Insight

A Look Inside The Complicated FCC Transaction Review Process

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The Federal Communications Commission (FCC) has stopped the 180-day informal clock on both the Comcast-Time Warner Cable transaction and AT&T's acquisition of DirecTV. This temporary halt should not be read as a mark against any of the companies. The FCC review process is far more complicated and uncertain than similar review processes at either the Department of Justice (DOJ) or the Federal Trade Commission (FTC), even though all aim to determine how a purchase will affect the market. The institutional structure of the FCC is quite different than antitrust agencies, resulting in extended reviews and unpredictable outcomes, which have detrimental effects on consumers. Setting clear guidelines for this process should be among the top priorities of any Telecommunications Act rewrite.

The communication industry is unique, since its transactions must undergo review by not only the FCC as a sector-specific regulator, but also by a federal antitrust agency, typically the DOJ. For most other industries, mergers and acquisitions are reviewed by just the FTC or the DOJ, and the two agencies ensure that there isn't overlap, for jurisdictional reasons. Under dual review, communications companies must file countless pages of documents and negotiate with two federal agencies, leading to substantial legal fees, which are ultimately borne by consumers.

The additional burden on the government and the companies are justified on the benefits afforded by the public interest standard, which has been part of the FCC mandate from its genesis. Technically, the FCC only has the power to approve license transfers, but its authority over the industry is still significant. Merging parties must demonstrate that the license transfer is in the public interest. Based on evidence available in the public record, the Commission itself determines whether that burden has been satisfied. Contrast this to the antitrust agencies, which bear the burden of proof and must demonstrate that the transaction substantially lessens competition in court if needed. Thus, the FCC is distinct from the FTC and the DOJ, which have outlined the elements of their analysis since 1968.

In addition to typical antitrust reasoning, the FCC can stop transactions that don't promote "access to advanced telecommunications and information services," and can attach conditions to the sale to assess likely impacts on "the quality of telecommunications services." But currently those factors are weighted ad hoc for each sale. As former FCC Commissioner Harold Furchtgott-Roth noted in 2000, "The Commission annually approves tens of thousands of license transfers without any scrutiny or comment; others receive minimal review, and a select few are subjected to intense regulatory scrutiny."

In practice this latitude translates into split decisions between the FCC and the antitrust agencies, increasing the number of halted transactions. If we assume that all agencies are prone to error, then the FCC will stop transactions that are good for consumers (a false positive), while also glossing over transactions that aren't in the consumer interest (a false negative). False positives are often swept away by competitive forces in the market. However, false negatives impose unforeseen costs on consumers as transactions that are in the consumer interest are deterred. The Federal Trade Commission (FTC) has, in contrast, come a long way in limiting these costly errors, aided by the injection of economic reasoning at all levels of analysis. But the FCC is

not constrained by these limits and has far more expansive authority, which is leading to higher unforeseen costs for consumers.

Moving to clearly laid out guidelines supported by consumer welfare analysis should be a part of any rewrite of the Telecom Act. The Supreme Court has admitted that "The statutory standard no doubt leaves wide discretion and calls for imaginative interpretation… born of years of unhappy trial and error." The Court was right. With a competitive media landscape we can no longer afford an imaginative interpretation. The result is a "standard" that is as "unhappy" as the consumers it affects.