The Failure of FCC Merger Reviews:

Communications Law Does Not Necessarily Perform Better than Antitrust Law

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Abstract: Antitrust law and communications law do not coexist well. The underlying premises of much of antitrust law makes little sense when the government sets prices, qualities of services, and reviews most if not all business decisions of a regulated firm. Yet the recent experience of the FCC’s review of mergers demonstrates that the FCC does a poor job as a surrogate antitrust agency. Not only are the FCC reviews redundant, they are costly, inefficient, and often lead to unlawful results. Consequently, antitrust law should not necessarily yield in the presence of communications law or other forms of regulatory law.

* The views expressed are those of the author alone and do not necessarily reflect the views of the American Enterprise Institute which takes no positions on public policy matters. Parts of this paper draw heavily on material from my forthcoming booking, A Tough Act to Follow.
The topic of this conference might be paraphrased as the role of antitrust law in a regulated industry. Of course, the two seemingly do not blend well. An underlying theme of several papers at this conference may be characterized as follows: in lawfully complying with government rules that regulate business practices, private businesses should not be liable for Sherman Act antitrust claims so long as the regulatory compliance is lawful. Regulation is often treated as exogenous and uncontrollable, implicitly lawful and correct. In the face of this powerful force of government regulation, other forms of law must be secondary. In the vernacular, government regulation trumps all other forms of law. One might easily conclude that antitrust law should not extend to heavily regulated sectors such as telecommunications, that antitrust law should cede its authority in the presence of overregulation.

I have a different story to tell. My story is that regulation, particularly in the realm of telecommunications, should not necessarily be considered either exogenous or lawful. Practitioners of antitrust and other forms of law should not simply wave the flag of surrender at the first utterance of the words “government regulation,” and certainly not the words “Federal Communications Commission.” The primary reason that antitrust law and communications law collide is not that they are inherently incompatible but rather that communications law has been misinterpreted. Communications law has become a euphemism for misguided and, at times, unlawful regulation.

It is quite easy to construct a scenario under which all of the elements of antitrust law could be exercised precisely and consistently with communications law. It is a scenario in which telecommunications regulation follows the narrow confines of communications law. Sadly that is not the current world of communications regulation. Instead, we have regulation today, as we have had for much of the past century, that interferes with competition, and thus with meaningful antitrust law.

**Competition and antitrust law**

Antitrust law is an elegant and subtle interpretation of consumer interests and claims in a competitive market. Antitrust law seeks to protect consumer interests by preventing extraordinarily anticompetitive behavior by rational market participants.

Antitrust law has little if any meaning in a market in which competition is proscribed. If the government grants itself or a single firm an uncontestable monopoly for the provision of a service, say telecommunications services, then antitrust law has little meaning for the provision of telecommunications services. For most of the 20th century, the United States and the few other countries with an identifiable antitrust law, had heavily-regulated monopolies for the provision of telecommunications services. Some of these monopolies were government-owned, others were privately owned, and all faced no economic competitor other than the arched eyebrow of a government regulator.
At the end of the 20th century, competition, albeit a heavily regulated form, began to creep into telecommunications markets. In the United States, regulated competition first emerged in wireless services, and later the possibility of wireline competition developed after passage of the Telecommunications Act of 1996. Make no mistake: the competition that has been permitted under the Act in the telecommunications sector is hardly pure economic competition as much as it is managed and regulated competition. The government manages with a heavy hand the entry and exit into the telecommunications market; the government sets prices and quality of service; the government dictates who must be served and under which specific conditions. Little happens without prior approval by the government.

Much of antitrust law is based on a simple economic paradigm: could a rational firm profitably raise prices for a non-transitory period as a result of a specific anticompetitive action. The action could be a merger or it could be collusion among ostensible competitors. The economic paradigm is a difficult concept in a world of heavy government regulation. How can a firm profitably raise prices if only the government can set—or review and preapprove—prices? How can a firm engage in an unlawful antitrust activity if all of its activities are reviewed and approved by the government? How can an event lead to an anticompetitive result when the government, rather than market forces, determine market outcomes?

Antitrust law is built on a framework of the rational behavior of a profit-seeking firm. It will behave as the dictates of a market permit it, but always it is acting rationally in its self-interest. Consequently, antitrust law has a natural tension with regulation that requires a firm to engage in activities, or behavior, that a rational firm would not hold. In a nutshell, communications law, even after the Telecommunications Act of 1996, is a series of regulations instructing firms to engage in irrational behavior.

How would the unfamiliar realms of regulated communications law and competitive antitrust law coexist? Not surprisingly, not well.

This paper focuses on a specific form of antitrust law, that pertaining to government review of mergers and acquisitions. Much of this law at the federal level is governed by the Clayton Act and the Hart-Scott-Rodino Act with its merger review process as implemented jointly by the Justice Department and the Federal Trade Commission. As will be seen, federal antitrust merger review law has coexisted, but not well, with communications law. While much of this conference addresses the Sherman Act, it is instructive to examine what has happened in the realm of merger review law as well.

**Federal merger review**

Every year businesses, both large and small, merge for any number of reasons. The federal government has sophisticated antitrust laws to ensure that these mergers do not result in anticompetitive combinations. Two federal agencies, the Department of Justice’s Antitrust Division and the Federal Trade Commission, enforce these laws with
large professional staffs. The initial screen for federal antitrust review of mergers is the Hart-Scott-Rodino filings, as listed in the first row of Table 1 for recent years.

Table 1


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<tr>
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<td>4,728</td>
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<td>122</td>
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<td>3.21%</td>
<td>3.30%</td>
<td>2.64%</td>
<td>2.43%</td>
<td>1.99%</td>
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</table>


* The precipitous decline in transactions in FY 2001 primarily reflects a statutory increase in the reporting requirement threshold from $15 million transactions to $50 million transactions.

