House and Senate, and is now the focus of an FCC Team. Reforming the FCC’s role in mergers is timely, as the blinding pace of strategic consolidations in telecommunications and media markets continues unabated. I appreciate this opportunity to offer my views about the fundamentals of a sound and more efficient merger review process. After providing some background, I will discuss three broad areas where reform should be considered: (1) the duplication of merger review between the FCC and U.S. antitrust authorities; (2) the standards applied by the FCC to mergers and the selection of conditions; and (3) the FCC’s review process, including its timeliness. Although I know that there is a specific proposal that is the subject of this legislative hearing today, my remarks will focus on these broad areas of concern and offer several reform options for each area.

I. Background

The FCC’s authority to review license transfers derives principally from various sections of Title III of the Communications Act of 1934 (entitled “Provisions Relating to Radio”) that direct the Commission to review applications to transfer licenses and determine “whether the public interest, convenience, and necessity will be served by the granting of such application . .

..¹ If the Commission so finds, it must grant the application. Section 214 of the Act is the source of authority for approving applications for the acquisition and transfer of lines by common carriers.² Thus, strictly speaking, the precipitating event for our review is a request to transfer licenses and lines from one company to another. We are not, it should be emphasized, specifically directed by Congress to review the potential anticompetitive effects of the underlying transaction itself.

Nonetheless, the Commission, over time, has come to interpret its obligation to make an affirmative finding that a license transfer is in the public interest as a fairly broad mandate to shift the public interest burden to the applicants and to review the benefits and harms of the transaction itself.³ In selected transactions, this has come to include comprehensive merger analysis. That is, an evaluation of the *competitive* benefits and harms of the entire transaction rather than a more limited determination that the lines and licenses would be put to valued public use.

¹ 47 U.S.C. § 309(a); *id.* §§ 308, 310(d). Though we do have some express antitrust authority under the Clayton Act, to my knowledge the FCC has rarely (if ever) invoked such authority as the basis for reviewing a merger merger. *See* 15 U.S.C. § 21(a).

² *See* 47 U.S.C. § 214(a)-(d).

³ *See, e.g.* Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Red 14712 (1999); Applications For Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 98-178, *Memorandum Opinion and Order*, 14 FCC Red 3160 (1999); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Red 18025 (1998); Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Red 19985 (1997).

It is useful to contrast FCC review with that of the federal antitrust authorities (Department of Justice and the Federal Trade Commission). The FCC's review is not formally rooted in the antitrust statutes and thus is not bound by judicial precedents in that area. In fact, the courts have held that the Commission's decision that a license transfer is "in the public interest" is entitled to "substantial judicial deference."⁴ Additionally, while the antitrust authorities must sue companies in court to block a merger they believe is harmful, the FCC may block a merger (technically a license transfer) on its own, with limited, if any, judicial review. Moreover, this difference affects the burden of proof. The antitrust authorities must prove their case by a preponderance of the evidence to block a merger, whereas the FCC places the burden on the applicants to affirmatively prove the transaction is "pro-competitive," a fairly recent pronouncement.⁵

II. Duplication of Merger Review Functions

Proponents of FCC review in defending the duplicative merger review process often cite the distinctions I have just outlined. However, the actual differences in analysis and outcome when one examines actual cases are substantially less. In most cases, the FCC's review follows the same line of analysis as that found in the merger guidelines employed by the antitrust

⁴ *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995), quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

⁵ See Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 19994, 20061, ¶ 16, 153 (1997). But see also Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, Report No. LB-96-32, *Memorandum Opinion and Order*, 12 FCC Rcd 2624 (1997). Eight months before the Bell Atlantic/Nynex decision, the Commission concluded in the SBC/PacTel proceeding that "the proposed transfer will result in pro-competitive effects, efficiencies, and other public interest benefits that could be real but, if they occur, will not likely be dramatic. We emphasize that it is not these benefits of the proposed transfer, but rather its lack of any significant and foreseeable anti-competitive effects, that has led us to approve it." *Id.* at 2661 ¶ 84 (emphasis added).

