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FCC's Review of Mergers: Unauthorized and Inefficient

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FCC's Review of Mergers: Unauthorized and Inefficient

INTRODUCTION

An unassuming visitor to the Federal Communications Commission's website or a reader of FCC-related stories in the popular and trade press over the past few decades would conclude that the Commission has clear legal authority to review mergers. After all, FCC.gov includes a webpage entitled "Mergers and Acquisition," which carefully documents the Commission's role in reviewing each of scores of mergers.[1] The FCC has reviewed approximately 100 mergers, all publicly visible.

Several years ago, I wrote that the FCC lacks legal authority to review mergers and that such reviews harm FCC-regulated parties.[2] The passage of time has neither improved the legal foundation for FCC merger reviews nor has diminished the economic harm caused by the Commission's overreach.

This *Working Paper* reviews the following:

- The FCC has no statutory authority to review mergers.
- The FCC merger review process is only partly public.

[1] https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions.

[2] *See*, *e.g.*, Separate Statement of Commissioner Harold Furchtgott-Roth Concurring in Part, Dissenting in Part, Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, SBC Communications Inc./Ameritech, Memorandum Opinion and Order, FCC 99-279, 14 FCC Rcd 14712, ("*Ameritech Dissent*") https://tinyurl.com/2wdsfxkx; and H. Furchtgott-Roth, A Tough Act to Follow*?:* The Telecommunications Act of 1996 and the Separation of Powers Failure, AEI Press, 2006, pp.109-15. *See also* H, Furchtgott-Roth, K. R. Arner, and A. Roth, A New Look at Communications Law, ch. 16, unpublished manuscript, 2025.

- Injured parties have few if any practical means to dispute FCC merger reviews.
- Even if the FCC possessed statutory authority to review mergers, its review of mergers is an inefficient use of government resources.
- Even if FCC merger review were an efficient use of government resources, such review leads to market confusion and inefficient economic outcomes.

I. THE FCC LACKS STATUTORY AUTHORITY TO REVIEW MERGERS

Many government agencies issue licenses and permits. Some of these, such as a driver's license, a passport, or even license tags for an automobile, are not transferable to a third party. But other licenses and permits can be bought and sold. House construction or renovation requires numerous permits, and a person typically need not reapply for every permit after purchasing the house. Government agencies that issue licenses and permits do not view transactions of underlying assets as basis to review and potentially to block the underlying transaction.

The FCC is different. The Commission claims discretion to review mergers based not on federal antitrust law, namely the Clayton Act, but on the transfer of FCC permits and FCC licenses. The Clayton Act requires federal review of certain transactions for compliance with antitrust laws.[3] The Antitrust Division of the Justice Department and the Federal Trade Commission (FTC) are the primary federal antitrust agencies with authority to

[3] 15 U.S.C. §§ 12 – 27.

review transactions. The law specifies which other federal agencies possess statutory authority to review transactions.[4] The FCC is not among those listed. The Telecommunications Act of 1996 removed the Commission's authority under the Clayton Act to review mergers involving common carriers.[5]

Before 1996, the FCC primarily regulated several large companies, such as AT&T, NBC, CBS, and ABC, and numerous small telephone and broadcasting companies. Several large Bell Operating Companies, cable companies, and long-distance companies also emerged in the late 1980s and early 1990s. While the FCC could and did review—and sometimes block—license transfers involving all these companies, the first time the FCC reviewed a major merger was the Capital Cities-ABC merger in 1986.[6] The FCC reviewed only a handful of mergers before 1996.

Other federal agencies have a narrow role in reviewing mergers outside of Clayton Act. For example, the Federal Aviation Administration reviews airline mergers for safety concerns, but not for antitrust competition concerns.[7] In 2014, the FCC posted on its website an essay from its General

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[4] "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary." 15 U.S.C. § 18.

[5] CLAYTON ACT- Section 7 of the Clayton Act (15 U.S.C. § 18) is amended in the last paragraph by striking "Federal Communications Commission." Public Law 104-104, § 601(b)(3).

[6] *See* A New Look at Communications Law, *supra* note 2.

