Merger Review Authority of the Federal Communications Commission

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December 8, 2009

Congressional Research Service
7-....
www.crs.gov
RS22940

Summary

With the proposed merger between Comcast and NBC/Universal announced recently, Congress has expressed an interest in the process of merger reviews at the Federal Communications Commission (FCC or Commission). This report will explain the merger review process at the FCC, as well as highlight some of the difference between the FCC's process and the more traditional antitrust merger review conducted by agencies such as the Department of Justice (DOJ) or the Federal Trade Commission (FTC).

Whenever companies holding licenses issued by the FCC wish to merge, the merging entities must obtain approval from two federal agencies: the DOJ and the FCC. The Commission and the DOJ do not follow precisely the same process or reasoning when examining the potential effects of proposed mergers. Though both agencies have the authority to proceed under the antitrust laws (as the DOJ must), the Commission generally chooses to examine proposed mergers under its Communications Act authority to grant license transfers. The act permits the Commission to grant the transfer only if the agency determines that the transaction would be in the public interest. The public interest standard is generally broader than the competition analysis authorized by the antitrust laws and conducted by the DOJ. Therefore, the Commission possesses greater latitude to examine other potential effects of a proposed merger beyond its possible effect on competition in the relevant market, and greater latitude when placing conditions upon the proposed transfer of a license than the DOJ may have when placing conditions upon the proposed merger that necessitates the license transfer.

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Introduction

Companies holding licenses issued by the Federal Communications Commission (FCC or Commission) are in a unique position when they seek to combine. In the United States, when most corporations plan to merge, the proposal is reviewed by only one of two federal agencies, the Department of Justice (DOJ) or the Federal Trade Commission (FTC) (which agency reviews the merger proposal depends on the outcome of a process known as "clearance").[1] Companies holding FCC licenses, on the other hand, must obtain approval from two federal agencies in order to consummate a merger: the DOJ[2] and the FCC. Though both agencies analyze the potential effects on competition a proposed merger may have, their processes differ, sometimes substantially. This report will focus on the FCC's authority to approve mergers and its process for reviewing these proposed transactions.

Sources of Commission Merger Review Authority

The Commission has authority under Sections 7 and 11 of the Clayton Act to review the proposed mergers of common carriers.[3] Specifically, the Commission may disapprove proposed mergers of "common carriers engaged in wire or radio communication or radio transmission of energy" where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[4]

The Commission also finds authority to review mergers through its power to approve or deny the transfer of the licenses it issues under the Communications Act. Sections 214(a) and 310(d) of the Communications Act require the Commission to deny the transfer of licenses if the Commission determines that the transfer is not in "the present or future public convenience and necessity"[5] under §214(a) or is not in the "public interest, convenience and necessity"[6] under §310(d). This standard is widely referred to as the "public interest" standard.

Although the Commission has explicit authority under the Clayton Act to review the proposed mergers of certain common carriers, it does not seem to have ever utilized that authority.[7] The Commission most often proceeds solely pursuant to the Communications Act, because that

[1] The FTC and DOJ have agreed that, to avoid unnecessary duplication, neither agency would proceed until the other agency "cleared" the investigation to it. The "clearance" policy, recently revised in 2002, is embodied in the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the Department of Justice Concerning Clearance Procedures for Investigations and is available online at http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf[hereinafter, Clearance Agreement].

[2] *Id.* The Clearance Agreement identifies the DOJ as the agency that, generally, will gain clearance to investigate media mergers, though the FTC may, in certain circumstances, obtain clearance to investigate.

[3] Codified as 15 U.S.C. §§ 18, 21(a).

[4] 15 U.S.C. §§ 18, 21(a).

[5] 47 U.S.C. § 214(a).

[6] 47 U.S.C. §310(d).

[7] In *United States v. Federal Communications Commission*, the United States Court of Appeals for the District of Columbia held that it was in the agency's discretion to institute enforcement proceedings when the agency had reason to believe a violation of the Clayton Act was occurring. 652 F.2d 82, 85-86 (D.C. Cir. 1980).

authority "necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws."[8] Indeed, courts have "insisted that the agencies [given licensing and regulatory authority over industry] consider antitrust policy as an important part of their public interest calculus," though they are not bound by the dictates of antitrust laws.[9] Not only must the Commission consider competitive effects in its public interest calculus, but the threshold required for a transaction to be approved is higher under the public interest standard than under traditional antitrust laws.