The Department of Justice and the Federal Trade Commission coordinate and divide the review of transactions to avoid reviewing the same transaction, both to conserve limited staff resources and to avoid placing the same parties in a form of double jeopardy. After a preliminary review of material in an initial submission of information for a Hart-Scott-Rodino transaction, an antitrust agency may request additional information, a “second request,” usually reserved for larger, more complicated, or potentially anticompetitive mergers. The second and third rows show the number of second requests issued by the FTC and the DOJ in the past decade. The fourth row shows the total number of second requests, and the final row is the frequency of second requests relative to the total number of reported transactions. As can be seen, such second requests are infrequent, ranging between 1.99 and 3.85 percent of reportable transactions.

Under the Clayton Act, the federal antitrust authorities can challenge anticompetitive mergers in federal court. Of the 43 mergers for which the Department of Justice sought a second request in FY 2001, it found 32 to be anticompetitive if permitted to proceed as initially proposed.¹ In 8 cases, the DOJ filed a complaint in federal court, and the merging parties entered a consent decree without further litigation,² including

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² Ibid.
WorldCom’s acquisition of Intermedia Communications and NewsCorp.’s acquisition of ChrisCraft. In the remaining 24 cases, the DOJ informed the merging parties of anticompetitive problems which the parties either resolved or withdrew the merger application altogether.

A similar pattern emerges at the FTC. Of the 27 mergers for which it sought a second request in FY 2001, in 23 instances it notified merging parties that it intended to challenge them. Eighteen sets of parties settled with consent decrees (including AOL in its acquisition of Time Warner), four withdrew their applications, and in only one instance did the FTC actually file in federal court.

Merger review activities at the FCC

The FCC, in contrast, has no specific statutory authority to review mergers, except under the limited Clayton Act Section 7 authority which apparently has never been exercised by the FCC. Instead, the FCC relies on the license transfer process under the Communications Act of 1934.

License transfers at the FCC have long been characterized by delays, but the delays in major transactions in recent years have become systematic. Businesses petition the FCC for rulemakings, licenses, license transfers, and many other matters because they have business plans that depend on a specific FCC action. Even if the FCC ultimately reaches a favorable decision, delays in reaching it can substantially erode a business’s profitability. Some delays reduce a business’s ability to sell its products or services reducing its revenue streams. Most business plans have cost structures that cannot be immediately turned on the moment an FCC approval is obtained. Personnel, investments in plant and equipment, capital accounts, and other expenses can and do accrue to a business during the pendency of an FCC decision. All too often, a business discovers that the FCC does not fully grant its petition. Business plans are dashed, or further delayed pending costly and time-consuming court appeals.

While the delays in the decision making process may be lawful, they are far from necessary. The Commission could make more timely decisions, and the Communications Act specifically encourages the FCC to make decisions within 90 days. Yet many decisions extend for seemingly endless months and years. The delays are particularly noticeable in the case of license transfers, most of which are ultimately granted. The FCC has issued hundreds of thousands of licenses, and each time a license shifts one holder to another, a formal license transfer must occur. Each year, more than ten

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3 Ibid. at 15-16.
4 Ibid.
5 Ibid., at 19.
6 Ibid. at 19 and 22.
7 The fullest explanation of the FCC’s asserted authority to review mergers and impose unrelated conditions under the “public interest doctrine” is found in the Bell Atlantic-NYNEX merger. See . See also Phoenix Center publication .
9 The transfers are usually under 47 U.S.C. 214 or 310.
thousand licenses are transferred, mostly on a routine basis in a matter of a few months including public notice and comment.

The FCC takes a few of these transfers, particularly those involving major mergers, and subjects them to a special and arbitrary review. A few years ago, the FCC created a “Merger Review Team” in the Office of General Counsel. The Merger Review Team handles some, but not all license transfers subject to special review. Table 2 lists by industry sector some of the major mergers reviewed by the FCC. The mergers included in the tables are primarily those listed at the Merger Review Team web site with a few additions denoted with by the symbol #. The mergers reviewed by the Merger Review Team only involve entities heavily regulated by the FCC. The listed mergers are large and range in size from a few hundred million dollars acquisition to tens of billions of dollars.
Table 2

Mergers Reviewed by the FCC
License Transfer Applications
Primarily Wireline Telecommunications

<table>
<thead>
<tr>
<th>Mergers</th>
<th>Date applied</th>
<th>Date approved</th>
<th>Days delayed</th>
<th>Delegated authority</th>
<th>Ad Hoc Conditions@</th>
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<tr>
<td>WorldCom-MFS#10</td>
<td>September 13, 1996</td>
<td>December 5, 1996</td>
<td>83</td>
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<td>SBC-Pacific Telesis 11</td>
<td>June 7, 1996</td>
<td>January 31, 1997</td>
<td>238</td>
<td>No</td>
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<tr>
<td>Bell Atlantic- NYNEX 12</td>
<td>April 22, 1996**</td>
<td>August 14, 1997</td>
<td>479</td>
<td>No</td>
<td>FCC conditions</td>
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<tr>
<td>Qwest-LCI#13</td>
<td>March 9, 1998**</td>
<td>May 21, 1998</td>
<td>73</td>
<td>Yes</td>
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<td>AT&amp;T-Teleport  14</td>
<td>February 3, 1998</td>
<td>July 21, 1998</td>
<td>168</td>
<td>No</td>
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<tr>
<td>WorldCom-MCI 15</td>
<td>October 1, 1997***</td>
<td>September 14, 1998</td>
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<td>SBC-SNET 16</td>
<td>February 20, 1998</td>
<td>October 15, 1998</td>
<td>237</td>
<td>No</td>
<td>FCC conditions</td>
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</table>