[7] *See*, *e.g.*, Federal Aviation Administration, "How Does That Work? The FAA's Safety Role in Airline Mergers," at https://www.faa.gov/sites/faa.gov/files/2022-07/Airline-Merger-Fact-Sheet_0.pdf.

Counsel, Jon Sallet, that attempts to explain how the FCC reviews both for competition and the public interest, as well as how the FCC's merger review is not the same as the Department of Justice's Section 7 Clayton Act review.[8] As Mr. Sallet stated:

> But, the 'public interest' standard is not limited to purely economic outcomes. It necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[9]

Most of the phrases from that passage of Mr. Sallet's essay can be located in a statute, but not in one that instructs the FCC to review mergers. Lacking statutory support, the Commission, not surprisingly, has refrained from drafting formal rules in the Code of Federal Regulations for its merger or transaction review process. There are no formal rules, only informal guidance found on the FCC website.[10]

Parties engaged in major mergers that coincidentally possess FCC permits or licenses have nothing more to rely on than informal guidance from

[8] FCC, Jon Sallet, "FCC Transaction Review: Competition and the Public Interest," Aug. 12, 2014, at https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.

[9] *Id.*, footnotes omitted.

[10] https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions.

the FCC website or informal guidance from informal communications with FCC staff. In contrast, merging parties that do not fall under FCC jurisdiction have clear guidelines to follow under the Clayton Act.

Merging parties at the FCC are left not only with uncertainty about process, but also about the outcome and appeal of an unfavorable outcome. The DOJ or the FTC must convince a judge to block a proposed merger. An unfavorable court ruling can be appealed. In contrast, the FCC only needs to refuse a license transfer or designate the application for hearing. Such merging parties cannot appeal an unfavorable decision or call for a hearing to a federal court.

When forced to cite a statutory source, the FCC primarily asserts merger review authority from three provisions of the Communications Act: Section 214 for common carriers, Section 310 for wireless operators, and various elastic provisions more generally. None of these provisions authorizes the Commission to specifically review mergers, not even under "public interest" authority.

A. Section 214

Harkening back to railroad antecedents in the Interstate Commerce Act, Sections 214(a) – (c) give the FCC authority for *granular* regulation of "lines" of service, not for *global* regulation of entire corporations. Section 214(a) of the Communications Act requires common carriers of interstate services (wireline telephony and wireless telephony) constructing, acquiring, or operating a "line" to have a certificate of "public convenience and necessity" for that "line" from the FCC.[11] The language of Section 214(a) is like the language in the Interstate Commerce Act pertaining to railroads, as amended by the Transportation Act of 1920, Section 402(18). Congress was apparently concerned that carriers could either abandon lines that provide service to otherwise unserved areas or could increase rates as a result of unnecessary extensions of lines. Nothing in Section 214(a) suggests, much less authorizes, FCC regulation of corporate mergers and large transactions. Nor does Section 214(a) pertain to a wide range of transactions the FCC reviews including those by broadcast companies, cable companies, and internet companies.

Section 214(c)[12] of the Communications Act involves the authority and discretion of the Commission to issue certificates of public convenience and necessity for individual "lines." The FCC may grant a petition for a certificate

[11] "No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line." 47 U.S.C. § 214(a).

[12] "The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest." 47 U.S.C. § 214(c).

in full or in part, or reject it.[13] The FCC also has discretion to places conditions on a certificate. Like with Section 214(a), nothing in Section 214(c) suggests or authorizes Commission regulation of corporate mergers and large transactions, much less on a "public interest" standard. Nor does Section 214(c) pertain to other regulated entities' transactions.

B. Section 310

Section 310 empowers the FCC to regulate transfers of wireless licenses and construction permits. Section 310(d), similar to the language in Section 310(b) of the original 1934 Act,[14] directs the FCC as follows:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.[15]

On its face, Section 310(d) grants the FCC authority to review and approve all transfers of wireless permits and licenses that meet a public interest, convenience, and necessity standard. The FCC has never defined that standard, and many transfers of wireless licenses and permits are routinely processed after generating no public comments. Only for certain license transfers, usually involving large mergers and acquisitions, does the FCC

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[13] For the historical antecedent, see Transportation Act of 1920, § 402(20).

