PHOENIX
CENTER
FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
www.phoenix-center.org

PHOENIX CENTER POLICY BULLETIN NO. 18

Thomas M. Koutsky, J.D.
Lawrence J. Spiwak, J.D.

Updated May 2007

SEPARATING POLITICS FROM POLICY IN FCC MERGER REVIEWS: A BASIC LEGAL PRIMER OF THE "PUBLIC INTEREST" STANDARD

Abstract: This BULLETIN presents a brief primer of the FCC's merger review authority under the Communications Act. As outlined herein, precedent dictates that the FCC has independent (and indeed broader) authority to review communications industry mergers separate from the authority bestowed upon the Department of Justice or Federal Trade Commission and, moreover, that this public interest review provides a useful and unique purpose. The FCC has clear responsibility to consider competitive effects and to conduct a rigorous economic analysis in any merger review under the traditional public interest standard. To the extent the FCC finds that the proposed merger harms the public interest in some way, the FCC is well within its public interest authority to issue narrowly-tailored conditions to its approval of the merger. But the FCC's merger review authority is not unfettered and, absent a clear nexus to any merger-related harm, the FCC should not use case-specific merger proceedings to achieve indirectly via "voluntary conditions" what it cannot do directly. If there are generic policy issues facing the industry—such as the emerging issue of network neutrality—then those issues are better handled in formal industry–wide notices of inquiry or rulemakings where they can be effectively dealt with in an open and more comprehensive manner.

PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (+1) (202) 274-0235 Fax: (+1) (202) 244-8257//9342 e-Fax: (+1) (202) 318-4909
WWW.PHOENIX-CENTER.ORG

I. Introduction

The purpose of this POLICY BULLETIN is to present a brief primer of the FCC's "public interest" standard that it uses in reviewing mergers pursuant to the Communications Act. As outlined more fully below, precedent dictates that the FCC has independent (and indeed broader) authority to review communications industry mergers separate from the authority bestowed upon the Department of Justice ("DOJ") or Federal Trade Commission ("FTC"), and that this public interest review provides a useful and unique purpose. To the extent the FCC finds that the proposed merger harms the public interest in some way, the FCC is well within its public interest authority to issue narrowly-tailored conditions to its approval of the merger.

However, precedent also dictates that the FCC's "public interest" authority is not unfettered. The public interest test requires an analysis of economic and competitive considerations, and the courts have sometimes rebuked the FCC for not being consistent in this analysis. Absent a clear nexus to any merger-related harm, the FCC should not use case-specific merger proceedings to achieve indirectly via "voluntary conditions" what it cannot do directly to accommodate particular political constituencies. If there are generic, unresolved policy issues—such as the emerging issue of network neutrality—then those issues are better handled in formal industry–wide inquiries or rulemakings where they can be effectively dealt with in a comprehensive manner. Important issues of public policy should not be decided in the course of closed negotiations over merger conditions in which only the regulator and the regulated entity participate. In contrast, Notices of Inquiry and Rulemakings have the benefit of offering the public a complete opportunity to comment on proposals and also result in consistent, industry-wide resolution of issues that apply across the board and will, hopefully, stand the test of time.

II. Why Does the FCC Have the Authority to Review Industry Mergers?

Every few years, and usually in the context of an important telecom or media merger, policymakers and regulated firms alike question whether the FCC's review of communications industry mergers is necessary. The DOJ and the FTC have authority to review mergers under the antitrust laws,[1] and courts supervise and review this process through Tunney Act proceedings. While there are continuing debates about the effectiveness of this antitrust process, there is very little serious debate over whether the antitrust, Hart-Scott-Rodino merger

---

[1] Section 7 of the Clayton Act proscribes any merger the effects of which "may be substantially to lessen competition." 15 U.S.C. § 18. Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, also apply to merger reviews but the DOJ and FTC. Mergers of a particular size are not allowed to proceed until either the DOJ or FTC reviews the proposed transaction pursuant to the Hart-Scott-Rodino Act pre-merger notification and reporting process. 15 U.S.C. § 18a.

5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (+1) (202) 274-0235 Fax: (+1) (202) 244-8257//9342 e-Fax: (+1) (202) 318-4909
WWW.PHOENIX-CENTER.ORG

pre-approval process is an important (and sometimes dramatic) check on market power. Yet, many contend that the FCC has no place in reviewing telephone, cable, broadcast and wireless industry mergers in addition to this DOJ or FTC review.[2] As such, it is appropriate to explore precisely what FCC review adds to this process.