authorities. We define product and geographic markets, we evaluate market power in those markets, we propound on the anticompetitive effects of the combination, and we consider efficiencies and barriers to entry to mitigate those effects. In the main, there are no meaningful differences in the analysis among the agencies. Thus, despite the different foundations, procedures and standards among the respective authorities, the evaluations by the FCC and the antitrust authorities are largely duplicative.⁶ This imposes significant costs on a transaction. The costs to the parties include greater uncertainty of result, increased legal costs to defend a proposed transaction before multiple agencies, and greater uncertainty of time before closure. The government bears a cost as well with the duplicative expenditure of resources inherent in concurrent jurisdiction. In the FCC's case, scarce resources are diverted from other critical activities, for example section 271 applications.⁸

This is not to say, however, that there is no role for the expert agency in some transactions. There are communications policies that may be implicated by a license transfer that are not encompassed in antitrust statutes and, thus, given little consideration by the antitrust authorities. The classic example is the impact on "diversity of voices," when media licensees merge. Congress has often chosen to protect such values, even where a consolidation might not

⁶ I would call the Committee's attention to a recent report issued by the Department of Justice's International Competition Policy Advisory Committee, which specifically addresses the overlapping merger-related functions of the U.S. antitrust authorities, sectoral regulators like the FCC, and the states. *See* Final Report, Justice's International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust at 142-154 and Annex 3-B.

⁸ It is important to note that the FCC has substantially fewer people trained in competitive analysis to review mergers than does DOJ or the FTC.

raise classic concentration concerns.⁹ In these cases, the FCC's review does not duplicate that of the antitrust authorities.

In sum, while today's duplicative merger process within the federal government needs to be reformed, I believe that there is room to preserve a role for the FCC that is more complimentary or supplementary. The Commission should be constrained to consider only issues such as whether the merger would violate an express provision of the Communications Act or the Commission's rules. In addition, it is appropriate for it to consider the merger's impact on other communications policies such as media diversity and universal service that are not appropriately considered by antitrust authorities. However, I believe that the Commission should be required to defer to the antitrust authorities' competitive analysis and leave it up to them (and the courts) to address specific competitive harms that they identify.

Finally, a full-blown merger review is not the only way for the FCC's expertise to come to bear. The Commission could file comments with the appropriate antitrust authority reviewing a merger or issue an advisory opinion on a given merger.

Reform Options

- Require deference to antitrust authorities' competitive analysis. Permit FCC to file comments with antitrust authorities in communications transaction.
- Limit FCC review to questions about whether the combined company would be in compliance with the Communications Act, and matters that are not fairly encompassed in the Clayton and Sherman Acts.

⁹ See, e.g., 47 U.S.C. § 533 (Cable Television Ownership Restrictions) and Pub. L. No. 104-104, § 202 (Broadcast Ownership).

II. Review Standards and Conditions

There are two areas in which standards come into play. First, there is a serious question about what standards the Commission employs for determining which license transfers receive extensive merger evaluation. Commissioner Furchtgott-Roth has spoken extensively about this problem and I will not repeat his criticism, but I do agree that the Commission's process on this point is vulnerable to challenge as arbitrary. The second standard issue involves the standard under which we review mergers: the public interest standard.

The "public interest" standard has been a part of the law since the inception of the Federal Radio Commission and, its successor, the FCC. This standard was introduced to communications regulation in a time when scholars and Congress believed in the supremacy of regulators in ordering economic relationships. But we are now in an era just after the pro-competitive, deregulatory 1996 Act in which Congress sought to remove decisions from the "enlightened regulator" to the market. It is hard to imagine a member of Congress today expressing the view articulated by Senator Clarence Dill, in the 1927 Radio Act debates, that the public interest standard would gain meaning by the staffing of the Commission with "men of big abilities and big vision."

I am substantially less comfortable than Senator Dill with a standard that depends heavily on the quality and "vision" of those who happen to occupy a Commission seat at any given time. The standard clearly lacks guiding principles that can more predictably govern Commission decisions. Whatever the merits of the standard in some contexts (and there are some), I believe its application to merger analysis is flawed. Particularly, since its has been employed as a simple

“balancing process” that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits.