10 FCC, DA 96-2039, In the Matter of MFS Communications Company, Inc. and WorldCom, Inc. Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international authorizations Eagle Uplink Corporation Application for authority pursuant to Section 25.118 of the Commission’s rules to transfer control of earth station licenses, Memorandum Opinion, Order, and Authorization, December 5, 1996.
12 FCC 97-286, In re Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, August 14, 1997.
14 FCC 98-169, In re Applications of Teleport Communications Group, Inc., Transferor and AT&T Corp., Transferee, for Consent to Transfer Control of Corporations Holding Point-To-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, Adopted July 21, 1998.
15 FCC 98-225, In the Matter of the Application of WorldCom Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom Inc., Memorandum Opinion and Order, September 14, 1998.
16 FCC 98-276, In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor To SBC Communications, Inc., Transferee,
<table>
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<tr>
<th>Company</th>
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<th>Condition</th>
<th>Notes</th>
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<td>SBC-Ameritech</td>
<td>July 24, 1998</td>
<td>October 6, 1999</td>
<td>439</td>
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<td>FCC conditions</td>
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<td>AT&amp;T-British Telecommunications</td>
<td>November 10, 1998</td>
<td>October 22, 1999</td>
<td>346</td>
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<td>Qwest-U.S. West</td>
<td>August 19, 1999</td>
<td>March 8, 2000</td>
<td>202</td>
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<td>Bell Atlantic-GTE</td>
<td>October 2, 1998</td>
<td>June 16, 2000</td>
<td>624</td>
<td>No</td>
<td>FCC</td>
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<td>Verizon-OnePoint</td>
<td>September 5, 2000</td>
<td>December 8, 2000</td>
<td>94</td>
<td>Yes</td>
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<td>WorldCom-Intermedia</td>
<td>October 23, 2000</td>
<td>January 17, 2001</td>
<td>86</td>
<td>Yes</td>
<td>FCC condition on compliance with DOJ proceeding</td>
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<td>Global Crossing-Frontier</td>
<td>October 10, 2000</td>
<td>April 16, 2001</td>
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<td>TDS-Chorus Communications</td>
<td>February 8, 2001</td>
<td>August 10, 2001</td>
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17 FCC 99-279, In re 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, Memorandum Opinion and Order, October 6, 1999.
18 FCC 99-313, In the Matter of AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order, October 22, 1999.
19 FCC 00-91, In the Matter of Qwest Communications International Inc. and US West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, March 8, 2000.
20 FCC 00-221, In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, June 16, 2000.
21 FCC, DA 00-2783, In the Matter of Joint Applications of OnePoint Communications Corp. and Verizon Communications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, To Transfer Control of Authorizations to Provide Domestic Interstate and International Telecommunications Services as a Non-Dominant Carrier, Memorandum Opinion and Order, December 8, 2000.
22 FCC, DA 01-130, In the Matter of Intermedia Communications Inc., Transferor, and WorldCom, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 21, 63, 90, 101, Memorandum Opinion and Order, January 17, 2001.
23 FCC, DA 01-961, In the Matter of Joint Applications of Global Crossing Ltd., and Citizens Communications Company for Authority To Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 20, 22, 63, 78, 90, and 101 of the Commission’s Rules, Memorandum Opinion and Order, April 16, 2001.
| XO Communications Reorganization \(\omega\) | February 21, 2002 | October 3, 2002 | 224 | Yes | DOJ, FBI |

# Not listed at FCC Merger Review Team Web Cite.
@ Conditions beyond what is necessary to come into compliance with FCC rules.
\(\omega\) Foreign ownership review.
* No conditions listed in order beyond what is necessary to come into compliance with FCC rules.
** Announced
*** Subsequently amended.

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24 FCC, DA 01-1914, In the Matter of Joint Applications of Telephone and Data Systems, Inc. and Chorus Communications, Ltd. for Authority to Transfer Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 22, 63 and 90 of the Commission’s Rules, Memorandum Opinion and Order, August 10, 2001.

25 FCC, DA 02-2512, In re Applications of XO Communications Inc. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Memorandum, Opinion, Order, and Authorization, October 3, 2002.
Table 2 (continued)

Mergers Reviewed by the FCC
License Transfer Applications
Primarily Cable Assets

|                | Date applied  | Date approved | Days delayed | Delegated authority | Ad Hoc Conditions
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<td>AT&amp;T-TCI</td>
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<td>February 17, 1999</td>
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<td>No</td>
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<td>AT&amp;T-MediaOne</td>
<td>July 7, 1999</td>
<td>June 5, 2000</td>
<td>334</td>
<td>No</td>
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<td>AOL-Time Warner</td>
<td>February 11, 2000</td>
<td>January 11, 2001</td>
<td>335</td>
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<td>Comcast-AT&amp;T</td>
<td>February 28, 2002</td>
<td>November 13, 2002</td>
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@ Conditions beyond what is necessary to come into compliance with FCC rules.
ω Foreign ownership review.
* No conditions listed in order beyond what is necessary to come into compliance with FCC rules.
** Announced
*** Subsequently amended.

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26 FCC 99-24, In the Matter of Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order, February 17, 1999.
27 FCC 00-202, In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee, Memorandum Opinion and Order, June 5, 2000.
29 FCC 02-310,
Table 2 (continued)

Mergers Reviewed by the FCC
License Transfer Applications
Primarily Satellite Services

| License Transfer Applications | Date applied | Date approved | Days delayed | Delegated authority | Ad Hoc Conditions@
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<td>Lockheed-Comsat(^{30})</td>
<td>September 15, 1999</td>
<td>July 27, 2000</td>
<td>316</td>
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<td>SES Global-GE Americom(^{31})</td>
<td>April 2, 2001</td>
<td>October 1, 2001</td>
<td>183</td>
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<tr>
<td>Telenor Satellite-Comsat(^{32})</td>
<td>May 4, 2001</td>
<td>December 14, 2001</td>
<td>224</td>
<td>No</td>
<td>FCC, DOJ, FBI</td>
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<tr>
<td>Iridium (New)-Iridium(^{33})</td>
<td>March 19, 2001</td>
<td>February 8, 2002</td>
<td>326</td>
<td>Yes</td>
<td>DOJ, FBI</td>
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<tr>
<td>Orbcomm-Orbital Communications Corp.(^{34})</td>
<td>July 25, 2001</td>
<td>March 8, 2002</td>
<td>226</td>
<td>Yes</td>
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\(^{31}\) DA 01-2100, In re Application of General Electric Capital Corporation, Transferors, and SES Global, S.A. Transferees, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization, October 1, 2001.