Proposed mergers that are reviewed under the Communications Act are held to a higher standard when examining their potential competitive effects than the same proposed transaction would be under the antitrust laws.[10] Under the Clayton Act, if the reviewing agency decides not to approve a proposed merger, the agency must either reach a remedial agreement with the parties or file suit to block the merger in federal court where the agency will bear the burden of persuading the court that the proposed merger will have *substantial* anticompetitive effects.[11] Not only must the government prove that the merger will decrease competition as compared to the current market,[12] but the government must prove that the proposed merger will *substantially* decrease competition.[13] This standard seems to indicate that proposed mergers that will be competitively neutral (preserve the current level of competition) would not violate the Clayton Act. In contrast, under the license transfer provisions of the Communications Act, the parties proposing to merge (as opposed to the reviewing agency) bear the burden of persuading the Commission[14] that the merger would *enhance* (rather than merely preserve) competition.[15] This standard that suggests a competitively neutral merger (which likely would be approved under the Clayton Act) could be denied by the Commission when acting under its Communications Act authority. The Commission reasons, therefore, that a review pursuant to the Communications Act's public interest standard renders the exercise of the Commission's Clayton Act authority unnecessary.[16]

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[8] *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985 -19987 at ¶ 2 (1997) [hereinafter, *NYNEX -Bell Atlantic Order*].

[9] *U.S. v. FCC*, 652 F.2d at 88 (citing Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (1968)).

[10] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 32 (2008).

[11] 15 U.S.C. § 18a.

[12] *See* United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (D.C. Cir. 1990) ("The ultimate burden of persuasion ... remains with the government at all times.").

[13] 15 U.S.C. § 18.

[14] 47 U.S.C. §309(e) (burdens of proceeding and proof rest with the applicant).

[15] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 32 (2008); *MCI -BT Order*, 12 FCC Rcd at 15354, ¶ 3; *NYNEX -Bell Atlantic Order*, 12 FCC Rcd at 19987, ¶ 2.

[16] *In the Matter of the Merger of MCI Communications Corporation and British Telecommunications, PLC*, 12 FCC Rcd 15351-15354 ¶ 30 (1997) (hereinafter *MCI -BT Order*).

Commission License Transfer Review Process and the Public Interest Standard

When attempting to receive approval for the transfer of relevant licenses in the context of a merger, the merging companies must submit an application for the transfer of all relevant licenses and certifications to the Commission.[17] The Commission, after receiving input from the public, then reviews the proposed transfer to determine whether it will serve the "public interest, convenience and necessity" as required by the Communications Act. The Commission is not required to complete this review in any set period of time, but has created an "informal timeline" of 180 days for consideration of license transfers.[18] The amount of time required to analyze license transfers is dependent upon the complexity of the proposed transaction and the intricacy of the public interest analysis it may require, and the 180-day goal is not always met.[19]

The public interest standard of the Communications Act generally is considered to be an amorphous standard, and, as noted above, is broader in scope than traditional antitrust standards.[20] The Supreme Court has stated that the public interest standard "no doubt leaves wide discretion and calls for imaginative interpretation."[21] The Commission, therefore, has found that the public interest standard "necessarily encompasses the broad aims of the Communications Act."[22] Factors considered to be in the public interest may include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest."[23] The Commission also may consider whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. Relevant to this analysis are technological and market changes, and the nature, complexity, and speed of change of the communications industry.

For each proposed license transfer, the Commission's analysis of the potential harmful competitive effects of a proposed merger largely tracks the analysis presented in the DOJ and

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[17] 47 U.S.C. § 214(a), 310(d).

[18] Informal Timeline for Consideration of Applications for Transfers for Assignments of Licenses or Authorizations Relating to Complex Mergers, http://www.fcc.gov/transaction/timeline.html.

[19] For example, the Sirius/XM Satellite Radio merger took 412 days to complete. The FCC timeline is available at http://www.fcc.gov/transaction/xm-sirius.html.

[20] Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States, 87 F.Supp. 324, 335 (D. D.C.), aff'd, 338 U.S. 864 (1949).

[21] FCC v. RCA Communications, Inc., 346 US 86, 90 (1953).

[22] *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, 23 FCC Rcd 514, 520 ¶ 12 (2008), *In the Matter of AT&T and Bell South Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007).

[23] *See* 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble. *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, 23 FCC Rcd 514, 520 ¶ 12 (2008), *In the Matter of AT&T and Bell South Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5673 ¶ 20 (2007).

FTC Merger Guidelines.[24] The Commission first defines the relevant product and geographic markets.[25] After defining the markets, the participants must be defined.[26] The Commission then analyzes the potential horizontal competitive effects within the markets, as well as the efficiencies that may be created by the proposed combination. The agency does the same for the vertical competitive effects and efficiencies. In this portion of the analysis, the Commission generally examines whether the merger will concentrate power in the hands of the merging parties in such a way that consumers could be harmed by, for example, increased prices, decreased services, or the exit of competitors from the marketplace.

