

The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Perspectives from FSF Scholars

January 8, 2007

Vol. 2, No. 1

Network Neutrality And The Problems With Policymaking Through Merger Conditions

by
Christopher S. Yoo

Recent press reports have featured quotations lauding the [Federal Communication's Commission's action](#) clearing the AT&T-BellSouth merger as a landmark in establishing a new type of regulation known as "network neutrality." A review of the agency's official decisions on the issue reveals these claims to be somewhat overstated. The [FCC's most comprehensive action on wireline broadband policy](#) to date reveals that the agency explicitly rejected calls to mandate network neutrality, finding the evidence insufficient to justify imposing such a requirement. (See paragraph 96).

Network neutrality proponents take heart from the fact that at the same time the FCC released this decision in September 2005, it also issued a [Policy Statement](#) adopting principles acknowledging consumers' rights to access content, run applications, and attach devices as they see fit. The problem is that the Policy Statement explicitly acknowledged that it had no legal force of its own unless and until it was subsequently incorporated into formal rules.

Read together, these two pronouncements did not purport to establish a network neutrality mandate. Quite the contrary, they explicitly refused to do so. Although the FCC reserved the right to revisit the issue should evidence of problems emerge, any such change would presumably require further agency action, including an opportunity for public notice and comment as well as a reasoned explanation of what made the agency change its mind.

So what explains the recent statements suggesting that the FCC's action clearing the AT&T-BellSouth merger established a key regulatory precedent in favor of network neutrality? In order to obtain FCC clearance for this merger, AT&T offered to adhere to the Policy Statement and certain other network neutrality principles for a period of two years. This followed the inclusion of similar (although less extensive) conditions in the orders approving the Verizon-MCI and SBC-AT&T mergers in late 2005 requiring that the merged companies would adhere to the principles stated in the Policy Statement for two years.

The FCC has long made its approval of mergers contingent on the merging parties' willingness to agree to certain conditions, and there is nothing legally improper about the practice. That said, academic commentators have long found the widespread use of such merger conditions problematic and have advocated reforms to the FCC's role in the merger process. Unlike the agencies charged with enforcing the antitrust laws (the Justice Department and the Federal Trade Commission), which operate under strict deadlines and for which agency inaction constitutes merger approval, FCC review does not operate under any mandatory time restrictions, and agency inaction effectively constitutes merger disapproval. Although the FCC has adopted self-imposed guidelines limiting its time for review, it does not always follow those guidelines and routinely stops the clock at various points during the review process.

One result is that FCC merger review typically takes from nine to twelve months, which is considerably longer than the two to four months that typify review by the antitrust agencies. Such delays can cripple an industry's ability to adapt to dynamic technological change.

Furthermore, the fact that agency inaction constitutes nonapproval rather than approval allows the FCC to engage in what the D.C. Circuit's Chief Judge David Bazelon famously called "raised eyebrow" regulation, in which the agency simply draws out its consideration of the proceedings while highlighting to the parties the areas that it believes merit further study. The parties usually have no trouble taking the hint. As their need for regulatory approval becomes increasingly urgent, they begin trying to obtain clearance of their merger by "voluntarily" offering self-imposed conditions aimed at addressing the concerns emphasized by the FCC. Because these conditions are purportedly not the result of agency action, the FCC need not engage in any extended analysis of whether it represents a change in policy or how to integrate the conditions into the larger regulatory scheme. Instead the order clearing the merger simply notes that the agency accepts the merging parties' offer to adhere to certain enumerated conditions.

For example, the orders approving the [Verizon-MCI](#) and [SBC-AT&T](#) mergers simply noted that the FCC "took comfort" in the merging parties' voluntary commitments to adhere to the aforementioned Policy Statement and accepted them as being in the public interest. The supposed voluntariness of these commitments arguably insulates the commitment from judicial review as a legal matter and essentially eliminates any likelihood that, as a practical matter, either of the merging parties would challenge the conditions in court.

In other contexts, major policy decisions must typically be accompanied by an explanation of the assumptions underlying the decision, the major alternatives that the agency considered, the reasoning the agency used to arrive at the particular choice that it did, and how to reconcile the current decision with agency precedent. To help with this consideration, agencies typically give public notice of their proposed actions and open them up for public comment. Such analysis and opportunities for public participation were notably missing in the Verizon-MCI and SBC-AT&T proceedings and were absent again when the AT&T-BellSouth proceedings were brought to a close. Again, this is not to say that the FCC's actions were in any way unlawful. The problem is that the FCC's current role in the merger clearance process allows it, simply by dragging its feet, to make

piecemeal regulatory policy that does not gain the usual benefits of the full administrative process.

Ultimately, to survive judicial review, the agency will have to reconcile any new network neutrality mandate with its prior decision finding insufficient evidence to justify imposing such a requirement. Allowing unexplained merger conditions to effect such a major change in policy would thus be extremely problematic. As the D.C. Circuit's 1993 *Bechtel* decision makes clear, the FCC must adhere to the complete formalities of the administrative process before elevating a policy statement into a general regulatory obligation. In fact, the [joint statement issued by FCC Chairman Kevin Martin and FCC Commissioner Deborah Taylor Tate](#) in conjunction with the AT&T-BellSouth makes a point to remind everyone that merger conditions by their very nature only bind the merging parties.

By avoiding such scrutiny, policymaking through merger conditions may lead to unintended consequences that even network neutrality proponents may find unpalatable. These dangers are vividly demonstrated by the fact that some network neutrality advocates have warned that the network neutrality conditions included in the AT&T-BellSouth merger contain an exception for Internet protocol television (IPTV). They have raised the concern that this exception may end up swallowing the rule.

Network neutrality remains an active issue at the FCC. It also emerged one of the highest profile issues during the debates over possible amendments to the communication statutes that took place in Congress last year. The House of Representatives rejected network neutrality amendments at the Subcommittee, Committee, and full House levels by wide margins. The issue was even more contentious in the Senate, with a network neutrality amendment failing in the Senate Commerce Committee by a single vote.

With a new Commissioner on the FCC and a new Democratic majority in both houses of Congress, I have little doubt that network neutrality will again be on the regulatory and legislative agenda during the coming year. The ultimate resolution of this debate will inevitably disappoint one side or the other (or perhaps, in the spirit of true compromise, both). I would hope that network neutrality proponents and opponents would both agree that, regardless of whether network neutrality is ultimately addressed by Congress or the FCC, this debate should be given the benefit of the complete administrative and legislative process. A policy issue of such importance deserves no less.

Christopher S. Yoo is Professor of Law and Director of the Technology and Entertainment Law Program at Vanderbilt University. This commentary is offered by Professor Yoo as a guest scholar as part of the "Perspectives from FSF Scholars" series.