\(^{33}\) DA 02-307, In re Applications of Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act Motorola Satellite Communications, Inc., Assignor; and Iridium Constellation LLC, Assignee, for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act Wireless SP, Inc., Assignor; and Iridium Carrier Services LLC, Assignee, and Iridium Satellite LLC, Assignee, for Consent to Assignment of License Pursuant to Sections 214 and 310(d) of the Communications Act Wireless SP, Inc., Assignor; and Iridium Satellite LLC, Assignee, for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act Iridium U.S., L.P. Assignor; and Iridium Carrier Services LLC, Assignee, for Consent to Assignment of Authorization to Provide Global Facilities-Based and Resale Services Pursuant to Section 214 of the Communications Act and Part 63 of the Commission’s Rules; U.S. LEO Services, Inc.and Iridium U.S., L.P. for Consent to Assignment of a Blanket Earth Station License Pursuant to Section 310(d) of the Communications Act; Iridium LLC and Iridium Constellation LLC for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act; Memorandum Opinion, Order and Authorization, February 8, 2002.
# Not listed at FCC Merger Review Team Web Cite.
@ Conditions beyond what is necessary to come into compliance with FCC rules.
ω Foreign ownership review.
* No conditions listed in order beyond what is necessary to come into compliance with FCC rules.
** Announced
*** Subsequently amended.

34 DA 02-576, In re Application of Orbital Communications Corporation and ORBCOMM GLOBAL, L.P. (ASSIGNORS) For Consent to Assign Non-Common Carrier Earth and Space Station Authorizations, Experimental Licenses, and VSAT Network to ORBCOMM License Corp. and ORBCOMM LLC (Assignees), Order and Authorization, March 8, 2002.
Table 2 (continued)

Mergers Reviewed by the FCC
License Transfer Applications
Primarily Wireless Telecommunications

<table>
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<td>Vodafone-AirTouch#35</td>
<td>2/5/99</td>
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<td>SBC-Comcast wireless#36</td>
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<td>VoiceStream-Cook Inleto#37</td>
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<td>Arch Communications-Paging Network#38</td>
<td>December 13, 1999</td>
<td>April 25, 2000</td>
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<td>SBC-BellSouth-Cingular#39</td>
<td>May 4, 2000</td>
<td>September 29, 2000</td>
<td>148</td>
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<td>TeleCorp, Tritel and Indus PCS#40</td>
<td>April 27, 2000</td>
<td>October 27, 2000</td>
<td>183</td>
<td>Yes</td>
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36 FCC, DA 99-1318, In re Applications of Comcast Cellular Holdings Co., Transferor, and SBC Communications Inc., Transferee, for consent to transfer of control of licenses and authorizations, Memorandum Opinion and Order, July 2, 1999.
37 FCC 00-53, In re Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, Cook Inlet/VS GSM II PCS, LLC, Cook Inlet/VS GSMIII PCS, LLC, Transferees, and Various Subsidiaries and Affiliates of Omnipoint Corporation Assignor, and Cook Inlet/VS GSM II PCS, LLC, Cook Inlet/VS GSMIII PCS, LLC, Assignees, For Consent to Transfer of Control and Assignment of Licenses and Authorizations, Memorandum Opinion and Order, February 14, 2000.
38 FCC, DA 00-925, In the Matter of Arch Communications Group, Inc. and Paging Network, Inc. For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses, Memorandum Opinion and Order, April 25, 2000.
39 FCC, DA 00-2223, In re Applications of SBC Communications Inc. and BellSouth Corporation For Consent to Transfer of Control or Assignment of Licenses and Authorizations, Memorandum Opinion and Order, September 29, 2000.
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<td>VoiceStream-Cook Inlet</td>
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<td>December 13, 2000</td>
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<td>Yes</td>
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<td>Verizon-ALLTEL</td>
<td>November 13, 2000</td>
<td>February 28, 2001</td>
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<td>Nextel-Motorola</td>
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<td>Deutsche Telekom-VoiceStream</td>
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<td>Nextel-Arch Wireless</td>
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<td>Nextel-Pacific Wireless</td>
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<td>November 16, 2001</td>
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<td>Nextel-Chadmoore</td>
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<td>November 30, 2001</td>
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<td>AT&amp;T Wireless-Telecorp PCS</td>
<td>October 24, 2001</td>
<td>February 12, 2002</td>
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<td>ALLTEL-Century Tel</td>
<td>March 28, 2002</td>
<td>June 12, 2002</td>
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<td>Yes</td>
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41 FCC, [ ] In re Applications of Cook Inlet Region, Inc., Transferor and VoiceStream Wireless Corporation, Transferee For Consent to Transfer of Control of Licenses and Authorizations and For Consent to Transfer an International Section 214 authorization and Cook Inlet/VoiceStream PCS, LLC, et al., Applicants Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, As Amended, Order, December 13, 2000
43 FCC, DA 00-2352, In re Applications of Motorola, Inc.; Motorola SMR, Inc.; and Motorola Communications and Electronics, Inc. Assignors; And FCI 900, Inc. Assignee, For Consent to Assignment of 900 MHz Specialized Mobile Radio Licenses, Order, April 16, 2001.
44 FCC 01-142, VoiceStream Wireless Corporation, Powertel, Inc., Transferors, And Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act And Powertel, Inc., Transferor, And VoiceStream Wireless Corporation, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act And Eliska Wireless Ventures License Subsidiary I, L.L.C., Wireless Alliance L.L.C., Cook Inlet/VS GSM IV PCS, LLC and Cook Inlet/VS GSM V PCS, LLC, Petitions for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act And Iowa Wireless Services Holding Corporation, et al. Petition for a Declaratory Ruling Pursuant to Section 310(b)(4) of the Act, and for a Ruling that the Transfer of a Minority Ownership Interest in the Licensee does not constitute a transfer of control under Section 310(d), Memorandum Opinion and Order, April 24, 2001.
# Not listed at FCC Merger Review Team Web Cite.
@ Conditions beyond what is necessary to come into compliance with FCC rules.
ω Foreign ownership review.
* No conditions listed in order beyond what is necessary to come into compliance with FCC rules.
** Announced
*** Subsequently amended.