First, FCC merger review is appropriate because it is the law.[3] The law gives the FCC the authority—and the obligation—to determine that these transactions are in the "public interest." Section 214(c) of the Communications Act states that the Commission "may attach to the issuance of [a 214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." Moreover, the Communications Act gives the FCC the authority to impose conditions on transactions so long as those conditions are consistent with applicable law. Section 303(r) provides that "except as otherwise provided in this Act, the Commission . . . shall . . . prescribe such . . . conditions, *not inconsistent with law*, as may be necessary to carry out *the provisions of this Act*."[4]

Given the complexity of the communications industry, Congress understood that while a primary examination of competitive issues by antitrust enforcement agencies is important, the FCC also needs to consider a number of other factors that are not part of the typical Hart-Scott-Rodino antitrust merger review process. Several of those factors are discussed in Section III below. In particular, while the antitrust agencies (via the Hart-Scott-Rodino process) are in an excellent position to address whether a particular merger would "substantially lessen competition", the Clayton Act standard, by definition, does not account for how the continuing presence of some sort of "public interest" regulation by the government—most notably universal service requirements, issues of public heath and safety, *etc.*—affects firms' conduct and industry structure. Moreover, this dual-review process is not unique to the communications industry, as Congress also established dual-review process for other complex industries such as electricity and banking where a similar dynamic analysis of non-traditional factors must be taken into account.

---

2 *See, e.g.*, Randolph J. May, *Reform the Process*, NATIONAL LAW JOURNAL (May 30, 2005); Peter Huber, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (Oxford University Press 1997). For a general criticism of the nation's antitrust laws, *see, e.g.,* F. S. McChesney and W. F. Shughart II, THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (1995).

3 *See* 47 U.S.C. §§ 214, 310(d).

4 47 U.S.C. § 303(r) (emphasis added).

In addition, the antitrust enforcement agencies simply may not have the industry expertise to understand all of the complexities and nuances of the telecom business.[5] In light of rapid technological change, using the DOJ/FTC Horizontal Merger Guidelines as the only guidepost for reviewing industry transactions could force the merger review process to rely solely upon a rigid, static view of industry structure.[6] Moreover, the Merger Guidelines are simply not designed to account for the myriad of FCC rulemakings and adjudications that occur literally everyday and which often affect any static competitive analysis. For both of these reasons, it is not uncommon for the FCC to detail staff and lend its expertise to the DOJ or FTC to assist in those agencies' reviews of communications industry mergers under the Clayton Act.

Courts have long recognized the FCC's unique expertise in dealing with the sometimes Byzantine aspects of communications industries. Indeed, the Supreme Court recently held that because the FCC must make difficult decisions regarding issues that "involve a 'subject matter [that] is technical, complex, and dynamic'" the "Commission is in a far better position to address these questions than" a court of general jurisdiction.[7]

Recent communications industry transactions present a particularly compelling case for independent FCC review because many of the recent deals flow directly from the FCC policy decisions that favor facilities-based entry or "inter-modal competition" over other alternatives. Indeed, as technology continues to facilitate convergence among competing distribution platforms, the logical outcome of a policy focus on "inter-modal competition" has been a phase of "intra-modal mergers" among similarly situated companies seeking to maximize economies of scale and scope.[8] Given the direct interrelationship between these mergers with regulatory policy, the FCC stands in an important position to determine whether these proposed intra-modal transactions will advance Congress' long-standing policy mandate that "all the people of

---

5 For a further exegesis of this point, *see* Jonathan Nuechterlein and Philip Weiser, *First Principles for an Effective Rewrite of the Telecommunications Act of 1996*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, WORKING PAPER NO. 05-03 (Mar. 2005).

6 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (available at http://www.usdoj.gov/atr/public/guidelines/hmg). In 1996, the DOJ and FTC issued a joint commentary on the application of the Guidelines, which includes discussions of how the agencies have applied and interpreted the Guidelines over the last decade. U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (Mar. 2006) (available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf).

7 *National Cable & Telecommunications Association, et al. v. Brand X Internet Services et al.*, 545 U.S. 967, ___, 125 S.Ct. 2688, 2712 (2005).

8 These mergers include continued consolidation among cable multiple system operators, such as the recent acquisition of the Adelphia cable systems by Comcast and Time Warner Cable.

the United States" shall have access to "a rapid, efficient, Nationwide and world-wide . . . communications service with adequate facilities at reasonable charges . . . ."[9]

The industry has been down this path before. When the FCC auctioned off the PCS spectrum in the mid-1990s, it essentially guessed that "five" wireless carriers (the existing two cellular carriers plus the A, B and C PCS spectrum blocks) was the appropriate number of firms for the market and also supposed that regional (as opposed to national) geographic licensing would be also appropriate. Prior Phoenix Center research has demonstrated that because sunk costs are inherent to most of the telecom industry, there will tend to be an equilibrium number of firms.[10] But the FCC could not have known in the early 1990's whether or not five wireless carriers was "too many" or "too few," and it erred on the side of caution by auctioning off several licenses in distinct geographic areas. If the natural equilibrium structure favored fewer and larger national players, then mergers should have been expected as a natural consequence of this initial policy choice in selecting a "starting point."[11] Accordingly, the subsequent wave of wireless mergers was an entirely logical outcome and reaction (or "sorting") by the market in response to a deliberate public policy choice. Antitrust agencies and the FCC may view such developments in a different light: to an antitrust agency, rapid consolidation may signal an imminent competition problem, while to the FCC such rapid consolidation is the expected consequence of a conscious public policy choice. In this environment, traditional tools of antitrust analysis might not present a complete picture of the emerging competitive dynamic.[12]

---

[9] 47 U.S.C. § 151.

