Insight

FCC Merger Review in the Spotlight

JEFFREY WESTLING | OCTOBER 30, 2024

Executive Summary

- With a slew of potential mergers in the telecommunications market, the Federal Communications Commission (FCC) will begin to review all transfers of telecommunications services, such as telephone networks and transfers of radio spectrum licenses.
- Unlike the antitrust agencies, the FCC reviews transactions under a much broader public interest standard, meaning that potential mergers could be subject to more exacting scrutiny.
- If the FCC employs the "big is bad" theory of the Biden Administration in its review, relatively routine mergers could soon face regulation by merger condition-setting if the FCC forgoes competitive analysis when reviewing transactions.

Introduction

With a slew of potential mergers in the telecommunications industry, the Federal Communications Commission (FCC) will soon review a variety of high-profile transfers of telecommunications services and assets, such as telephone networks and radio spectrum licenses. But whether the FCC adopts the Biden Administration's long-held "big is bad" antitrust approach, which sees concentration in markets as a per se harm, remains to be seen. While the adoption of this approach by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) has drawn scrutiny from a wide range of critics, the FCC has largely remained out of the debate – so far.

The Communications Act of 1934 grants the FCC the authority to review transactions that involve the transfer of telecommunications lines and radio spectrum licenses. Unlike the FTC and DOJ, which generally review transactions under a "harm to competition" analysis,

the FCC reviews transactions under a broad public interest standard. Proponents of the standard argue that this allows the FCC to impose conditions on mergers that can address competition policy concerns that may otherwise be outside of the FTC or DOJ's purview. Critics argue, however, that voluntary conditions are often negotiated in haste and are not subject to judicial review, allowing the FCC to impose a variety of conditions unrelated to competition concerns of the merger.

While thus far the Biden FCC largely hasn't broken from precedent, recent court decisions restraining agency rulemaking authority could spur action from the FCC to regulate through conditions imposed in mergers. With many large telecommunications transactions currently, or soon to be, before the FCC, it will be critical for Congress to maintain careful oversight to ensure the agency does not attempt to impose regulations that have been overturned by the courts.

Current Merger Review Authority

Under the Clayton Act, both the FTC and the DOJ can sue to block any mergers that would substantially lessen competition, which under current judicial interpretations largely focuses on the transaction's effect on consumers. This approach places the burden of proof on these agencies to show the merger would ultimately harm competition and consumers. The Biden Administration, however, has largely attempted to move away from the consumer welfare standard, releasing guidelines to industry indicating that any additional concentration in markets could result in a challenge. While the final decisions are left to the courts, many parties subject to FTC and DOJ review would rather acquiesce to conditions or simply abandon mergers entirely rather than go through costly litigation. As a result, many mergers that could benefit consumers are lost under this standard.

The FTC and DOJ are not the only agencies that review mergers. For telecommunications transactions, the Communications Act of 1934 requires the FCC to deny the transfer of licenses if the agency determines that the transfer is not in the present or future public convenience and necessity (which is the standard for telecommunications lines such as telephone networks) or is not in the public interest, convenience, or necessity (which is the standard for the transfer of radio licenses). While the agency has the authority to review mergers of common carriers under the Clayton Act much like the DOJ (the FTC has no authority over common carriers), the FCC has always relied on the authority granted by the Communications Act because the authority "necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws." In other words, the authority granted by the Communications Act is more expansive.

While the public interest standard, as it is called, is not well-defined, the FCC has stated

that it will consider whether approving the merger would substantially frustrate or impair the objectives or implementation of the Communications Act or related statutes, considering issues ranging from competition and localism to broadcast ownership.

Concerns About FCC Merger Review

While proponents of the FCC's public interest standard argue that it allows the agency to impose conditions on mergers to alleviate potential competitive concerns, the broad and largely ill-defined standards of FCC review allow the agency to impose a wide range of conditions before it approves mergers, especially in the context of transfers of radio licenses. By imposing conditions on mergers, the FCC can go around existing rulemaking procedures and impose regulations on specific companies that choose to forgo a costly process of litigation and are not subject to judicial review.

The FCC primarily regulates through notice and comment rulemaking. For example, the FCC is currently considering whether it should mandate that broadband providers unlock devices within a certain timeframe, meaning that consumers could leave their existing provider with their device and use that same device with another provider. The NPRM has received much attention from a wide range of parties and will likely be challenged regardless of the final decision, as the agency may not even have the authority to impose such regulations. Nevertheless, whether the FCC possesses such explicit authority may be irrelevant: Some providers are already subject to device unlocking requirements because the FCC imposed these restrictions during merger review, demonstrating that much of the agency's power can be found in its setting of conditions during this review. As an example, T-Mobile agreed to device unlocking policies to receive FCC approval for its $1.3 billion Mint deal, which the FCC had been delaying. If the FCC does move forward with its device unlocking proposals, it should be done in accordance with the proper procedures and under authority granted to it by Congress, and not through the implicit choice on specific providers between costly litigation or quick and easy acquiescence.

These concerns may become more urgent. The Supreme Court recently eliminated the *Chevron* Doctrine, which essentially held that courts would defer to agencies' interpretation of ambiguity in statutes. *Chevron* allowed agencies to interpret their statues broadly, and many rules from agencies with similar statutory authority to the FCC could survive so long as the agency considered all the arguments in the record. With the overturning of *Chevron* in *Loper Bright v. Raimondo*, major FCC rules finalized within the last few years, such as its broadband reclassification order (more commonly known as the net neutrality order) and its rules prohibiting digital discrimination, could be in jeopardy. If the agency fails to defend its signature rules in court, it could follow the lead of the Biden Administration's FTC and DOJ and use merger review as a venue for regulation through condition setting, a practice that is

likely to harm competition and cause confusion for consumers – and has historically done so.

Congress' Role

Currently, the FCC is reviewing a variety of telecommunications mergers. Most notably, T-Mobile is acquiring USCellular (the fourth largest, but regional, wireless carrier), DirectTV is acquiring Dish, and Verizon is acquiring Frontier Communications. Interested parties already have begun to call for a wide range of conditions to be imposed on the respective mergers. For example, public interest groups have called for conditions such as mandatory data roaming and additional cell phone unlocking requirements. How the FCC reviews these transactions can give additional insight into how the agency may approach its merger review process after the overturning of the *Chevron* doctrine.

While conditions can and should be explored by relevant agencies to ensure that mergers do not harm competition, conditions should be narrowly tailored to address competitive harms that could arise as a result of the transactions. If the FCC begins to embrace "big is bad" antitrust policies like the DOJ and FTC, and thus blocks mergers solely to prevent telecommunications providers from growing, Congress can exercise its oversight authority to rein in the agency.

Additionally, Congress can consider whether the FCC should have a role in merger review at all. The FCC's public interest standard allows it to impose conditions completely irrelevant to competitive concerns of a transaction. Congress could decide to place all the authority to review telecommunications mergers with the DOJ (and the FTC to the extent the merger doesn't involve a common carrier). Even though the agencies have embraced a "big is bad" approach to antitrust, their cases are still limited by antitrust laws focused on competition. This would ensure that merger reviews for telecommunications companies are subject to the same standards as other industries, rather than allowing the FCC to impose regulations on companies it cannot pass through its existing authority.