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### Table 2 (Continued)

**Mergers Reviewed by the FCC**

**License Transfer Applications**

**Primarily Broadcasting Assets**

<table>
<thead>
<tr>
<th>Mergers Reviewed by the FCC</th>
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<th>Days delayed</th>
<th>Delegated authority</th>
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<td>Westinghouse-Infinity#50</td>
<td>June 20, 1996**</td>
<td>December 26, 1996</td>
<td>189</td>
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<td>FCC conditions</td>
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<tr>
<td>Viacom-CBS51</td>
<td>November 16, 1999</td>
<td>May 3, 2000</td>
<td>169</td>
<td>No</td>
<td>FCC conditions</td>
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<tr>
<td>Clearchannel-AMFM52</td>
<td>November 16, 1999</td>
<td>August 7, 2000</td>
<td>265</td>
<td>No</td>
<td>FCC conditions</td>
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<tr>
<td>Newscorp-Chris</td>
<td>September</td>
<td>July 23, 2000</td>
<td>318</td>
<td>No</td>
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50 In re Applications of Stockholders of Infinity Broadcasting Corporation (Transferor) and Westinghouse Electric Corporation (Transferee); For Transfer of Control of Infinity Broadcasting Corporation, Licensee of WCAO(AM), Baltimore, Maryland; WJFK(AM), Baltimore, Maryland; WLIF-FM, Baltimore, Maryland; WXYV(FM), Baltimore, Maryland; WJFK-FM, Manassas, Virginia; WPGC(AM), Morningside, Maryland; WPGC-FM, Morningside, Maryland; WQYK(AM), Seffner, Florida; WQYK-FM, St. Petersburg, Florida; WAOK(AM), Atlanta, Georgia; WVWE(FM), Atlanta, Georgia; WZGC(FM), Atlanta, Georgia; WOMC(FM), Detroit, Michigan; WXYT(AM), Detroit, Michigan; WYCD-FM, Detroit, Michigan; WCKG(FM), Elmhurst Park, Illinois; WJJ(D)(AM), Chicago, Illinois; WJM(FM), Chicago, Illinois; WUSN(FM), Chicago, Illinois; WYSY(FM), Aurora, Illinois; KDFM(AM), Highland Park, Texas; KEWS-FM, Arlington, Texas; KHVN(AM), Fort Worth, Texas; KOAI-FM, Fort Worth, Texas; KRBV(FM), Dallas, Texas; KVIL-FM, Highland Park, Texas; KYNG-FM, Dallas, Texas; KXYZ(AM), Houston, Texas; KROQ-FM, Pasadena, California; KRT-FM, Los Angeles, California; KFRC(AM), San Francisco, California; KFRC-FM, San Francisco, California; KFRC-FM1, Danville, California; KFRC-FM2, Pleasanton, California; KFRC-FM3, Walnut Creek, California; KOME(AM), San Jose, California; KOME-FM1, Santa Cruz, California; KOME-FM2, Morgan Hill, California; KYCY(AM), San Francisco, California; KYCY-FM1, Pleasanton, California; WBCN(AM), Boston, Massachusetts; WBOS(AM), Brookline, Massachusetts; WOAZ(FM), Lowell, Massachusetts; WZLX(FM), Boston, Massachusetts; WFT(FM), New York, New York; WXRK(FM), New York, New York; WZRC(AM), New York, New York; WIP(AM), Philadelphia, Pennsylvania; WYSP(FM), Philadelphia, Pennsylvania Infinity Fort Worth License Corporation Assignor and The Dallas-Fort Worth Stations Trust, Bill Clark, Trustee Assignee; For the Assignment of the licenses of KHVN(AM), Fort Worth, Texas and KRBV(FM), Dallas, Texas Infinity KOAI-FM License Corporation Assignor and The Dallas-Fort Worth Stations Trust, Bill Clark, Trustee Assignee; For the Assignment of the license of KOAI-FM, Fort Worth, Texas Westinghouse Electric Corporation/Group W Broadcasting, Inc. Assignee and The Chicago Stations Trust, Henry M. Rivera, Trustee, Assignee; For the Assignment of the license of WSCR(AM) and WXRT(FM), Illinois Westinghouse Electric Corporation/CBS INC. Request for Permanent Waivers of Section 73.3555(c) of the Commission's Rules, Memorandum Opinion and Order, December 26, 1996.


52 FCC 00-296, In the Matter of the Applications of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee) For Consent to the Transfer of Control of AMFM Texas Licenses Limited Partnership, AMFM Radio Licenses, LLC, Capstar Texas Limited Partnership, WAXQ License Corp., WLTW License Corp., Cleveland Radio Licenses, LLC, and KOL License Limited Partnership Licensees of WTKE(FM), Andalusia, AL, et. al., Memorandum Opinion and Order, August 7, 2000.
The fourth column of Table 2 lists the number of days required to complete the review. The length of these delays ranges from 73 to 730 days. Of the 48 mergers listed, only 5 took 90 days or less to review consistent with the Communications Act direction. In contrast, the delays averaged nearly 224 days, and the median delay is nearly 190 days. Thus, more than half of the delays last more than half a year, twice as long as the

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53 FCC 01-209, In the Matter of the Applications of UTV of San Francisco, Inc., KCOP Television, Inc. UTV of San Antonio, Inc., Oregon Television, Inc., UTV of Baltimore, Inc., WWOR-TV, Inc., and UTV of Orlando, Inc. and United Television, Inc. (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations KBHK-TV, San Francisco, CA; KCOP-TV, Los Angeles, CA; KMOL-TV, San Antonio, TX; KPTV-TV, Portland, OR; WUTB-TV, Baltimore, MD; WWOR-TV, Secaucus, NJ; WRBW-TV, Orlando, FL; KMSP-TV, Minneapolis, MN; KTVX-TV, Salt City, UT; KUTP-TV, Phoenix, AZ, Memorandum Opinion and Order, July 23, 2001.