[10] J. B. Duvall and G. S. Ford, *Changing Industry Structure: The Economics of Entry and Price Competition*, PHOENIX CENTER POLICY PAPER NO. 10 (Apr. 2001); T. R. Beard, G. S. Ford and L. J. Spiwak, *Why ADCo? Why Now? An Economic Exploration into the Future Industry Structure for the "Last Mile" in Local Telecommunications Markets*, PHOENIX CENTER POLICY PAPER NO. 12 (Nov. 2001); *reprinted in* 54 FED. COM. L. J. 421 (May 2002) (http://www.law.indiana.edu/fclj/pubs/v54/no3/spiwak.pdf); G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Competition After Unbundling: Entry, Industry Structure and Convergence,* PHOENIX CENTER POLICY PAPER NO. 21 (2005) available at: http://www.phoenix-center.org/pcpp/PCPP21Final.pdf, *and to be reprinted in* 59 FEDERAL COMMUNICATIONS LAW JOURNAL (forthcoming Winter 2007).

[11] A similar result occurred in radio broadcasting, where FCC rules created maximum fragmentation in the industry by nearly forbidding multi-station owners. *See* R. B. Ekelund, G. S. Ford and T. Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. LAW & ECON. 157 (2000).

[12] *See, e.g., United States v. Baker Hughes Inc.,* 908 F.2d 981, 986 (D.C. Cir. 1990) (Thomas, J.) (market share statistics "misleading" in a "volatile and shifting" market); *Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1000 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) (When a "predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of market power . . . in such cases market share should be at most a point of departure in determining whether market power exists."); *Metro Mobile CTS, Inc. v. New Vector Communications Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) ("Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where . . . the predominant market share is

(Footnote Continued….)

The same can be said for competition issues relating to vertical conduct and acquisitions. The trend in antitrust law has been not to review "vertical" mergers closely, based on the arguments of economists that such transactions often promote economic efficiency and only rarely have adverse competitive effects. In contrast, public policy has tread more carefully regarding vertical issues in the communications industry.[13] These concerns have been notable in the context of access to video programming. Congress has passed laws that limit the ability of cable systems to restrict the distribution of video programming networks to rivals.[14] Since many cable firms are vertically integrated with the most popular programming networks (like HBO and The Discovery Channel), concerns over whether cable mergers would impact the distribution of such programming networks play an important role in the FCC's merger review process.

In reviewing cable industry mergers, the FCC makes a careful determination as to whether such programming distribution issues are better resolved through company-specific, merger-specific conditions, or whether existing program access laws, which apply to the industry generally, are sufficient. For example, when the FCC recently reviewed the acquisition of Adelphia Cable by Time Warner Cable and Comcast, it found that transactions would enable Comcast and Time Warner to raise the price of access to regional sports networks (like Comcast SportsNet) by imposing uniform price increases applicable to all multichannel video programming distributors, including their own systems, and that such a strategy is likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives

---

the result of regulation"); *see also* D. Cameron & M. Glick, *Market Share and Market Power in Merger and Monopolization Cases*, 17 MANAGERIAL & DECISION ECON. 193 (1996)(legal precedent requiring courts to draw inferences about market power based primarily or exclusively on market shares and/or market concentration can often be misleading; the only alternative to such bright-line rules is to utilize modern economic tools to undertake more extensive competitive analyses).

13 *In re Teleprompter,* 87 F.C.C.2d 531 (1981), where in reviewing a cable industry merger, the Commission observed that:

> [V]ertical integration has conflicting components, in terms of the incentives involved. While it may create a natural tendency for the systems involved to deal with affiliated enterprises, it is also the engine for the creation of new products and services to increase the value of the total package of services offered [to] the public. *Given the conflicting incentives involved, we believe it would be inappropriate to conclude on any general basis that vertical integration is undesirable. Rather, what appears to be required is scrutiny of particular aspects of these vertical relationships for adverse consequences.*

Id. at ¶ 61 (footnotes omitted and emphasis supplied).

14 47 U.S.C. § 548. Those program access rules were put in place specifically because existing antitrust laws were ill-suited to remedy this important policy-relevant barrier to entry. *See* J. Olson & L. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?* 13 CARDOZO ARTS & ENT. L.J. 283 (1994).

to Comcast and Time Warner. The FCC found that the acquisition, by increasing the regional "clustering" of cable networks in geographic areas, would enhance the cable firms' ability to force local sports teams and local sports viewers to deal with the local cable company with regard to showing matches on cable television. To resolve this merger-specific harm, the FCC imposed a narrowly-tailored merger-related commitment to alleviate this problem.[15] But the FCC refrained from imposing broader obligations in response to arguments from competitors that they generally were having difficulty obtaining affiliated, national programming from Time Warner and Comcast. In that context, the FCC did not impose conditions because it reasoned that the existing program access rules were the appropriate forum to handle such disputes.[16]

