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**Involuntary Volunteers at the FCC**

by

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Back in March 2000, I published an essay in *Legal Times* titled, "[Any Volunteers?](#)" The piece argued that the Federal Communications Commission's merger review process is often tainted by the agency's extraction of so-called "voluntary" conditions from merger applicants during the agency's consideration of a proposed transaction. Now, two decades later, the Court of Appeals for the District of Columbia Circuit has just issued an opinion in [Competitive Enterprise Institute v. FCC](#) in which the court also criticized, albeit in dicta, this aspect of the FCC's review process.

First, before returning to the D.C. Circuit's August 14, 2020, decision, here's some background.

Media or telecommunications companies holding spectrum licenses or other forms of authorization must obtain the FCC's prior approval before they may transfer control of such instruments or assign them to another party. Technically, the FCC does not review the proposed merger or acquisition *per se*, but rather reviews only the applications for transfer of control or assignment of the pertinent licenses. As a practical matter, however, for most transactions of any significance, transfer or assignment of the authorizations is crucial to consummation of the deal.

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In other words, absent Commission approval of the transfer of the licenses, the proposed merger would not go forward.

On what basis does the FCC decide whether or not to approve a proposed deal? The relevant portions of the Communications Act require that the agency determine that the transaction is in "the public interest."

Of course, the public interest standard is inherently vague, if not completely indeterminate. As Justice Felix Frankfurter remarked in the leading case of *FCC v. Pottsville Broadcasting Co.*, the standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." Well, another way of saying what Justice Frankfurter declared is that the public interest standard is essentially standardless.

You already may have surmised that this inherent indeterminacy is problematic when the FCC reviews merger applications. The public interest standard's vagueness enables the FCC to range far beyond analyzing specific impacts closely related to the proposed transaction. So, the agency can withhold approval until the applicants agree to "volunteer" merger conditions that the Commission has telegraphed, often in closed door meetings, that it wishes to impose.

At the time I published "[Any Volunteers?](#)" two decades ago, the FCC, after a fourteen months' review, had recently [approved an order](#) allowing the proposed merger of the Ameritech and SBC Communications telecom firms – subject to an agreement by the companies to abide by thirty detailed "volunteered" conditions. One of those conditions, for example, required the merged company to deploy advanced services to low-income household areas on an accelerated schedule relative to non-low-income households, a mandate that did not apply to other service providers or that was not required by the Communications Act or the agency's regulations.

At the time the SBC/Ameritech merger was approved, FCC Commissioner Harold Furthgott-Roth stated: "What emerged was a set of conditions proposed by the SBC that only those willing to contort the English language could call 'voluntary.'" Commissioner Michael Powell (subsequently FCC Chairman) commented: "I do not subscribe to ... the idea that a regulated entity can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties."

On many occasions before and after the SBC/Ameritech merger, the FCC has imposed "volunteered" conditions, and many of these conditions have had nothing to do with specific impacts related to the merger. Examples include a volunteered commitment for merging broadcast companies to carry more children's television programming, a commitment to cease offshoring a telecom firm's workforce, and a commitment to abide by various net neutrality practices. None of the commitments were mandated at the time by the Communications Act or FCC regulations. Of course, this is not to say that the Commission shouldn't have considered adopting one of more of them on an industry-wide basis as a rule in a generic proceeding.

But what the agency should not do is engage in "regulation by condition."

Which brings me back to the D.C. Circuit's opinion in the [Competitive Enterprise Institute](#) case involving the [FCC's May 2016 approval](#) of a merger between Charter Communications, Time

Warner Cable, and Bright House Networks. The Competitive Enterprise Institute challenged four conditions volunteered by the applicants during the review process which were then incorporated into the approval order. The court ruled that CEI had standing to challenge only two of the four conditions. Because the FCC declined to defend any of the conditions on the merits, those two were vacated.

Questions relating to CEI's standing are the most significant aspects of the case from a precedential perspective. My purpose here, however, is not to address standing, but rather to shine a spotlight on the court's discussion regarding the FCC's practice of imposing conditions not related to specific impacts caused by the merger at hand. Criticizing the FCC for not restricting its review to whether a merger applicant meets the Communications Act criteria for holding a license, the court declared: "[A]fter broadening its focus to the entire merger, the FCC imposed conditions sweeping even beyond that." And the court emphasized that the agency conceded that providing discounted service to low-income consumers, one of the two volunteered conditions imposed, "is not a transaction-specific benefit."

Finally, the court quoted this from FCC Commissioner Michael O'Rielly's dissent to the Charter merger order: "Once delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption." Strong language indeed – but, to my mind, not inapt regarding an abusive practice that should cease.

In my 2000 *Legal Times* "[Any Volunteers?](#)" essay, in [congressional testimony](#), and in many other venues, I've urged Congress to adopt legislation to reform the FCC's merger review process, including by restricting reviews to a determination as to whether the merged company will be in compliance with all existing Communications Act and regulatory requirements.

Waiting for Congress to adopt such reform legislation may be as frustrating as waiting for Godot. In the meantime, I have suggested that the FCC itself could take steps to reform the merger review process. In a Fall 2008 law review article, "[A Modest Plea for FCC Modesty Regarding the Public Interest Standard](#)," I recommended that the Commission "announce that it will refrain from imposing 'voluntary' conditions on merger proponents that are unrelated to compliance with existing statutory or regulatory requirements." In this exercise of self-restraint, "the agency would narrow substantially the application of the public interest standard."

It would be risky business to bet your house on Congress legislating merger review reform or the FCC adopting a new policy of self-restraint in its transaction review process. In the meantime, it would be a pretty safe bet that there will be more "volunteers" showing up at the Commission's door whenever telecom and media companies seek the agency's approval for a merger.

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