[14] Communications Act of 1934, § 310(b) Pub. L. No. 73-416, 48. Stat. 1086 (1934).

[15] 47 U.S.C. § 310(d).

engage in lengthy reviews. As with the transfer of a "line" under Section 214, FCC review of a wireless "permit" or "license" transfer under Section 310 is review of the transaction of a *granular* asset, not the review of *all* of the assets in a merger or acquisition.

Many federal agencies, particularly those established during the New Deal, also have a public interest standard. The Securities Act of 1933[16] mentions the "public interest" 34 times, but the Securities and Exchange Commission does not interpret the Securities Act of 1933 as a basis to review mergers involving securities on a "public interest" basis outside of the Clayton Act. The Securities Exchange Act of 1934 mentions "public interest" 230 times, but the Securities and Exchange Commission does not interpret that law as a basis to review mergers involving securities on a "public interest" basis outside of the Clayton Act. Instead, the SEC can review certain mergers under the specific carve out in the Clayton Act for the SEC.[17]

C. Elastic Provisions

As with many statutes, the Communications Act of 1934 has some elastic provisions that the FCC has occasionally interpreted as expanding its authority to review mergers. Chief among these provisions are Section 303(r):

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—[18]

[16] 15 U.S.C. § 77a – 77mm.

[17] 15 U.S.C. § 79j.

[18] 47 U.S.C. § 303.

> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be *necessary to carry out the provisions of this chapter*,[19]

And 4(i)

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, *as may be necessary in the execution of its functions*.[20]

These provisions give some flexibility to the FCC in interpreting the Communications Act, but only as *necessary* in fulfilling its obligations under Chapter 47. The elastic provisions of the Communications Act have been used to rationalize merger conditions that contradict provisions of the Communications Act.[21] The FCC has never persuasively argued that it is unable to fulfill its obligations under Chapter 47 without reviewing entire mergers. It is difficult to see how any statutory flexibility extends to the FCC reviewing entire mergers when the Telecommunications Act of 1996 specifically excluded the FCC from merger review under the Clayton Act.

II. THE FCC MERGER REVIEW PROCESS IS ONLY PARTLY PUBLIC

Although it has no clear legal authority to review mergers, the FCC is quite public about the fact that it reviews mergers and some of the process.

[19] 47 U.S.C. § 303(r). Emphasis added in italics.

[20] 47 U.S.C. § 154(i). Emphasis added in italics.

[21] *See*, *e.g.*, *Ameritech Dissent*, *supra* note 2.

A. The Public Merger Review Process

Within the Office of General Counsel's website is a page titled "Mergers and Acquisitions" with links to several FCC files.[22] The major tabs are the following: Current and Recent Transactions;[23] Major Transactions Decisions by year;[24] Archived Transactions;[25] Frequently Asked Questions;[26] Process Overview of "Significant Transactions";[27] and Transactions Team, Office of General Counsel.[28]

As noted in the previous section, the FCC does not have clear legal authority to review mergers and has not promulgated rules in the Code of Federal Regulations for such reviews. The FCC webpages on merger reviews serve as informal guidance, and the webpages sometimes misstate statutory language. For example, the FCC process review webpage states:

> The standards for the FCC's review have also been set by Congress. Both in making the initial assignment and in reviewing the transfer of any license, the FCC must determine whether 'the public interest, convenience, and necessity' would be served by

[22] FCC, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions, accessed Mar. 22, 2025.

[23] FCC, https://www.fcc.gov/transactions/recent-transactions, accessed Mar. 22, 2025.

[24] FCC, https://www.fcc.gov/proceedings-actions/mergers-transactions/general/major-transaction-decisions, accessed Mar. 22, 2025.

[25] FCC, https://www.fcc.gov/proceedings-actions/mergers-transactions/major-transactions-archive, accessed Mar. 22, 2025.

[26] FCC, https://www.fcc.gov/reports-research/guides/mergers-frequently-asked-questions, accessed Mar. 22, 2025.

[27] FCC, https://www.fcc.gov/reports-research/guides/review-of-significant-transactions, accessed Mar. 22, 2025.

