

To Bargain in the Public Interest

FCC Should Issue Clear Guidelines About Likely Merger Conditions

BY KATHLEEN WALLMAN

Recently, Randolph J. May criticized the way in which the Federal Communications Commission wields its merger review authority ("Any Volunteers?" March 6, Page 62). Spotlighting several high-profile mergers and the conditions the FCC imposed as a condition of approval, May argued that the FCC has been using its public interest standard to extract burdensome and painful concessions. In his words, the agency has been "regulating by condition."

May then proposed a significant—and, in my view, unnecessary—step: that Congress require the agency to rely pre-emptively on the competitive analysis of the Justice Department or the Federal Trade Commission. The DOJ and FTC, of course, also review merger applications, albeit under different standards prescribed by different statutes.

May raises several worthy points. The FCC's statutory duty to apply the public interest standard is indeed broader and more subject to interpretation than the standards under which other agencies operate. Congress assigned this task to the FCC and surely has the authority to do radical surgery, even to the point of removing the FCC's oversight of competitive effects (as May proposes). But I believe that many of his concerns can be resolved more easily.

The simplest and most direct solution would be for the FCC to articulate clear guidelines about what the public interest means and how the agency will assess it in the context of specific actions. While the FCC's published orders on approved mergers give some insight into what the

agency is looking for, a comprehensive statement would go far in allaying parties' concerns that they are playing blindman's buff when they try to figure out what rules the agency will apply to a merger. The DOJ and FTC already issue such statements from time to time—for example, the DOJ's recent guidelines for strategic alliances.

ILLUMINATING THE PROCESS

The guidelines could address a number of the areas that have come under scrutiny and criticism. Consider the following:

- Currently, the process for license transfers requires an applicant to submit a public statement justifying why the transfer is in the public interest. It would be highly illuminating to have the staff's reaction to such a filing issued to the public before the process goes too far down the road.

The staff response would not be dispositive, but instead would be a starting point that identifies and isolates major issues of concern—and allows these issues to be addressed openly and immediately. Among other things, publicly identifying the hard issues early on might speed up the review process by giving staff a vehicle for saying what troubles them without committing the commission as an institution.

- Another advance in the process would be for the FCC to give substantive public notice of what conditions it might seek in a particular transaction.

The publication of the proposed conditions in transactions such as the SBC–Ameritech merger is a good step in this direction, and it should be institutionalized. Public forums on mergers, such as those held on SBC–Ameritech and MCI

WorldCom–Sprint, are also a healthy development insofar as they help to acquaint the public and other interested entities with the otherwise opaque process by which deals change to meet the FCC's concerns.

- Another salutary development would be for the FCC to commit affirmatively



that any conditions would be closely and causally linked to specific potential harms not otherwise protected against.

For example, in the context of mergers among long distance companies, the possibility that low-income customers might be adversely affected is a concern that even a competitive market might not allay. It is this type of concern that the FCC is uniquely well-poised to evaluate, and it is the sort of condition that the agency's guidelines could highlight as legitimate and causally related to the transaction at hand.

- The guidelines might also specify that matters of general concern across an industry—for example, law enforcement access to information needed for investigatory purposes—will not be resolved in a specific transfer. This would level the playing field among market competitors and eliminate the sweeping concessions that May spotlighted in specific individual transactions.

Granted, these guidelines will not address all of May's points. But the guidelines I propose would set the stage for what should be the main event in merger review: figuring out what action is in the public interest. Of course, not everyone will agree on what the public interest is and how to protect it. But the FCC has the statutory obligation to act in the public interest, a role that always will necessitate judgment and discretion. The guidelines I propose would educate everyone about the bounds of that discretion.

By voluntarily issuing guidelines that bring some regularity to its proceedings and articulating clearly the interests it seeks to protect, the FCC could address and overcome many of the criticisms that May raises.

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Go to www.law.com/dc to read Randolph J. May's March 6 column on the FCC's approach to mergers.