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Special Access and the FCC's Broken Merger Review Process

by
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Many times in the past I have written about the Federal Communications Commission's merger review process, especially how, by its very nature, the process often produces perverse public policy results. As early as March 2000, in an essay in Legal Times called "Any Volunteers?," I bemoaned the FCC's practice of "regulation by condition" in connection with merger reviews. The now common "regulation by condition" phenomenon is enabled in large part because the "public interest" standard under which merger proposals are evaluated is so indeterminate that it provides commissioners with virtually unbridled discretion to extract "voluntary" concessions from merger proponents understandably anxious to have the agency approve their pending merger. The concessions take the form of "volunteered" conditions, many of which have nothing to do with any claimed anticompetitive effect of the merger.

It is now time for the FCC to take a voluntary action of its own, one of regulatory self-restraint and modesty. As explained below, it should adopt a Policy Statement which more narrowly confines the exercise of its merger review authority by voluntarily reining in its presently unbounded discretion under the public interest standard.

The AT&T-BellSouth merger is only the most recent case demonstrating the need for reform of the FCC's review process. Because of a deadlock among the four voting commissioners (one of the five commissioners recused himself), in order to get the merger approved AT&T was forced to accede to certain conditions insisted upon by Commissioners Michael Copps and Jonathan Adelstein. The net neutrality condition has garnered the most attention because of the vociferous debate about whether new mandates are necessary to prevent Internet service providers from discriminating against independent content and applications providers. Because of the competition that already exists in the broadband marketplace, with still more competition looming in the future, the likelihood of any such discrimination occurring is minimal. In light of this

minimal threat, certainly the costs in foregone investment and innovation likely to result from the imposition of net neutrality mandates outweigh any benefits.

But, perversely, while AT&T and BellSouth were forced to agree to a net neutrality condition based on highly exaggerated concerns about potential future discrimination, they were, at the same time, put in the position, again by Commissioners Copps and Adelstein, of "volunteering" a separate condition governing special access circuits, a condition that appears to implement a discriminatory pricing regime in contravention of the Communications Act and the Commission's rules. Keep in mind that special access circuits are high capacity facilities used by major business and carrier customers. Because these high-cap circuits are subject to much more competition than the ordinary lines used to serve residential customers, their rates have been deregulated for a number of years in many metropolitan areas.

Under the duress of the merger approval process, AT&T volunteered to reduce the rates for certain already-deregulated special access circuits for four years to the same level that prevails for circuits that have not been deregulated. This forced concession in itself is unfortunate, because as FCC Chairman Kevin Martin and Commissioner Deborah Tate declared in a separate statement, "the reimposition of rate regulation in the special access market is inconsistent with the Commission's general policies of deregulating prices in competitive markets." Chairman Martin and Commissioner Tate rightly pointed out that reimposing special access rate regulation is not warranted by current market conditions "and may deter facilities investment."

But the special access condition goes further in that AT&T purports to limit the applicability of the reduced rates so that some customers may avail themselves of the discounts and others may not. Specifically, carriers like Verizon and Qwest do not qualify for the discounted rates unless they also reduce their special access rates in their own regions. In other words, the merger condition not only purports to bind AT&T, but also to induce carriers that are not parties to the merger and that are not before the Commission to change their rates. This further aspect makes the condition not only problematical from a policy perspective, but from a legal one as well.

As Chairman Martin and Commissioner Tate explain, the condition appears to conflict with the Communications Act's prohibition in Section 202(a) that prohibits discriminatory pricing of communications services. (Note that special access circuits are communications services subject to the Title II common carrier regulatory provisions, not information services, such as broadband Internet services, which are not.) For this reason, Chairman Martin and Commissioner Tate declared that when AT&T attempts to fulfill the special access condition by filing tariffs that implement its merger commitment, "we would oppose such discriminatory practices and would encourage such tariffs to be rejected."

Verizon has appealed this discriminatory pricing aspect of the merger approval action to the court of appeals. As Chairman Martin and Commissioner Tate explained, normally customers, whether they are carriers or non-carriers,

must be charged the same rate for like tariffed services. So, while it is hazardous predicting what courts will do, it looks like Verizon has a credible case.

Apart from the outcome of any particular court case, one thing should be abundantly clear: The current merger review process, with so much unconstrained discretion placed in the hands of the commissioners under the public interest standard, should be reformed. Short of legislative changes that would confine the Commission's role to determining whether the proposed merger is in compliance with all existing statutory and regulatory requirements, and which would defer to the antitrust authorities for assessment of the competitive impacts, there is one idea worth considering that the FCC can implement itself. The Commission could adopt a new Policy Statement that, at least for purposes of merger review proceedings if not more, constrains the agency's discretion under the public interest standard. For example, it would be a notable and worthy act of regulatory self-restraint for the Commission to say that, in the future, it will only consider imposing merger conditions that address alleged anticompetitive claims raised by the specific pending merger. If thought necessary, the Policy Statement could have an exception for "extraordinary" or "unusual" circumstances that the Commission determines require the imposition of conditions even when there is no claimed anticompetitive impact. The main point is that the FCC has it within its discretion to start down the path of merger review reform by more precisely defining what the public interest standard means in the merger review context.

Moving in this new direction of regulatory self-restraint would go a long way towards avoiding situations in which commissioners sanction a "volunteered" condition which, on its face, appears to sanction a discriminatory pricing regime. And all at the same time those same commissioners express concern about discrimination on the Internet that is unlikely ever to be of consequence. It just goes to show that treating "special access" in such an unwarrantedly special way can lead to especially questionable regulatory results.

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