54 FCC 01-336, In the matter of Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee) For Consent to the Transfer of Control of Glencairn, Ltd. (Sinclair), Memorandum Opinion and Order and Notice of Apparent Liability, adopted November 15, 2001.

55 FCC 02-113, In the Matter of Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee) For Consent to the Transfer of Control of Estrella License Corporation Licensee of Television Stations KVEA(TV), Corona, California K47GD, San Luis Obispo, California; Telemundo of Los Angeles License Corp. Licensee of Television Stations KWHY-TV, Los Angeles, California KWHY-LP, Santa Barbara, California; Telemundo of Florida License Corporation Licensee of Television Station WSCV(TV), Fort Lauderdale, Florida; Telemundo of Galveston-Houston License Corporation Licensee of Television Station KTMD(TV), Galveston, Texas; Telemundo of Northern California License Corporation Licensee of Television Stations KSTS(TV), San Jose, California K15CU, Salinas, California KEJT-LP, Salt Lake City, Utah K47DQ, Sacramento, California K52CK, Stockton, California W32AY, Boston, Massachusetts K27EL, Santa Maria, California K52FF, Reno, Nevada K61FI, Modesto, California; Telemundo of San Antonio License Corporation Licensee of Television Station KVDA(TV), San Antonio, Texas; WNJU License Corporation Licensee of Television Station WNJU(TV), Linden, New Jersey; Telemundo of Steamboat Springs Colorado License Corporation Licensee of Television Stations KMAS-TV, Steamboat Springs, Colorado KSBS-LP, Denver, Colorado KMAS-LP, Denver, Colorado K34FB, Pueblo, Colorado; Telemundo of Puerto Rico License Corporation Licensee of Television Stations WKAQ-TV, San Juan, Puerto Rico W09AT, Fajardo, Puerto Rico W32AJ, Utuado, Puerto Rico W68BU, Adjuntas, Puerto Rico; Telemundo of Colorado Springs, Inc. Licensee of Television Stations K49CJ, Colorado Springs, Colorado; Telemundo of Dallas License Corporation Licensee of Television Station KXTX-TV, Dallas, Texas; Video 44 Licensee of Television Station WSNS-TV, Chicago, Illinois, Memorandum Opinion and Order, April 9, 2002.
Communications Act instruction. There is no clear pattern across industry sectors; a merger in any sector can take substantial time, although those license transfers handled on delegated authority tend to take substantially less time those reviewed by the full Commission. The median delay for license transfers decided by the full Commission is 248 days, while the median delay on delegated authority is only half as long. Thus, license transfers handled on delegated authority tend to have delays approximately one month longer than Communications Act guidance, while those decided by the Commission have an additional four month delay.

The exact cost of a delay in the FCC’s response to a petition, such as license transfers for a merger, is impossible to calculate. In addition to the direct costs of the lost revenues and additional costs listed above, there are many indirect costs of a business plan on the rocks. Investors and key employees lose faith in the business plan; businesses begin to crumble before regulatory relief is granted.

When a party petitions the FCC for decision, there is no certainty about the length of time for a decision. Consider mergers. As noted for the mergers in Table 2, the delays ranged from less than 3 months to two years. This enormous range of delays makes planning business decisions difficult.

The importance of 1996

Before 1996, major mergers in the communications sector were rare, often restricted by a range of regulations limiting ownership. The infrequent major transaction in the sector typically involved acquisition by a firm without substantially regulated assets. FCC reviews of these transactions tended to focus on compliance with the existing burden of FCC rules rather than on novel concepts of broader competition within the national economy, although even these reviews were certainly not frequent enough for the FCC to develop merger review guidelines. As far as I can discern, none of these mergers before the Telecommunications Act of 1996 led to conditions placed by the FCC that went beyond preexisting FCC rules. Thus, before the passage of the Act, the FCC did not look at merger reviews as an opportunity to trample administrative freedom and create company-specific rules.

The Telecommunications Act of 1996 unleashed decades of pent-up demand to rationalize better the structure of business organizations in the communications sectors. The year 1996, with more than one hundred billion dollars worth of announced mergers in the communications sector, saw a substantial increase in merger activity in the communications sector over prior years. The initial mergers after the Act tended to be reviewed along the same narrow basis—often by bureaus on delegated authority rather than by the full Commission—that the infrequent pre-Act mergers had been reviewed.

56 E.g., the acquisition of Capital Cities-ABC by Disney, or the acquisition of CBS by Westinghouse.
57 See Phoenix Center publication.
58 Some of the early mergers after the passage of the Act included U.S. West-Continental Cablevision (handled by the Cable Bureau), SBC-Pacific Telesis, and
The Bell Atlantic-NYNEX combination was the watershed merger that established a bold departure from precedent by the FCC to create company-specific laws in response to mergers.\(^\text{59}\) In an aggressive order, one of the last major orders under Chairman Reed Hundt, the FCC dismissed the limitations of the Clayton Act and asserted a new “public interest” standard for the review of mergers that implicitly meant the FCC could impose any conditions for any reason on any merger.\(^\text{60}\)

The merger review process that the FCC initiated in the Bell Atlantic – NYNEX merger had the following steps:

- Avoid written rules about which mergers will be reviewed and what process will be followed;
- Transform the license transfer process into a way to find “public interest” benefits to outweigh the harms or lack of benefits resulting from the merger;
- Seek wide ranging comments in opposition to the merger from interested parties, at times even using public fora to attack the merger;\(^\text{61}\)
- Delay approval of the license transfer;
- Articulate long-term conditions to create firm-specific rules that the FCC could not on its own lawfully impose on all such similarly-situated firms;
- Compel the merging parties to “volunteer” to offer the conditions.