In summary, the FCC has the legal obligation to review communications industry mergers. This dual review is not unique to the FCC and is also present in other industries like banking and energy. The sheer breadth and complexity of the communications industry necessitates this dual review, because communications industry transactions reflect not only questions of static economic efficiency and market power, but they also reflect the shifting of regulatory policy and technological change. As the Supreme Court said in the *Brand X* decision last year, "[n]othing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions."[17]

III. The "Public Interest" Standard Requires a Thorough Economic Analysis of Competitive Issues

Properly applied, the FCC's "public interest" merger review authority can navigate these waters and take into account the complex and unique characteristics of the communications industry. Precedent makes clear that in reviewing mergers pursuant to the public interest standard, the FCC must consider competitive effects and to conduct a rigorous economic analysis.[18] While one can dispute the FCC's application of economics in many prior

---

[15] *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-912, Memorandum Opinion and Order, FCC No. 06-105 (rel. Jul. 21, 2006) (*Adelphia-Time Warner-Comcast*) at ¶¶ 294-300.

[16] *Id.* at ¶ 174.

[17] *Brand X, supra* n. 7, 125 S.Ct. at 2712.

[18] The universal requirement to consider competitive effects under the public interest standard stands in direct contrast to other, more politically-charged topics, like employee job concerns, which may only be considered when the statute provides specific language ordering the administrative agency to do so (*e.g.*, the FCC's "obligation under

(Footnote Continued….)

proceedings, any argument that the "public interest" standard is devoid of meaning under current law (and, therefore, that the FCC should abdicate its core responsibilities and defer to the DOJ or FTC) simply is not supported by the case law.[19]

While regulatory agency and antitrust merger review are different, they do share many of the same goals. As the D.C. Circuit first stated in 1968 and later reaffirmed in 1980 in *United States v. FCC,* the "basic goal of governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible."[20] As a result, the D.C. Circuit "has insisted that the [FCC] consider antitrust policy as an important part of their public interest calculus."[21] According to (now) Supreme Court Justice Stephen Breyer, these goals are "low and economically efficient prices, innovation, and efficient production methods."[22] As such, assertions that there is no relationship between antitrust and economic regulation completely miss the point.[23] Indeed, as Supreme Court Justice Felix Frankfurter stated over fifty years ago, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[24]

While FCC review must include some degree of competitive analysis, the FCC is plainly permitted to come to different conclusions than a strict antitrust review (conducted by the DOJ

---

the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.,* to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups"); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 & n. 7 (1976) (employee job concerns do not fall within the scope of an agency's "public interest" inquiry to ensure "just and reasonable rates", because "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare."

19 *See supra* n. 2; *see also* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FED. COM. L. J. 427 (2001); PROGRESS AND FREEDOM FOUNDATION DIGITAL AGE COMMUNICATIONS ACT PROJECT, *Proposal of the Regulatory Framework Working Group Release 1.0* (Randolph J. May and James B. Speta Co-Chairs) (June 2005) at 21 (arguing that a new telecom act is necessary because "the current model of regulation [is] based on vague standards such as the 'public interest' and 'just and reasonable'").

20 *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (quoting *Northern Natural Gas co. v. FPC,* 399 F.2d 953, 959 (D.C. Cir. 1968)).

21 *Id.*

22 *Town of Concord v. Boston Edison Co*., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.), *cert. denied*, 499 U.S. 931 (1991).

23 *See, e.g*., *Northern Natural Gas v. FPC*, *supra* n. 20, 399 F.2d at 961 ("In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content' to the broad statutory concept of the 'public interest.'"); *United States v. AT&T*, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) (it is "not appropriate to distinguish between Communications Act standards and antitrust standards" because "both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest").

24 *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94-95 (1953).

or FTC) may determine. Indeed, the seminal case regarding the FCC's public interest authority resulted from the DOJ disagreeing with and challenging in court the FCC's approval of an important transaction in the satellite industry in the 1970s, which the DOJ believed was anticompetitive. The D.C. Circuit ruled in favor of the FCC, stating that all the FCC must do, in the exercise of its responsibilities, is "*make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations*."[25] The *United States v. FCC* decision vividly shows that the FCC's authority, while it includes competition policies, is a separate and distinct duty from the antitrust enforcement agencies'. The FCC has a significantly different standard.[26]

The FCC's charge is no easy task.[27] The Hart-Scott-Rodino Act merger review process focuses upon whether the merged firm would be able to sustain a "small but significant and nontransitory" increase in price over a very short time-span and will examine entry that is likely to occur within two years. This approach, by definition, largely focuses the attention of the antitrust enforcement agencies on the current competitive environment and not on the environment that is likely to emerge over the next five to ten years. The FCC's authority under the Communications Act is significantly broader because the FCC, like other administrative

---

25 *United States v. FCC*, *supra* n. 20, 652 F.2d at 81-82 (*quoting Northern Natural Gas Co. v. FPC*, *id.*). *See also FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 755-62 (1973) (regulatory agencies must consider "matters relating to both the broad purposes" of their enabling statutes "and the fundamental national economic policy expressed in the antitrust laws"); *FCC v. RCA, supra* n. 24, 346 U.S. at 94 ("There can be no doubt that competition is a relevant factor in weighing the public interest.").