Consistent with my long-standing concerns regarding our license transfer process, I have fundamental difficulties with the public interest standard as developed and applied in the Commission’s merger reviews. Simply put, I am very uncomfortable with a standard that places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale. This balancing approach leads to a number of problems: First, the approach creates a great temptation to load up the benefits side of the scale with a big wish list of conditions that are non-germane to the merger’s harmful effects. Second, the approach makes it easier for identified harms, even significant ones, to be visited upon the public in exchange for other benefits. Third, the conditions that are sought are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking.¹⁰

A. The Problem of the Mountain and the Pebble

To conceptualize the problems with the public interest standard when reviewing a license transfer (*i.e.*, a merger), consider a simple balancing scale of the “see-saw” variety. On the left side of the scale are public interest harms and, on the right, public interest benefits. The balancing approach requires that the benefits outweigh the harms. If the harms weigh but an ounce more than the proposed benefits, the standard (if faithfully applied as articulated) would

¹⁰ A fuller recitation of my critique of standards and conditions can be found in my separate statement, dissenting in part, in the SBC/Ameritech merger Order.

require us to block the merger. This approach is troubling on one level, for if the government were neutral with respect to the asserted benefits, it still could be compelled to stop a merger based on essentially negligible harms. This has led me to believe that perhaps the FCC should bear the burden of demonstrating a basis for blocking or conditioning a merger (much as the antitrust authorities do) rather than placing an affirmative duty on applicants to show their combination is pro-competitive.

The more serious problem arises with the public interest “scale,” however, when the Commission, rather than weighing the harms against the *proffered* benefits, attempts to tip the balance by adding weight to the benefits “platter” with conditions. The public interest standard, as the Commission applies it, does not require that the conditions cure or remedy the identified harms. The conditions need only outweigh the harms. Thus, the Commission is free to compensate for a pebble of harm on one side of the public interest scale by throwing a mountain of purportedly beneficial conditions on the other side of the scale. In other words, when conditions are not calibrated to remedy harms, there is no constraint on how voluminous or unrelated they might be. The consequence of this approach is that the slightest harm opens up a quarry of “would-be-nice-to-haves” that can be piled on the scale. Moreover, the coercive effect of having the applicants over a barrel hoping to gain merger approval dramatically improves the chances that the companies will “agree” to abide by the conditions. Thus, the temptation and the enticement to stack the scale with precious gems is irresistible to competing companies, interest groups and the Commission itself.

B. “Poor Joshua!”¹¹

The second difficulty I have with the Commission’s merger standard is that in theory, it will allow a merger to go forward that it finds will harm the public, as long as the public gets something good in return. In the humorous extreme, one could analogize this to allowing a stranger to beat your dog as long as he commits to giving the dog a bone and some fun squeaky toys. No doubt, the “ol’ boy” has been quite anxious to get a bone and add to his saliva-laden collection of playmates, but not at the expense of a beating. Of course, this analogy is perhaps less humorous if one assumes that the public interest is entitled to better treatment than your dog.

Jests aside, the point is that when merger conditions are not designed to remedy harms, all the unrelated benefits in the world will not cure the loss to the public. If one is convinced of the significance of a proposed merger’s harms, it is unsettling that the merger would proceed without significantly mitigating those harmful effects with remedial conditions.

C. Wither Thoughtful Deliberation?

I think it a profound mistake to use license transfer proceedings as a way to advance policies of general applicability that are otherwise, and more appropriately, the subject of rulemakings. My reasons are three:

¹¹ This famous refrain is drawn from *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (J. Blackmun, dissenting) (holding that state had no constitutional duty to protect Joshua, a child, from his father after receiving reports of possible abuse). In *DeShaney*, Justice Blackmun wrote: “Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . dutifully record[] these incidents in [their] files.” *Id.* at 213.

First, no matter how much we try to include other parties, a merger review is primarily an intimate, bilateral dance between the government and the applicants. The nature of this dance is one of negotiation. Where there are some harms and the question is finding a set of conditions that will allow the merger to proceed, the tango proceeds until there is a meeting of the minds between the government and its suitor. The parties inevitably go back and forth in an effort to find a compromise where the government gets a satisfactory list of conditions, but not so many that the applicants walk away from the deal. Thus, the process is not sufficiently fulsome to broach broader policy questions. The point also shows the importance of requiring conditions to be merger specific.

Second, by importing parts of rulemakings and transforming them into merger conditions, we risk substantially confusing both the industry and state commissions with respect to rules previously adopted. The conditions often overlap significantly with many of our ongoing proceedings to implement the Telecommunications Act of 1996. In tackling these other proceedings, the Commission must consider more than the interests of the merging parties. Relying on conditions that overlap with more general proceedings will require us to distinguish carefully this conditioning exercise from our broader duties under the Act.

