# Reform the Process

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Fueled largely by the digital revolution's technological onslaught, the communications industry is in the midst of major turmoil. Competition from new entrants and the breakdown of formerly distinct service boundaries are reshaping the industry landscape. In such a shifting marketplace environment, companies naturally seek to gain a competitive advantage-or to prevent their competitors from gaining one-by exploring new business arrangements. So it is not surprising that several megamergers, such as the proposed combinations of SBC and AT&T, Verizon and MCI, and Sprint and Nextel, are pending before the Federal Communications Commission (FCC) and the Department of Justice (DOJ).

In my view, today's industry environment argues in favor of a dynamic competitive analysis that takes full account of the rapid destruction of old business models and the emergence of new ones. In an age of "anywhere" minutes, the old notions of "long distance" and "local" markets are quickly becoming obsolete. Nonetheless, the proposed mergers undoubtedly will receive close scrutiny from the federal government. This is entirely appropriate, of course.

What is not appropriate is the way that the FCC, for its part, often handles mergers. The agency substantially duplicates the effort undertaken by DOJ. And its process frequently has been characterized by a whiff of regulatory extortion resulting from the imposition of merger conditions unrelated to compliance with existing statutory requirements or rules.

To understand how the FCC can improve its merger-review process, it is necessary to have in mind the statutory basis upon which the agency proceeds. Although it is authorized to review mergers involving communications carriers under the Clayton Act to determine if they will substantially lessen competition, the agency never uses that authority. Rather, it invokes its authority under the Communications Act of 1934 to determine whether license transfers are in the "public interest." Because major communications companies all have FCC-granted licenses that are integral to their business operations, the mergers cannot be consummated until the commission approves the license transfers.

**The 'public interest' standard**

The indeterminate nature of this "public interest" standard creates opportunities for regulatory overkill and abuse. By the same token, that very indeterminacy would allow the FCC, in an exercise of regulatory self-restraint, to reform the process. With Kevin Martin, a new forward-looking chairman at the helm, the agency should use the pending mergers to chart a new course.

Here is what should be done. First, the commission should largely defer to DOJ's expertise regarding competitive concerns. Even while refraining from exercising its authority to prevent mergers in restraint of trade, the chief, but not exclusive, focus of the FCC's review under the public-interest standard has been its assessment of the competitive effects of the proposed transaction. Of course, DOJ (or at times the Federal Trade Commission) is also charged with analyzing a merger's competitive impact. The FCC has attempted to differentiate its role by claiming that it must be convinced the merger will "enhance competition" while DOJ determines whether the merger will "substantially lessen competition." This seems more a matter of semantics than anything else. The reality is that the agencies avail themselves of essentially the same market information and perform a similar competitive analysis.

Second, the FCC should refrain from imposing "voluntary" conditions on merger proponents that are unrelated to existing statutory or regulatory requirements. In the past, the agency has used the unbounded vagueness of the public-interest standard to impose a sort of "regulation by condition." The FCC lets the merger proponents know in off-the-record negotiations that if they voluntarily offer to abide by certain conditions, the license-transfer applications will be approved subject to such conditions.

For example, when SBC merged with Ameritech in 1999, the companies eventually volunteered to abide by 30 separately enumerated regulatory conditions (not counting a multitude of subconditions). Most, such as requiring huge discounts for competitors' use of the merging parties' networks and priority build-out requirements for broadband services to low-income households, went far beyond existing statutory or rule requirements. However salutary such mandates might be if imposed on an industrywide basis, it is inappropriate, and unseemly, to engage in such a back-door process of regulatory extraction. Already, those who oppose the SBC-AT&T merger have proposed dozens of conditions unrelated to any competitive impacts unique to the merger, such as an almost certainly unconstitutional prohibition on SBC lobbying against municipal ownership of communications networks.

No one benefits from the wasteful expenditure of private and public resources resulting from duplication of tasks by government agencies. And important rule-of-law values are undermined by a process that takes advantage of the indeterminacy of a congressional delegation of authority to impose singular mandates on merger applicants as the price of obtaining a license transfer. More than a contortion of the English language is at stake here.

For American consumers to realize the full benefits of today's dynamic communications marketplace, merger proposals should be considered in a fair, timely and efficient manner. The FCC should avail itself of the opportunity presented by the pending license-transfer applications to reform its merger-review process. To do so would be a shining example of regulatory self-restraint.

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