26 *See, e.g.*, *ABC Cos. Inc.*, 7 F.C.C.2d 245, 249 (1966) ("Antitrust Division is charged with the enforcement of the antitrust laws . . . while the Commission is charged with effectuating the policies of the Communications Act."); *see also* Dissenting Statement of FTC Commissioner Mary L. Azcuenaga in *Time Warner, Inc.*, FTC File No. 961-0004 (Aug. 14, 1996) (because FCC already had rules in place prohibiting discriminatory prices and practices, there was "little justification" for the FTC to require Time Warner to "comply with communications law" and, therefore, to the extent that the proposed consent order offered "a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress"; as such, "*[t]here is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC*." (emphasis supplied)).

27 *See, e.g.*, *Turner Broadcasting System, Inc., v. FCC*, 117 S. Ct. 1174, 1189 (1997) (regulatory schemes concerning telecommunications have "special significance" because of the "inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change"); *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Court is "aware . . . of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, *see, e.g.*, Telecommunications Act of 1996 . . . ."); *Columbia Broadcasting, Inc v. Democratic National Committee*, 412 U.S. 94, 102, 93 S. Ct. 2080, 2086 (1973) ("The problems of regulation are rendered more difficult because the . . . industry is dynamic in terms of technological change"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (the "Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects" of the telecommunications industry").

agencies, is "entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry."[28] Therefore, it is not unreasonable to expect the FCC to consider the ramifications of its policies over a longer period. Given this broader responsibility, it is incumbent upon the Commission when reviewing industry transactions to take a far more dynamic and flexible approach.[29]

Notwithstanding, several commentators have argued that the FCC should simply abandon its merger review authority and defer all matters of competition analysis to the DOJ or FTC.[30] But it is not entirely clear that the antitrust legal standards, particularly the "unfair competition" standard of Section 5 of the Federal Trade Commission Act, are also not subject to *ad hoc* manipulation by enforcement authorities and regulatory excess.[31] FCC merger orders under the "public interest" standard are subject to judicial review, just as courts review consent decrees entered into by the government and merging parties pursuant to the Tunney Act. As such, the argument that somehow the DOJ/FTC process is in fact inherently "better" or "more consistent" founders on fact.

---

[28] *FCC v. RCA, supra* n. 24, 346 U.S. at 93-95; *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the [DOJ] . . . must apply" because administrative agency is not required to "serve as an enforcer of antitrust policy in conjunction" with the DOJ or FTC; thus, while agency "must include antitrust considerations in its public interest calculations . . . it is not bound to use antitrust principles when they may be inconsistent with the [agency's] regulatory goals"); *see also National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) (Congress, through the Communications Act, "gave the Commission not niggardly but expansive powers."); *Craig O. McCaw*, Memorandum Opinion & Order, 9 FCC Rcd. 5836 (1994) at ¶ 7, *aff'd*, *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (FCC's "jurisdiction under the Communications Act gives us much more flexibility and more precise enforcement tools that the typical court has").

[29] *See* Walter G. Bolter et al., TELECOMMUNICATIONS POLICY FOR THE 1980'S: THE TRANSITION TO COMPETITION 360 (1984); *see also* Lawrence J. Spiwak, *What Hath Congress Wrought? Reorienting Economic Analysis Of Telecommunications Markets After The 1996 Act,* ANTITRUST MAGAZINE (Spring 1997) and citations therein.

[30] *See, e.g., supra* n. 2.

[31] As former FTC Chairman Timothy Muris noted, the "unfair competition standard" in the wrong hands produced "a series of proposed rules relying upon vague theories of unfairness that often had no empirical basis, could be based entirely upon the Commissioners' personal values, and did not have to consider the ultimate *costs* to consumers of foregoing their ability to choose freely in the marketplace." Remarks of Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, before the Progress and Freedom Foundation's Aspen Summit, "Cyberspace and the American Dream" (Aug. 19, 2003) (available at: http://www.ftc.gov/speeches/muris/030819aspen.htm#N_49_).

IV. With Great Power Comes Great Responsibility

Of course, while the FCC clearly has the obligation to examine competitive issues, a crucial question is whether there are any appropriate limits on the FCC's authority. Unfortunately, the FCC has in the past interpreted its mandate incorrectly, and did not limit its review to determining whether a merger is "in" or "consistent with" the public interest[32] but instead sought to utilize the merger review process to otherwise "*enhance* the public interest."[33] Critics have seized upon this inconsistency and claimed that the FCC has abused its authority to impose narrow-tailored merger conditions and, therefore, cannot be trusted to uphold the basic maxim that competition policy is designed to protect competition and not individual competitors.[34] However, while the FCC has not always stuck to this fundamental precept, the law is clear that the FCC must exercise its public interest authority with analytical rigor and caution.