The merger review process initiated in the Bell Atlantic-NYNEX transaction stands in stark contrast to the process used by the primary federal antitrust agencies, DOJ and the FTC. Those agencies go to great lengths to avoid redundant review; one and only one agency will review a merger. The antitrust merger review process is well-established following written guidelines with predictable interpretations. The process is discreet rather than a public forum. The vast majority of mergers do not receive so much as a second review, a large number—but small percentage—have a negotiated consent decree to divest in advance assets related to market power that might be created by the merger rather than permanent regulatory obligations, and only a small number are actually challenged in court. The antitrust review is not a means of creating “public interest” benefits.

Technically, the FCC did not “approve” the Bell Atlantic-NYNEX merger only subject to “surprise” conditions on unwilling and unwitting parties: such a sequence would have led to a lengthy “hearing” process. Instead, the FCC negotiated with the merger parties in advance and made clear that, absent the stipulated conditions, the merger, which had already languished for more than a year at the FCC, would be delayed still longer. The FCC imposed the negotiated conditions only on the newly merged Bell

\(^{59}\) FCC 97- __, Bell Atlantic-NYNEX.  
\(^{60}\) Ibid.  
\(^{61}\) See FCC En Banc Hearings on major mergers (1998) and AOL-Time Warner.
Atlantic, conditions that, if they had any merit, could not have lawfully been applied to the incumbent local exchange industry, much less a single firm in the industry. The merging parties were compelled to “volunteer” to offer the stipulated conditions, and in so doing, foreclose most avenues for litigation appeal of the “voluntary” conditions. In most areas of law, contracts entered under duress are not binding, but under administrative law, the condition of duress is rarely if ever argued.

From the perspective of an agency accumulating power, the Bell Atlantic-NYNEX merger was an unmitigated success. The form and substance of the conditions that the FCC imposed were far different from the form that an antitrust agency would have imposed. Whereas a private party before a purely executive branch agency might have challenged in court, in Congress, or in both, the discretionary use of power, the newly merged Bell Atlantic did not challenge the outcome. Indeed, it would have had an awkward case given that it had “volunteered” to the conditions.

The FCC never looked back to the detached form of merger reviews that it had exercised before the Bell Atlantic-NYNEX transactions. Afterward, the detailed, “public interest” merger review became the norm rather than the exception. Even without clear legal authority, the FCC invented a merger review process confident that no one would challenge it; I once labeled it “Can-Opener” merger review law. As shown in Table 2, the vast majority of subsequent merger reviews by the full Commission imposed conditions that went beyond the then existing FCC rules.

Some major mergers are reviewed by the full Commission, and some on delegated authority are reviewed by at the bureau level. The FCC has no clear rules to determine where a merger will be reviewed. As can be seen in Table 2, most major mergers reviewed by the full Commission are approved with ad hoc conditions beyond those necessary to bring the merging parties into compliance with FCC rules. The net effect of these ad hoc merger conditions is company-specific rules and regulations. In contrast, major mergers reviewed by bureaus are unlikely to face conditions beyond what is necessary to bring the licensees into compliance with FCC rules.

In 2000, Chairman Kennard created a formal “Merger Review Team” with its own web location within the Office of General Counsel. The Merger Review Team continued under Chairman Powell. Its web site lists mergers under review but fails to describe the screening technique used to decide which mergers will be reviewed. Yet the mergers intensively reviewed by the FCC are only a small portion of all mergers, only a small portion of mergers within the communications sector, and only a small portion of all license transfers at the FCC.

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64 See Fcc web site, Office of General Counsel.
The merger reviews became examples of the worst forms of government administrative behavior. The following is a list of the failings from just one merger review—SBC-Ameritech: (1) the transaction does not violate any extant statute or rule; (2) the alleged harms are speculative and unrelated to the merger; (3) the conditions do not remediate the alleged harms; (4) the conditions are inconsistent with the Communications Act; (5) the conditions are disproportionate to the alleged potential harms; (6) the conditions place undue administrative burdens and costs on both the FCC and participants in the telecommunications market; (7) the conditions are either voluntary and therefore unenforceable or involuntary and therefore judicially reviewable; (8) the FCC lacks merger review authority; (9) the order was adopted pursuant to extraordinary procedures that undermine the appearance of impartial decisionmaking; (10) the order was adopted pursuant to an ad hoc and potentially arbitrary rule; and (11) the order fails to articulate intelligible principles to cabin the “public interest” test for mergers. 65

These and other failings are found in practically each merger reviewed by the FCC. The problems associated with FCC merger reviews were so rampant that hearings were held in Congress on the subject both by the House Judiciary Committee 66 and the House Commerce Committee. 67

Some of the most egregious examples of policy exploits masquerading as merger reviews were in the context of mass media license transfers. For example, Sinclair applied to transfer licenses from Sullivan Broadcast Holdings and from Glencairn on November 16, 1999. 68 Sinclair was not a popular business at the FCC, and so it was punished in the license transfer process. Some of the Sinclair license transfers were contested based on the FCC’s new ownership attribution rules. 69 Sinclair filed for a writ of mandamus with D.C. Circuit Court of Appeals on September 10, 2001 seeking to force the FCC to make a decision. 70 The FCC subsequently decided on November 15, 2001 to grant all but one of the requested license transfers. 71 The FCC issued a notice of apparent liability to Sinclair and Glencairn after finding that Sinclair had effectively controlled Glencairn licenses without seeking a transfer of control. 72

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65 See FCC, 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, CC Docket 98-141, Statement of H. Furchtgott-Roth, concurring in part and dissenting in part, October 6, 1999. This statement uses these 11 deficiencies as headings.
69 In the matter of Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee) For Consent to the Transfer of Control of Glencairn, Ltd. (Sinclair), FCC 01-336, Memorandum Opinion and Order and Notice of Apparent Liability, adopted November 15, 2001.
70 See fn. 33 supra.
71 See fn. 34 supra.
72 Ibid.
In 1997, Paxson Communications Corporation petitioned for transfer of control of one of the WQED Pittsburgh licenses. After a long contentious saga, the FCC in December 1999, more than two years after the initial application, ultimately granted the license transfer to PCC, but only after creating “guidance” for educational programming content. The clear affront to the First Amendment caused the FCC to withdraw the guidance within six weeks. The FCC demonstrated that it could take a long time to conduct a simple license transfer, and that it could create extraordinary regulatory costs by placing superfluous conditions on license transfers, in this case content regulation, in the process.