[28] FCC, https://www.fcc.gov/proceedings-actions/mergers-transactions/transaction-team-office-general-counsel, accessed Mar. 22, 2025.

granting the application.[29]

The "public interest, convenience, and necessity" standard is found in Section 310 for wireless licenses, but not in Section 214 for permits for common carriers.

The initial FCC merger review process is straightforward:

> Before a company may assign an FCC license to another company or acquire a company holding an FCC license, it must receive the Commission's approval. The Commission reviews applications for the transfer of control and assignment of licenses and authorizations to ensure that the public interest would be served by approving the applications. The vast majority of transfer of control and assignment applications are simple and unopposed and are processed quickly. These applications can be found by searching the Commission's online filing systems or by contacting the relevant Bureau.[30]

But not all transactions are handled expeditiously. "Some transactions, however, present more complex legal, economic or other public interest issues and are likely to elicit a significant amount of public comment, thus requiring more extensive Commission review."[31] These transactions singled out for extended review, often called "major transactions," have extensive public files:[32]

> Each major transaction has its own web page, listed below. While not the official public record of the proceeding, the web page

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[29] FCC, https://www.fcc.gov/reports-research/guides/review-of-significant-transactions, accessed Mar. 22, 2025.

[30] FCC, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions, accessed Mar. 22, 2025.

[31] *Id.*

[32] The distinction between "major transactions" and other transactions is never clearly defined and appears to be a judgment call.

> includes relevant information about the specific transaction, including a short description, a timeline, and links to the applications, petitions, comments and other pleadings, *ex parte* filings and Commission orders and decisions.[33]

The FCC applies a "public interest" standard to its review of major mergers, and it gives an overview of what it seeks in the review process:

> A large part of that [public interest] determination involves assessing the competitive impact of the license transfer. But unlike other parts of the federal government, the FCC examines
>
> > not only whether competition would be harmed by approving the license transfer
> >
> > but also whether it would be enhanced.
>
> In addition, the FCC examines
>
> > the likely effects of the transfer on the private sector deployment of advanced services,
> >
> > the diversity of license holders,
> >
> > and the diversity of information sources and services available to the public.[34]

These "public interest" standards for major transactions are simply policy statements by the FCC, adopted outside of the Administrative Procedure Act. None of these "public interest" standards for review of major transactions is found in either Sections 214 or 310. The concept of "advanced services" is

[33] FCC, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions, accessed Mar. 22, 2025.

[34] FCC, https://www.fcc.gov/reports-research/guides/review-of-significant-transactions, accessed Mar. 22, 2025.

found in Section 254 on universal service[35] and in Section 1302 on advanced telecommunications incentives,[36] but not in the context of transactions. The phrase "diversity of license holders" is not found in the Communications Act or in the Code of Federal Regulations. The phrase "diversity of information sources" is found as a purpose of Section 532 for cable channels, but not specifically for merger reviews.[37]

B. The Merger Review Process Outside Public View

Not all aspects of the FCC's merger review process for major transactions are publicly visible. A good example is a "public interest statement" for major transactions. Although not required by statute or even by the informal guidance in the FCC web pages, most applications for transfers of permits or licenses will include a document often called a "public interest statement." This statement explains why the applicants believe the proposed transfers should be approved in the "public interest." Topics addressed include competition, promotion of advanced services, and, where possible, statements of diversity of license holders, and diversity of available services. A "public interest statement" may also include offers by the merging parties to commit to certain outcomes such as a sale of certain assets to a third party, a pricing plan for low-income customers, or a plan to build out services to

[35] 47 U.S.C. § 254.

[36] 47 U.S.C. § 1302.

[37] 47 U.S.C. § 532.

certain geographic areas. Some of the commitments in the "public interest statement" for major transactions may be generated by the merging parties. In some cases, the commitments in the "public interest statement" may reflect suggestions from third parties or from the FCC itself.