The most important limitation on the FCC's public interest standard is the precept that the focus of the standard is upon the interests of the *public,* and not the interests of *competitors* who may seek to use the merger process to hamstring a competitor. For example, in the 1981 case of *Hawaiian Telephone v. FCC,*[35] the D.C. Circuit overturned an FCC grant of Section 214 authority for service between the U.S. mainland and Hawaii because it found that the Commission had engaged in an *ad hoc* approach which improperly aimed at "equalizing competition among competitors." The D.C. Circuit stated that FCC public interest analysis must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change." The court found that it was "all too embarrassingly apparent that the

[32] *See, e.g., Pacific Power & Light Co. v. FPC,* 111 F.2d 1014, 1016 (9th Cir. 1940) (It is "enough if the applicants show that the proposed merger is *compatible* with the public interest." An agency "as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law.")

[33] *See, e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, Memorandum Opinion & Order, FCC 97-286 (rel. Aug. 14, 1997) at ¶ 2. In that decision, the FCC, rather than requiring applicants to demonstrate that their proposed merger was in the public interest for any number of possible reasons (like efficiency savings that would lead to lower rates), the FCC stated that "[i]n order to find that a merger is in the public interest, we must . . . be convinced that it will *enhance competition*. A merger will be pro-competitive if the harms to competition . . . are outweighed by the benefits that *enhance competition*. If applicants cannot carry this burden, the applications must be denied." (emphasis supplied). Competition is certainly an important goal, but this singular focus on only that one public interest concern—to the exclusion of others—was, in our view, improper.

[34] *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)).

[35] 498 F.2d 771 (D.C. Cir. 1974). The "public interest" standard in the Communications Act is applied in many contexts, such as the granting of licenses, so court decisions on those topics, like *Hawaiian Telephone,* provide important insight on the limitations of the FCC authority in this area.

Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically equalizing competition among competitors."[36]

Subsequent decisions reiterate the importance that consumer welfare analysis plays in the FCC's public interest standard. In 1995, the various parties challenged the Commission's approval of the acquisition of McCaw Cellular licenses by AT&T by arguing that the FCC should have imposed the antitrust Modified Final Judgment ("MFJ") restrictions applicable to the Regional Bell Operating Companies ("RBOCs") on the merged firm. Citing *Hawaiian Telephone,* the D.C. Circuit rejected merger opponents' arguments and found that the application of the MFJ restrictions to the merged entity would "serve the interests only of the RBOCs rather than those of the public." The court stated that when the Commission considers whether a proposed merger serves the public interest, the "*Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors.'*"[37]

The FCC's merger authority is also indirectly limited by statute, in that merger conditions cannot be used to avoid statutory mandates.[38] In 2001, the D.C. Circuit overturned the FCC's conditional approval of SBC's acquisition of Ameritech, holding that the FCC strayed far from its merger review authority in an attempt to invent a new regulatory regime for broadband services by means of a merger condition. One SBC/Ameritech merger condition permitted the merged firm to provide advanced services through a separate subsidiary that would not be subject to the unbundling and resale provisions of Section 251 of the Act.[39] Competitors

---

[36] *Id.* at 775-76.

[37] *SBC Communications*, *supra* n. 28, 56 F.3d at 1491 (emphasis supplied) (citing *Hawaiian Telephone*, *supra* n. 35); *W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("equalization of competition is not itself a sufficient basis for Commission action")). One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is analytically the equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As the FCC's former chief economist recently argued, it is very "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" do nothing but harm, rather than improve, consumer welfare. Joseph Farrell, *Creating Local Competition*, 49 FED. COMM. L.J. 201, 212 (1996). In highly concentrated industries, the focus of policy should be on regulation that promotes competitive entry, rather than regulation that "protects competition." The later will often turn into the mere protection of the private interests of competitors.

[38] For example, section 303(r) of the Communications Act provides that "except as otherwise provided in this Act, the Commission . . . shall . . . prescribe such . . . conditions, *not inconsistent with law*, as may be necessary to carry out *the provisions of this Act*." 47 U.S.C. § 303(r) (emphasis added).

[39] Commissioner Harold Furchtgott-Roth dissented from this part of the FCC's order. In a separate statement that foreshadowed the D.C. Circuit's future ruling, Commissioner Furchtgott-Roth stated that the conditions adopted were "inconsistent with specific sections of the Communications Act." *See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and*

(Footnote Continued….)

challenged that decision, arguing that the FCC's condition was "simply a device to accomplish indirectly what the statute clearly forbids" and constituted an unreasonable exercise of the FCC's merger review authority. The D.C. Circuit agreed and called the FCC's action an attempt to "sideslip § 251(c)'s requirements." Therefore, while the FCC has statutory authority to review and condition mergers, it does not have the authority to use merger conditions to circumvent the statutes the agency is charged with administering.