After evaluating potential competitive effects, the Commission examines claimed public interest benefits of a proposed transaction, such as the potential provision of new programming or services, lower prices for services, increased service coverage, etc. The public interest benefits must be transaction-specific, meaning that "the claimed benefit must be likely to be accomplished as a result of the transaction but be unlikely to be realized by other means that entail fewer anticompetitive effects."[27] This standard does not mean that the claimed benefit must be nearly impossible absent a merger. Rather, the benefit must be unlikely to occur absent a merger. The claimed benefits must be supported by evidence and, in order to be in the public interest, the effects of the claimed benefits must flow through to consumers and not inure solely to the merging entities.

The Commission weighs these benefits against the potential harms to the public interest using a "sliding scale approach."[28] In this approach, where potential harms seem likely to occur, applicants must show that the claimed benefits are of a higher degree of magnitude and likelihood than when potential harms appear less likely. If the Commission's analysis suggests that the parties have shown that the merger, on balance, benefits the public interest, the Commission generally approves the transfer without condition.[29] If the Commission determines that the proposed merger will harm competition or the public interest, the Commission may either designate the proposed transaction for hearing,[30] or may negotiate with the parties to place voluntary conditions on the transaction to alleviate those harmful effects. In most instances, the Commission and the parties choose to negotiate.

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[24] *See* Department of Justice and Federal Trade Commission 1992 Merger Guidelines, 4 Trade Reg. Rep. (CCH) P 13,104 (1992) [hereinafter, Merger Guidelines]. It is important to note that the Commission is not bound by the Merger Guidelines.

[25] *See e.g.*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶¶ 35-73 (2008).

[26] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 48 (2008). If the Commission is unable to define the relevant markets, the Commission will conduct its analysis by adopting "worst-case assumptions" which maximize the likelihood of harm. *Id.*

[27] *Id.* at ¶ 75.

[28] *Id.* at ¶ 76.

[29] *See e.g.*, *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to Fairpoint Communications, Inc.*, WC Docket No. 07-22, FCC 07-226 (January 9, 2008).

[30] Under 47 U.S.C. § 309(e), if the Commission is unable to make the finding that the proposed transaction is in the public interest or after all information is submitted a substantial and material question of fact is presented, the application must be formally designated for a hearing.

Negotiated Conditions on Telecommunications Mergers

The Commission finds its authority to negotiate and enforce voluntary conditions on license transfers under §303(r) of the Communications Act, which grants the Commission the authority to "prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions" of the act,[31] and §214(c), which grants the Commission the power to place "such terms and conditions as in its judgment the public convenience and necessity may require" on the certificates the agency issues pursuant to its license transfer review authority.[32] The parties and the Commission may agree to any condition upon the proposed transfer that is tailored to mitigate the specific harms anticipated by the Commission's review. For example, the Commission has approved license transfers to be in the public interest when conditioned upon such varied commitments as the divestiture of certain assets;[33] the creation of new programming and a la carte options;[34] maintenance of promised conditions to protect national security (including the citizenship status of certain key employees) where the merger involves a foreign owned corporation;[35] temporary price freezes;[36] compliance with increased reporting requirements;[37] unbundling of certain services;[38] and compliance with the Commission's "net neutrality" policy.[39] In each of these cases, the Commission made clear that, absent these voluntary commitments, the proposed transactions would have resulted in significant public interest harms (such as monopoly power or potential to increase prices for extended periods) and the license transfer would not have been approved. Therefore, negotiation of acceptable conditions emerges as an important part of the license transfer process for many corporations seeking to combine.

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[31] 47 U.S.C. § 303(r).

[32] 47 U.S.C. § 214(c).

[33] *See e.g.*, *In re News Corp. & DircTV Group, Inc.*, 23 FCC Rcd 3265, 3294 at ¶ 63 (2008) (ordering the severance of attributable interests in certain assets).

[34] *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 111-112.

[35] *In the Matter of Intelsat Holdings, Ltd. and Serafina Holdings Limited Consolidated Application to Transfer Control of Holders of Title II and Title III authorizations*, 22 FCC Rcd 22151 (2007).

[36] *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc, Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 at ¶ 105-110; *In the Matter of SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, Appendix F (2005).

[37] *In the Matter of SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, Appendix F (2005).

[38] *Id.*

[39] *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Order, FCC 05-184, Appendix G (November 15, 2005).

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