For major transactions, the merger review process is lengthy. Although the FCC nominally has a "180-day clock,"[38] in practice, the clock is often stopped. The FCC publicly describes the options available for decisions regarding applications for transactions:

> After reviewing the evidence and hearing the views of the public, the Commission issues its decision. The Commission may approve the application outright, or with conditions designed to ensure that the public interest is served. Transactions can be approved with conditions that allow the transaction to proceed but eliminate or mitigate the potential harms the Commission has found are likely to occur. If the Commission is unable to approve the transaction, it will refer it to an Administrative Law Judge for a hearing.[39]

But the FCC public documents do not explain certain aspects of the options including the following:

- First, the FCC usually does not passively accept just the conditions suggested by the merging parties in the public interest statement. Instead, the Commission imposes other conditions.
- Second, the negotiations over the final merger conditions are outside of public view. Indeed, the negotiations are outside of the view of most commissioners and their staffs. Although it is not surprising that the to-and-fro negotiations for settlements

[38] FCC, https://www.fcc.gov/reports-research/guides/review-of-significant-transactions, accessed Mar. 22, 2025.

[39] FCC https://www.fcc.gov/reports-research/guides/review-of-significant-transactions, accessed Mar. 22, 2025.

between disputing parties are not publicly aired, the hidden denouement is a paradoxical twist to a process that the FCC initially unveiled as transparent and public.[40]

- Third, the FCC insists that, if there are to be conditions on the transaction, those conditions must be "volunteered" by the merging parties. These "volunteered" conditions are submitted to the FCC as a revised "public interest statement" towards the end of the review process. As explained below, the "volunteered" conditions prevent appeal. The FCC then adopts the revised "public interest statement" as the conditions on the transaction.
- Fourth, there is little if any effective limit to the types of conditions that the FCC can place on a proposed transaction. Conditions may include compliance with certain existing rules that apply to all entities under FCC jurisdiction to compliance with company-specific rules created specifically for the transaction, whether or not those company-specific rules are within the jurisdiction of the FCC. Often, the FCC lacks the authority to place such company-specific rules outside of the context of a major transaction.

III. INJURED PARTIES HAVE FEW IF ANY PRACTICAL MEANS TO DISPUTE FCC MERGER REVIEWS

Typically, parties dissatisfied with, and even injured by, an adverse administrative ruling can appeal the ruling. But that is not the case with major transactions reviewed by the FCC.

For a major transaction subject to conditions—and practically all major transactions are subject to conditions—the merging parties cannot subsequently contest the conditions because they were volunteered. Third

[40] FCC, "FCC Implements Predictable, Transparent and Streamlined Merger Review Process," Press Release, Jan. 12, 2000, at https://www.fcc.gov/fcc-implements-predictable-transparent-streamlined-merger-review-process.

parties can contest the conditions but rarely succeed.[41] Thus parties to a transaction have three options at the end of the review process if the FCC requires conditions: (1) accept the transaction conditions and "volunteer" them in a revised public interest statement; (2) abandon the proposed transaction; or (3) face the designation for hearing of the transaction before an administrative law judge. The third option is a non-starter as hearings before FCC administrative law judges rarely end, much less successfully. If a proposed transaction is designated for hearing, the parties soon withdraw the proposed transaction. For major transactions, the parties will often have invested hundreds of millions of dollars in legal and financial fees plus more than a year of management attention, all of which would be lost if the transaction were abandoned. Thus, there are powerful incentives to accept the merger conditions.

Of course, at the same time as FCC transaction review, the DOJ—or in some cases, the FTC—conducts a separate Clayton Act review of the same transaction, often focusing on many of the same competitive issues. The procedural difference is that the DOJ or the FTC must go to court to block or even to place conditions on a transaction, while the FCC need only refuse to transfer permits or licenses without court review. Because it is procedurally easier for the FCC to block or to condition a major transaction, the FCC

[41] For a rare exception of a successful third-party challenge to transaction conditions, *see* *Competitive Enterprise Institute v. FCC*, 970 F.3d 372 (D.C. Cir. 2020).

routinely goes first after considerable coordination between agencies. In only a handful of instances has the DOJ gone first, or have the FCC and DOJ not coordinated well with the FCC.

The FCC limits its review of transactions to businesses that the Commission substantially regulates. Businesses with large numbers of FCC licenses or permits, but whose primary lines of business are outside FCC authority, are not subject to merger reviews.[42] Businesses facing substantial FCC regulation are understandably hesitant to object, even when the Commission lacks legal authority.