Table 3 lists the number of mergers by fiscal year and their disposition by the FCC as listed at the Merger Review Team web site in late 2002. The sharp increase in FY 2000 simply reflects the date of the creation of the Merger Review Team. Previously, mergers had been reviewed on a more *ad hoc* basis.

**Table 3**

**Major Transactions Listed at the Merger Review Team Web Site**

**Fiscal Years 1997-2002**

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<th>Year</th>
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<td>6</td>
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</tbody>
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74 Ibid.
75 See WQED Pittsburgh, FCC 00-25, Order on Reconsideration, Adopted January 28, 2000.
Table 3 includes only those designated by the Merger Review Team as “major” or in its archives. The Merger Review Team only became active in 2000, and consequently few mergers before 2000 are listed. Many of these were major multi-billion dollar mergers, even though not listed by the FCC, including: U.S. West-Continental Cable; Qwest-LCI; Time Warner-Turner Broadcasting; and MCI-MFS.

Notice that none of the major mergers was disapproved--designated for hearing--between FY 1997 and FY 2002. The first major merger to be designated for hearing was the EchoStar-Hughes transaction, which was designated for hearing in FY 2003.

Of course, all of the mergers reviewed by the FCC, as listed in Table 3, were also reviewed by either the FTC or the DOJ. It is never the case that the FCC reviews a major merger without a review by one of the federal antitrust agencies. The FCC review might make more sense if it were limited to issues related just to FCC rules or statutes, but few if any of the FCC reviews fail to mention antitrust and economic competition issues. Indeed, some of the reviews seem based entirely on antitrust analysis.

Moreover, many of the merger reviews involved what amounted to a “balancing” of additional doses of “public interest” to offset the harms associated with a merger. This balancing approach was properly decried by then Commissioner Michael Powell in several statements objecting to the merger process. Under this balancing approach, no matter how harmful an underlying merger, it can always be remedied by offsetting public interest contributions.

Of course, not all major mergers, much less all mergers, are reviewed by the FCC. Table 4 lists some of the major mergers that have not been reviewed by the FCC in recent years. In each instance, the merging parties held substantial FCC licenses, at times substantially exceeding those held by parties subject to the FCC merger review process. The only distinguishing feature between the firms listed in Table 4 and those listed in Table 2 is that the former are not heavily as regulated by the FCC as the latter.

Table 4

Major mergers from 1997 to 2001 that were not reviewed by the FCC

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<td>Rejected or Designated for Hearing</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

* Ad hoc conditions are conditions beyond those necessary to bring applicants into compliance with FCC rules.

Source: FCC web site

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76 This is the position that I took in concurring and dissenting statements on FCC merger reviews.
77 See EchoStar-Hughes decision.
78 See M. Powell statements in SBC-Ameritech, Bell Atlantic-GTE, and AOL-TW.
79 See HFR statements.
Exxon-Mobil
Chevron-Texaco
Georgia-Pacific-Fort James
Pepsico-Quaker
Tribune-Times Mirror
Citibank-Travelers
Hewlett Packard-Compaq
Boeing-McDonnell Douglas
Dow Chemical-Union Carbide
El Paso Energy-Coastal Corporation
SmithKline-Glaxo Wellcome
Philip Morris-Nabisco Holdings
Pfizer-Warner Lambert
TV Guide-Gemstar
Daimler-Chrysler

Throughout this period, the FCC has generally refused to codify its merger review process, so as to preserve as much discretion for itself as possible. Of course, it would be awkward if not impossible to write defensible merger review guidelines that the FCC will review on detail the license transfers of those entities that are otherwise heavily regulated by the FCC. More than ten thousand license transfers are reviewed each year by the FCC and submitted for public comment, but few are designated as “major” by the Merger Review Team. Some of the transfers that are not designated as “major” receive comments, have conditions placed on the transfers, and may even have transfers designated for hearing.

For broadcast radio mergers, the FCC belatedly did establish merger review guidelines. Under these guidelines, the FCC has both approved some radio mergers and designated others for hearing. FCC review of radio mergers is inconsistent with the Telecommunications Act of 1996.

Conclusion

It is difficult to review the FCC’s handling of merger reviews and license transfers and not reach the conclusion that the FCC should abandon the merger review business entirely and leave it to the antitrust agencies. At least in this area, regulation should not overshadow antitrust law rather than visa versa.

The application of antitrust law in the presence of excessive government regulation is far more complicated than in its absence. The traditional federal antitrust

82 See Nov. 2001.
83 See AM-FM merger, HFR dissenting statement.
agencies of the Justice Department and the Federal Trade Commission have a strong interest in enforcing federal antitrust laws and in protecting markets from anticompetitive abuses. It is possible to imagine, although this paper has not provided a complete basis for such an inference, that all forms of regulation designed to mimic competition can equally well if not better be implemented through antitrust law. Much of communications law falls in this category of efforts, often weak, to mimic competition.

Some of antitrust laws, such as the Sherman Act, are difficult to interpret, much less implement, in the context of heavily regulated industries. The inference should not necessarily be drawn, however, that antitrust law should recede in the presence of government regulation such as the federal and state regulation of telecommunications. As seen in this paper, FCC review of mergers has not only duplicates that of other federal agencies, it leads to costly, unpredictable, and at times unlawful results.