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A Proposal for Improving the FCC's Merger Review Process

by

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The newly constituted Federal Communications Commission should act to improve its merger review process. One way it could accomplish this would be to issue a policy statement to indicate clearly and concisely key elements of the approach it intends to follow in conducting merger reviews.

At least since March 2000, in this [Legal Times column entitled "Any Volunteers,"](#) I have been advocating reform of the process under which the FCC reviews proposed transactions that require its approval as a result of the transfer or assignment of licenses or authorizations. This [National Journal piece, "Reform the Process,"](#) published in May 2005, is to the same effect.

In these early pieces and dozens since then, I have highlighted these problematic aspects of the manner in which merger reviews are conducted: (1) the reviews take too long to complete; (2) the competition analysis performed by the FCC largely duplicate those of the antitrust authorities (usually the Department of Justice); and (3) the FCC all too frequently abuses its "public interest" authority by imposing conditions unrelated to any transaction-specific harms.

In other words, invoking the vague congressional delegation granting it authority to approve proposed license and authorizations only if they are in the "public interest," the Commission engages, as I put it in the March 2000 [Legal Times column](#), in "regulation by condition." Of

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course, “regulation by condition” avoids the Administrative Procedure Act requirements that apply to regulation through rulemaking or adjudication.

Congress could reform the agency’s merger review process, and I have urged it to do so at least twice in testimony before the House Energy and Commerce Committee’s Subcommittee on Communications and Technology. My testimony in 2011 and 2013 advocating FCC process reform, including reform of the transaction review process, is [here](#) and [here](#). [Congressman Greg Walden, then Subcommittee Chairman and now Chairman of the full Commerce Committee, deserves much credit for his efforts regarding process reform during the time he led the Subcommittee.]

While congressional action is necessary to achieve the full measure of reform, and to increase the likelihood that such reform is durable, there is no reason the FCC itself, in the meantime, should not advance the merger review reform cause through the adoption of a general policy statement. A policy statement, which the Administrative Procedure Act explicitly contemplates and which is exempt from the notice and comment requirements that apply to rulemaking, would announce to the public that the FCC intends to act to improve the process. Even to the extent the statement may amount, in part, to a reaffirmation of existing policy or agency precedent, the new pronouncement would be useful.

While other matters might also be addressed, the policy statement should contain at least these two fundamental elements:

- A commitment to complete review of proposed mergers in a timely fashion.
- A commitment to refrain from imposing conditions on approvals of transactions unless they are narrowly tailored to address harms uniquely presented by the specific transaction.

A brief word about each element.

Timeliness. The Commission presently has a stated goal of completing transaction reviews within 180 days. But with regard to significant transactions, the goal is rarely achieved. Indeed, FCC reviews of significant transactions often take more than a year. To be sure, not all of the delays are attributable to the FCC; there may be valid reasons for “stopping the clock,” for example, relating to a refusal of a party to provide pertinent information.

Nevertheless, in light of the rapidity with which the communications landscape is changing, and the imperatives which drive market participants to seek mergers to expand their operations, achieve greater efficiencies, implement new business models or market strategies, or the like, the FCC should commit itself, except in exceptional circumstances to be explained, to actually completing its merger reviews within 180 days.

One way that the Commission surely can help accomplish the timeliness commitment is to refrain from considering the imposition of extraneous merger conditions. It is undeniable that, in the past, the agency has devoted substantial amounts of time and resources to consideration of

conditions that should have been “out of bounds” for the review proceeding. This only delays agency action in completing the review.

Refrain from imposing extraneous condition. Aside from delaying completion of the review process, the Commission’s resort to “regulation by condition” frequently leads to unsound policy and inequitable treatment of similarly situated regulated market participants. There are many examples that could be cited, but here are just two – an old one and a current one. One of the 30 regulatory conditions comprising 60 pages attached to the approval of the SBC Communications/Ameritech merger required the merged company to roll out advanced services to low income customers. However meritorious this idea might have been as a general proposition, it did not address a claimed transaction-specific harm. If the Commission wanted to adopt a regulatory requirement to aid low-income persons, it should have considered doing so in a generic rulemaking proceeding.

A recent example is particularly striking because it is so ill-advised. In approving the proposed Charter/Time Warner Cable/Bright House merger in May 2016, the FCC imposed a condition requiring the merged company to offer broadband service of at least 60 Mbps to at least two million new consumer locations within five years. And at least one million of the new locations must be in areas already served by an Internet service provider offering speeds of at least 25 Mbps. The Commission did not even claim the novel “build-out” condition was intended to address any transaction-specific harm. Rather, it merely said it was a “public interest” benefit.

The Commission currently is considering petitions to reconsider the Charter “overbuild” condition. I agree with the petitioners that, among other reasons, the condition constitutes unsound policy because the government-dictated entry of Charter into locations already served by a provider likely will harm small and medium-sized ISPs that are the most likely targets of the overbuild condition. And, in any event, government-mandated entry into specific geographic areas by one company subject to “regulation by condition” is likely to lead to an uneconomic allocation of resources that otherwise could be utilized more productively to achieve larger public benefits without the competitive distortions.

But my purpose here is not to argue the particular public interest detriments of the Charter “overbuild” condition. Rather, it is to show why the imposition of extraneous conditions unrelated to transaction-specific harms is often unfair to market competitors and inconsistent with sound policy. If the Commission wants to consider adopting new regulatory requirements such as those discussed above, it should do so in an industry-wide generic rulemaking proceeding.

It may be that the Commission’s action with regard to the Charter overbuild condition runs counter to its own precedents suggesting the agency will impose conditions only to remedy transaction-specific harms. If so, this is all the more reason for the Commission to issue a policy statement along the lines proposed here. The policy statement would serve the purpose of making clear that, in the future, the agency will not impose a merger condition unless the condition addresses a harm uniquely presented by the specific transaction and the condition is narrowly tailored to address such transaction-specific harm.

In other words, the policy statement would make clear that the FCC will not use the delegation of “public interest” authority as a blank check upon which it can draft merger conditions unrelated to transaction-specific harms.

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This *Perspectives* is the seventh in a series of fresh reform proposals that the Free State Foundation has issued since the beginning of the year. Each publication contains new ideas for reforming communications policy. Here are the previous publications:

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Regulatory Reviews](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 1 (January 3, 2017).

Randolph J. May, [A Proposal for Trialing FCC Process Reforms](#) , FSF Blog, January 9, 2017.

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Forbearance Process](#),” *Perspectives from FSF Scholars*, Vol. 12, No.4 (January 17, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Video Competition Policy](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 5 (February 8, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Regulations Impacting Small Businesses](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 6 (February 13, 2017).

Randolph J. May and Seth L. Cooper, [A Proposal for Spurring New Technologies and Communications Services](#), *Perspectives from FSF Scholars*, Vol. 12, No. 7 (February 21, 2017).