IV. FCC MERGER REVIEW IS AN INEFFICIENT USE OF GOVERNMENT RESOURCES

The objections to the FCC's merger reviews go beyond a lack of statutory authority. Even if the Commission had statutory authority to review mergers, such reviews duplicate the substantial efforts of the statutory federal antitrust authorities. The FCC claims that it has a separate "public interest" standard—distinguishable from the competition standard under the Clayton Act of the antitrust agencies—for the review of transfers of permits and licenses.[43] But any such distinction is difficult to explain much less to defend.

Each year, without any FCC involvement, the DOJ and FTC review scores of transactions under the Clayton Act. The agencies approve some

[42] *See*, *e.g.*, A Tough Act to Follow, *supra* note 2 at 115-16.

[43] *See*, *e.g.*, J. Sallet, *supra* note 9.

transactions (sometimes with conditions), while they block other mergers. Neither the FCC nor the federal antitrust agencies claim that—absent FCC review—the approval, condition, or rejection of a transaction fails a "public interest" test. Indeed, courts sometimes phrase antitrust opinions, even without FCC review, as being needed in the "public interest."[44]

But in essence, that is exactly the FCC's position. The Commission implicitly asserts that its "public interest" standard under the Communications Act is different from the standards applied under the Clayton Act, and that transaction reviews under the Clayton Act alone are insufficient to meet the "public interest" standard under the Communications Act.

Absent an FCC transaction review, the FCC could still convey its concerns about a pending transaction or merger to the DOJ or FTC. Other federal agencies share their views about pending transactions with the Department of Justice, FTC, and sometimes the FCC.

The redundant reviews of the same merger but by different federal agencies are costly for the federal government. The FCC maintains a separate team within the Office of General Counsel dedicated to transaction reviews.[45] Many staff years are dedicated by each federal agency that reviews a merger. If only one federal agency reviewed each transaction, this is staff time that could

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[44] *See*, *e.g.*, *U.S. v. S&P Global Inc., et al.*, Final Judgment, Mar. 21, 2022, "Entry of this Final Judgment is in the public interest," at 20. https://www.justice.gov/atr/case-document/401040.

[45] https://www.fcc.gov/proceedings-actions/mergers-transactions/transaction-team-office-general-counsel.

more efficiently be dedicated to other activities.

Moreover, the Commission often imposes rules on transactions that require subsequent FCC monitoring and potential enforcement. Many conditions require periodic reports after the transaction closes. FCC staff in turn must review the reports, often submit them for public comment and review, and sometimes act upon the public comments. The Commission is also often the tribunal that hears complaints of non-compliance with the transaction-specific rules. Consequently, the dedication and distraction of FCC staff does not end with the review and approval of a merger with conditions; it merely begins a new phase.

The cost of complying with the FCC-imposed transaction conditions are not borne entirely or even primarily by the FCC. Instead, the party engaged in the transaction carries the burden of complying with the company-specific rules, and these are costs not borne by other competitors in the market. Further, the customers and vendors of the company whose transaction is reviewed by the FCC also pay higher costs because of the FCC transaction conditions.

V. FCC MERGER REVIEW LEADS TO MARKET CONFUSION AND INEFFICIENT ECONOMIC OUTCOMES

A consistent finding in economics is that, *in the absence of transaction costs*, transactions among owners of assets will result in economic efficiency with assets being put to their most economically valuable use.[46] The greater the transaction costs, the more likely assets will remain in their current use and not be transacted to a higher-valued use. The FCC merger review process creates substantial transaction costs—greater costs than for transactions that avoid FCC review. The FCC review of mergers creates several economic inefficiencies discussed below.

A. Uncertainty and Risk of Process and Outcome

As discussed above, parties whose merger review falls under the Clayton Act have a clear idea of the process. Antitrust agency staff who specialize in merger review request and receive information from the transacting parties. Based on this information, and information they may independently collect, the staff make a recommendation to agency decisionmakers about how to proceed. Third parties, such as competitors and advocacy groups, may submit comments, but agency staffs tend to give little weight to complaints from competitors. Those processes are spelled out in statute, in federal rules, and in merger guidelines. A federal court must approve an agency decision to condition or to block the proposed transaction.

