

Any Volunteers?

The FCC unfairly regulates 'by condition' when it extracts concessions from merging telecom companies.

**by Randolph J. May
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Last month, I warned readers to beware of regulation by advisory opinion. This month, let's look at another type of often ill-conceived agency action: "regulation by condition."

One obvious example of this practice is the Federal Communications Commission's use of its merger review authority to extract concessions from combining telecom companies.

Consider these recent cases of regulation by condition:

To merge their local telephone companies, SBC Communications and Ameritech had to obtain the FCC's permission to transfer the necessary licenses. After months of waiting for agency approval, the companies "volunteered" last October to abide by 30 regulatory conditions, filling more than 60 pages. Most of these conditions—such as requiring the merged company to substantially restructure, provide huge discounts for competitors' use of its network, and roll out advanced services to low-income households—go far beyond the requirements of the Communications Act or the FCC's rules.

A few years ago, when CBS and Westinghouse sought waivers of station ownership restrictions in connection with their merger, they "volunteered" to carry more children's programming than required by the FCC's rules. The requested waivers were granted. Shortly thereafter, when the FCC denied similar waiver requests by Disney and ABC in conjunction with their merger, then-FCC Chairman Reed Hundt said that an offer of extra children's programming "would have greatly strengthened" their waiver requests.

With more large mergers on deck at the FCC, such as AT&T/MediaOne Group, Bell Atlantic/GTE, CBS/Viacom, US West/Qwest, and MCI/Sprint, it's worth examining how the "regulation by condition" game is played at that agency.

After the SBC/Ameritech merger application had been pending for more than 14 months, Rep. W.J. "Billy" Tauzin, chairman of the House telecommunications subcommittee, charged that the FCC's review process leaves the merging companies vulnerable to "shakedowns that would raise the hair on the back of your head." According to Tauzin, the FCC review process invites abuse by encouraging lobbyists to claim that they are needed to push the deal through.

FCC Chairman William Kennard challenged Tauzin to produce specific evidence of shakedowns, claiming: "Any suggestion that any person or organization needs to hire a paid lobbyist to

communicate their points of view to the commission, or to get the FCC to act on a matter, is simply not the case."

Both Tauzin's charge and Kennard's response are somewhat hyperbolic. There has been no evidence of "shakedowns" in any illegal sense. But it's also true that merger applicants typically retain a horde of lobbyists to work the FCC's corridors.

Here's something else that's definitely true. "What emerged (from the merger review process) was a set of conditions proposed by SBC that only those willing to contort the English language could call 'voluntary.' " So said FCC Commissioner Harold Furchtgott-Roth on the day the SBC/Ameritech merger was approved.

Commissioner Michael Powell agreed: "I do not subscribe to . . . the idea that a regulated entity can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship."

The spate of large mergers in the telecommunications industry may raise legitimate competitive concerns. Even though the telecom market is rapidly becoming a global battlefield-with such players as British Telecom, Deutsche Telecom, and France Telecom competing here and all over the world-and technological convergence is rapidly eroding old market boundaries, it still makes sense to scrutinize these mega-mergers. But under what standard and process?

License to regulate

Although the FCC is authorized to review telecom mergers under the Clayton Act to determine if they will substantially lessen competition, it never invokes this authority. Not surprisingly, the agency prefers to use its authority to determine whether license transfers are in "the public interest." The FCC technically does not review the proposed merger, but only the applications for the transfer of licenses to the new entity. Although not the case for hundreds of other applicants that seek approval for license transfers each year, for companies like SBC and Ameritech, the transfer of authorizations often are crucial to their deals.

Under the public interest standard, the commission supposedly considers: (1) whether the merger would violate any provision of the Communications Act or other statutes; (2) whether it would violate any FCC rule; (3) whether it would substantially frustrate or impair implementation of the Communications Act or other statutes; and (4) whether the merger promises to yield affirmative public interest benefits. Of course, if the merger is inconsistent with the Communications Act, the agency's rules, or other statutory provisions, then the FCC should not approve it until the violations are satisfactorily remedied. That's all the first three factors say. And the fourth is a tautology: it merely restates the FCC's public interest standard.

In practice, the principal focus of the FCC's merger review has been the competitive effects of the transaction. Such an analysis is not unimportant, but it is one that the Department of Justice and the Federal Trade Commission are charged with performing under the antitrust laws. The FCC attempts to differentiate its role by claiming that it must "be convinced that (the merger) will enhance competition" while DOJ or the FTC focus on whether the proposed merger "will substantially lessen competition." In reality, all three agencies examine essentially the same market information and perform a similar analysis. The difference between deciding whether a merger will substantially lessen competition or fail to enhance competition is akin to the difference between deciding whether agency action is "arbitrary and capricious" or an "abuse of discretion." Not much.

To reduce the burden on merging companies and eliminate duplication of government resources, the FCC should largely defer to the Justice Department's or FTC's analysis of the competitive impact of the merger. A Feb. 28 report by the International Competition Policy Advisory Committee concludes that these agencies have the staff and expertise to perform this function quite competently.

Deferring to the antitrust authorities would be a step in the right direction, but not a sufficient one. The nub of the problem is that the FCC's merger review process takes place under the Communications Act's indeterminate public interest standard. This encourages regulation by condition, a la SBC/Ameritech.

While arguably it may make sense to require telephone companies to roll out a certain percentage of their advanced services in low-income neighborhoods, this type of policy issue should be considered in a generic rule-making proceeding. There was no evidence that SBC's or Ameritech's roll-out policies differed from other carriers or that the merger proposal affected their own plans in this regard.

Indeed, even when the "volunteered" conditions relate more closely to the commission's articulated competitive concerns-say, the requirement that the applicants offer certain services only through a separate subsidiary or offer substantial new discounts for services provided to their competitors- regulation by condition is unsound, because it imposes new burdens only on the merging parties. In the case of SBC and Ameritech, the merged companies are in no different position than other incumbent carriers, like BellSouth, which are not subject to the same requirements. The bottom line is that this process unfairly singles out merger applicants for regulation that, if justified at all, should be applied on an industrywide basis.

Bills have been introduced in Congress that would alter the FCC's merger review authority. The most productive approach would be to require the FCC to rely presumptively on the competitive analysis of the DOJ or the FTC. And, in lieu of the public interest standard, Congress should provide more specific criteria for whatever else it wants the FCC to focus on

outside the realm of competition.

Legislation along these lines would make it more difficult for the agency to engage in regulation by condition. Absent such reform, merger applicants will have to continue playing the FCC's version of "Let's make a deal."

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