Finally, legal scholars have expressed concern that the authority to review mergers is a powerful tool that can easily be misapplied. With regard to important industry transactions, this "hold up" power borders on granting the agency absolute power for which there is no check or balance. If agencies approach this task without self-limiting their use of this authority, then the potential to use the process to aggrandize authority and abuse it will be strong. As Judge Frank Easterbrook observed well over twenty years ago,

> Often an agency with the power to deny an application (say, a request to commence service) or to delay the grant of the application will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority. The conditioning power is limited, of course, by private responses to the ultimatums—firms will not agree to conditions more onerous than the losses they would suffer from the agency's pursuit of the options expressly granted by the statute. The firm will accept the options expressly granted by the statute. *The firm will accept the conditions only when they make both it and the agency (representing the public or some other constituency) better off. Still, though, the agency's options often are potent, and the grant of an application on condition may greatly increase the span of the agency's control.*[40]

Thus, FCC Commissioners should exercise restraint on their collective or individual efforts to use the FCC's merger authority to alter the industry through conditions that would otherwise be unobtainable through the "normal channels."

Accordingly, while the FCC is well within its authority to issue narrowly-tailored conditions as appropriate to remedy a merger-related harm, viewing industry mergers as opportunities to promote or jump-start an affirmative public policy agenda—particularly if policymakers are

---

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, Separate Statement of Commissioner Harold Furchtgott-Roth Concurring in Part, Dissenting in Part, FCC No. 99-279 (Oct. 6, 1999).

40 Frank Easterbrook, *The Court and the Economic System,* 98 HARV. L. REV. 4, 39 (1984) (emphasis supplied).

frustrated by an inability to achieve a political consensus on nationwide rules of general applicability—is a troubling extension of regulatory authority by the FCC. While it may be appealing for policymakers to attempt to advance a policy agenda through merger conditions, using the leverage of the merger review process to force a particular outcome down the throats of one particular firm in the industry ultimately may constitute a violation of the public trust. Instead of acting consistent with the public interest, the FCC would be advancing a public policy agenda for which it otherwise would not have the legal authority or political support.

Moreover, conditioning particular mergers may fail to solve industry-wide problems with industry-wide solutions.[41] For example, for the last year, AT&T and Verizon have agreed to conduct their businesses in accordance with the Commission's *Broadband Internet Access Policy Statement*[42] as part of voluntary merger commitments made in relation to the SBC-AT&T and Verizon-MCI mergers.[43] Yet, the nation's cable industry, which provides more residential broadband connections than AT&T and Verizon combined, has not been subject to that same network neutrality regime, nor has Qwest, BellSouth, nor the nation's other local telephone or wireless companies. The merits of such a policy should be debated and considered on an industry-wide basis in a forum of industry-wide applicability.[44] Only in that setting can the industry and the public actively participate in its construction, application, and uniform enforcement.[45]

---

41 For example, while the FCC was effectively enjoined by the Eighth Circuit from enforcing the TELRIC pricing rules standard for unbundled network elements with incumbent LECs and the state commissions, Bell Atlantic was required to sell network elements at those TELRIC prices by virtue of merger conditions in the Bell Atlantic/NYNEX merger proceedings. One does not have to agree or disagree with TELRIC pricing of UNEs to recognize the *ad hoc* nature of this policy, as other Bell companies, such as BellSouth and U S WEST, were not subject to such rules. *In re NYNEX Corporation and Bell Atlantic Corporation*, Memorandum Opinion and Order, 12 FCC Rcd. 19,985 (1997); *see also* Remarks By Chairman Reed Hundt To State Commissioners on the Bell Atlantic/NYNEX Merger (Oct. 3, 1997)(available at: http://www.fcc.gov/Speeches/Hundt/spreh758.html).

42 *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* FCC 05-191, POLICY STATEMENT (rel. Sep. 23, 2005) ("*Broadband Internet Access Policy Statement*").

43 *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183 (rel. Nov. 17, 2005); *In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control,* WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005).

44 Proponents of such a policy would no doubt prefer nationwide rules of general applicability but might view mergers as a "second-best" alternative. But this temptation should be avoided because it has the potential to create a complicated patchwork of legal regimes over which there is a clear, nationwide interest.

45 Using merger related proceedings to change existing regulations also could run afoul of the Administrative Procedure Act's (APA) requirements that an agency provide adequate public notice of any pending rule change or decision. The Supreme Court has held that if an agency adopts "a new position inconsistent with" an existing

(Footnote Continued….)

The merger condition drafting and adoption process as a practical matter does not live up to this obligation, as it often occurs in negotiations between the FCC and the merging entities with very little opportunity for public input and review. Are consumers really well-served by backroom, closed-door negotiations between the regulator and prospective merging parties over important public issues? The opportunity for the regulator and the regulated to game such a system to the exclusion of important consumer and competitor interests is strong.

In conclusion, while it is appropriate to impose narrowly-tailored conditions to remedy specific merger-related harms when consumer welfare is at risk, to the extent there are policy issues of generic concern, those issues are better handled in an agency proceeding where they can be effectively dealt with in a focused, comprehensive and public manner.[46]

V. Case Study: Network Neutrality

One of the most politically-charged issues that has arisen in the last several mergers reviewed by the FCC is the emerging issue of "network neutrality."[47] Since proposals for network neutrality clearly involve all segments of the industry—wireline, cable and wireless—logic would dictate that those network neutrality proposals are best not reviewed in the context of a company-specific merger. As discussed above, an industry-wide issue should be examined in an industry-wide context.