But parties with transactions also before the FCC face a different and less certain process explained neither in statute nor in rules. A chairman can block a transaction simply by refusing to bring it up for consideration. Or the

[46] R.H. *Coase*, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960).

Commission as a whole can vote to block or to condition a transaction, and the parties have no effective recourse to court for review.

FCC transaction review is not *instead* of antitrust review; FCC transaction review is *in addition* to antitrust review. The parties to the transaction must abide by all the antitrust agency's procedures as well as those of the FCC. Some of the information requests are the same; some are different. The FCC works primarily with a public record; the antitrust agencies in contrast have access to substantial confidential information.

The additional FCC process is not only unpredictable, but it is costly and time-consuming. The transaction parties typically hire separate and costly counsel for the FCC.

Parties to a transaction involving only a Clayton Act antitrust authority have some control over the ultimate outcome. The antitrust agencies will negotiate with the transacting parties, and the agencies must go to court to block or to condition a transaction. The transacting parties have the opportunity first to persuade an antitrust agency that a proposed merger is pro-competitive. Although an agency challenge will cause many parties to proposed transactions to abandon them, the parties can still persuade a court that the transaction is not anticompetitive.

A transaction reviewed by the FCC is different. The FCC has sole discretion to block or to condition a merger—or not to act on it at all—without court review.

B. Company-specific Rules

Even if the transaction survives FCC review, the resulting company often must comply with company-specific rules. These rules, sometimes including scores of details,[47] place the company at a disadvantage relative to competing companies unburdened by those rules. As noted elsewhere,[48] these company-specific rules often do not remedy any alleged harm under review by the FCC and often are unrelated to communications law.

C. Conditions Unrelated to Alleged Wrongdoing

Although the merging parties will "volunteer" for the FCC conditions on a transaction, the Commission ultimately determines the nature of those conditions. In proposing conditions on a transaction, the FCC will cite an alleged harm such as reduced competition or higher prices. The FCC may then insist on conditions unrelated to the alleged harms.[49] The result is two sets of harms: those initially identified by the FCC but uncured by the merger conditions; and those created by conditions the FCC imposed.

D. Encouragement of Anticompetitive Pleadings at the FCC

An FCC docket for a review of a proposed transaction is normally filled with comments. Some are from consumers. Some are from competitors. Still others are from advocacy groups with an interest in the outcome of the

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[47] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, 2011, 26 FCC Rcd 423.

[48] *See, e.g.*, *Ameritech Dissent*, *supra* note 21.

[49] *Id.*

proceeding. Perhaps because they review hundreds of transactions annually, the antitrust agencies review relatively few of these comments and are relatively uninfluenced by them. In contrast, the FCC reviews in detail only a few transactions annually, and procedurally the FCC feels obliged to respond to public comments. Consequently, competitors and advocacy groups, particularly those hostile to a proposed transaction, file frequently in FCC transaction reviews. The Commission addresses those comments in its orders, and on occasion, those comments form the basis of conditions on transaction or even to block a transaction.

E. Inescapable Perception that the FCC Merger Review Process Is Arbitrary

FCC-regulated parties inevitably view the merger review process as arbitrary. Some parties are delayed and blocked; others are treated expeditiously and with deference.[50] These perceptions erode confidence in the FCC.

F. FCC Review Deters Transactions

Absent FCC review, only antitrust agencies governed by the Clayton Act would review entire mergers.[51] The FCC review of mergers adds cost, time, and uncertainty to federal merger reviews. Doubtlessly, some parties decline

[50] Contrast the treatment of Standard General/Tegna (MB Docket 22-162) with Audacy License, LLC, as Debtor-in-Possession (Assignor) and Audacy License, LLC (Assignee), Application File Nos. 0000241074 et al., Memorandum Opinion and Order, FCC 24- 94 (rel. Sept. 30, 2024).

[51] Of course, the FCC could continue to review whether the transacting parties comply with existing FCC rules.

to pursue otherwise efficient mergers because of the added cost and uncertainty of FCC merger review. These transaction costs leave the inefficiently allocated assets in their current use.