Third, I personally am uncomfortable essentially promulgating rules without the deliberative process of notice and comment normally afforded in a comprehensive rulemaking. Moreover, I think it unacceptable to pursue matters as conditions where they are insulated from judicial review. In a classic rulemaking, parties have the right to petition for review in court. But when a merger is approved with conditions, the applicants are unlikely to pursue a challenge

to terms that regulators will claim they acceded to “voluntarily” as the price for gaining favorable approval.

Finally, I do not subscribe to an essential assumption of this process, that is, the idea that a regulated entity can “voluntarily” offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship. And, even if there were, I do not believe that the guiding structures of the regulatory process (either rulemaking or adjudication) should be supplanted by a unilateral offer from a license transfer applicant.

Reform Options

- Establish standards or thresholds for determining which, if any, license transfers should be subject to more comprehensive review.
- Establish guiding principles to curtail the breadth of the public interest standard.
- Require conditions to either cure a violation of the statute, or remedy clearly identified public harms.
- Place the burden on the Commission to demonstrate that a license transfer would not be in the public interest.

III. Process

This brings me to my last area of consideration, the process of reviewing mergers at the FCC. Chief among the concerns of parties contemplating merger transactions is how long will it take to get through all of the regulatory hurdles. This is especially concerning to a competitive, technology-focused industry that is now running on Internet time. I believe that reform in the substantive areas I have already discussed could alleviate much of the delay of major

transactions caused by monkeying with competitive issues that are not within our core expertise, inviting and addressing all sorts of non-germane challenges and negotiating “voluntary” conditions. But the process itself also needs examination.

The FCC Office of General Counsel’s “Transactions Team” has recently proposed a 180-day timeline for completing our review of major transactions. Under the staff’s proposal, the clock would start at the release of the FCC staff’s “Public Notice” announcing the applications underlying the transaction have been accepted for filing and inviting the filing of petitions and comments. I applaud the Commission’s self-initiated efforts in this area, though much work remains to be done.

Some of the pending legislative initiatives that have been offered, including the measure that is the subject of this hearing today, would require the Commission grant or deny the merger applications within a set period (*e.g.*, 90 days) from the date the application is filed. I believe the current statute itself offers some guidance as to how to structure the chronology of review. I would note that section 5(d) of the Communications Act, added by Congress in the early 50s, provides for a non-binding “objective” of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases. In addition, Section 309 of the Act, especially subsections (d) and (e), provide a well-understood process of handling all Title III applications and oppositions thereto.

I believe that time constraints are wise, but must not be completely rigid or unbending. Mergers are fact intensive reviews that are not always easily boxed into particular time windows. Moreover, short time frames may be fine for pro-competitive mergers, but in the face of real public harm, it is important for the government to act thoroughly and decisively. Short time frames may also allow the parties to game the process to deny the Commission the information it needs to make an informed judgment in order to run out the clock. I think the more prudent approach is to set clear temporal benchmarks and require the full Commission to authorize any further review, and then only for limited blocks of time. Let me offer an example:

- (1) **Filing and Quick-look:** Once an application is filed, the appropriate Bureau will give the application a “quick-look” to ensure the application is complete. If so, the application is accepted and placed on public notice (within 5 to 10 business days).
- (2) **Comment Period:** For 30 days, parties in interest have an opportunity to petition to deny the application under section 309, and the applicant will be afforded the opportunity to file a reply.
- (3) **Stage 1 Review:** After the comment period ends the bureau will review the application to determine if the transfer would result in public harms (45 to 60 days).
- (4) **Commission Review:** At the end of stage 1 review, the Commission by formal action must either:
 - (a) Grant the application (and denying the petitions to deny) with or without conditions;
 - (b) Authorize further investigation by the staff for a defined interval (*e.g.*, 60 days), triggering stage 2 review, with perhaps additional comment; or
 - (c) Designate the application for administrative hearing in accordance with section 309 of the Communications Act and applicable provisions of the Administrative Procedures Act. (Congress could authorize a less onerous paper hearing, than a hearing on the record.)
- (5) **Decision:** The vast majority of cases should take no longer than 60 to 90 days. In the most complex cases, where significant and germane public harms have been identified in the Stage 1 review, our final decision should be rendered within six to nine months from the filing of the application.

IV. Conclusion

I look forward to continuing to work with Members of Congress and with my colleagues on the scores of transactions that are likely to come before us and the initiatives to reform this process.

Thank you for your attention. I will be happy to answer any questions you may have.