Phoenix Center research has shown that network neutrality presents a number of important and complex questions, and that application of these network neutrality principles carries significant risks. It certainly is always proper for the FCC to conduct a notice of inquiry to inform its decision making on network neutrality (or any other pressing policy issue it deems

---

regulation or effects "a substantive change in the regulation," notice and comment under section 553(b) of the Administrative Procedures Act ("APA") is required. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). The D.C. Circuit recently ruled that "fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretive rule." *United States Telecom Ass'n and CenturyTel, Inc. v. FCC,* Nos. 03-1414, 03-1443 (D.C. Cir. Mar. 11, 2005), slip op. at 12.

[46] *Adelphia-Time Warner-Comcast*, *supra* n. 15 at ¶ 192 ("We find that some of the concerns raised are not transaction-specific and are more appropriately addressed in other proceedings.")

[47] *See SBC-AT&T, supra* n. 43, at ¶ 125 (committing merged entity to conduct its business consistent with the FCC's Broadband Internet Access policy statement for two years); *Verizon-MCI, supra* n. 43, at ¶ 130 (same); *but see Adelphia-Time Warner-Comcast*, *supra* n. 15 (containing no such commitment from the two largest cable system providers). *See also Application for Consent to Transfer Control filed by AT&T Inc. and BellSouth Corp.*, WC Docket No. 06-74, Public Notice, DA 06-2035 (Oct. 13, 2006) (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-2035A1.pdf). In that Public Notice, the FCC requested comment on a series of merger conditions offered by AT&T in the context of its merger with BellSouth. In that proposal, AT&T offered to conduct business consistent with the FCC's *Broadband Internet Access Policy Statem*ent for at least thirty months.

appropriate). But given the complexities of the telecom business, the unintended consequences of attempting to formulate and enforce a "bright line" network neutrality rule could far outweigh the public benefits.[48] Given the importance of this issue and the risk that network neutrality regulation could substantially impact broadband deployment, these proposals and their consequences deserve to be considered and debated in an open, industry-wide setting—and not the haste of a company-specific merger review.

In general, previous research concludes that network operators would not have the incentive to engage in discriminatory.[49] But if such conduct did in fact occur, then the case law discussed above makes clear that not only does FCC does have the ability to act under its existing authority, but its inquiry must be made using sound economic and competition principles. Issues raised by network neutrality proposals are complex and the FCC is well-positioned for it to utilize its unique industry expertise to take a flexible, case-by-case approach to resolving such dispute, as it has in the past.[50]

VI. Conclusion

Without question, the FCC has the authority and obligation to review communications industry mergers. But this authority is constrained: precedent demands that the FCC establish and carry out a cohesive and rigorous approach to merger review that is supported by the law, economics and, of course, the facts. Merger conditions must take into account competitive factors but also must be in the "public interest" and not the interest of individual competitors that are looking to saddle their rivals with unique regulatory burdens.

While there are restraints on the FCC's merger authority, the public interest standard does give the agency great power. Such power begets temptation— including the temptation to seek to accomplish through merger conditions policy outcomes that would otherwise be difficult to

---

48 G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Network Neutrality and Industry Structure*, PHOENIX CENTER POLICY PAPER NO. 24 (April 2006) (available at: http://www.phoenix-center.org/pcpp/PCPP24Final.pdf *and to be reprinted in* 29 HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL (Forthcoming Spring 2007)); G. S. Ford, T. M. Koutsky and L. J. Spiwak, *The Efficiency Risk of Network Neutrality Rules*, PHOENIX CENTER POLICY BULLETIN NO. 16 (May 2006) (available at: http://www.phoenix-center.org/PolicyBulletin/PCPB16Final.pdf); G. S. Ford, T. M. Koutsky and L. J. Spiwak, *The Burden of Network Neutrality Mandates on Rural Broadband Deployment*, PHOENIX CENTER POLICY PAPER NO. 25 (July 2006)(available at: http://www.phoenix-center.org/pcpp/PCPP25Final.pdf).

49 *See, e.g.*, J. Farrell & P. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet* Age, 17 HARVARD J. OF LAW & TECHNOLOGY 85 (2003).

50 Not all commentators believe that the FCC is the appropriate forum for resolving network neutrality disputes. *See, e.g.*, R. Gifford, *Let the FTC Do It! Maybe It Already Can*, PROGRESS SNAPSHOT RELEASE 2.12 (April 2006); R. W. Hahn, and R. E. Litan, *Competition and Antitrust Law Can Protect the Internet*, AEI-BROOKINGS JOINT CENTER POLICY MATTERS 06-21 (September 2006).

obtain. But FCC Commissioners should exercise restraint in their efforts to regulate through merger conditions. Important public policy issues deserve to be debated openly in industry-wide settings and should not be hidden in the backrooms of the FCC.