

SERVING TWO MASTERS: THE DUAL JURISDICTION OF THE FCC AND THE JUSTICE DEPARTMENT OVER TELECOMMUNICATIONS TRANSACTIONS

James R. Weiss
Martin L. Stern*

I. INTRODUCTION

On April 22, 1996, Bell Atlantic Corporation and NYNEX Corporation announced their plans to form the largest local telephone company in the United States with 141,000 employees in thirteen states and the District of Columbia, 39 million lines, \$53.3 billion in assets, and \$3.4 billion in estimated annual profits.¹ After enormous efforts by the merging parties and the reviewing federal agencies—the Antitrust Division of the U.S. Department of Justice (“DOJ” or “Justice Department”) and the Federal Communications Commission (“FCC” or “Commission”)—the two agencies reached opposite conclusions.

Approximately one year after the Bell Atlantic/NYNEX merger was announced, the DOJ issued a two sentence press release stating that it would not challenge the transaction.² Several months later, after reviewing virtually the same information as the DOJ, the FCC declared that the Bell Atlantic/NYNEX merger would harm competition and could not proceed absent the imposition of serious conditions on the merger³ that the FCC believed would protect local competition in the Northeastern United States.⁴ In contrast to the

reaction that followed the Justice Department announcement, the FCC’s decision was cheered by many critics of the DOJ’s decision, and was described as the action “where [the] Justice [Department] failed to act.”⁵

The contrasting decisions of the DOJ and the FCC regarding the Bell Atlantic/NYNEX merger illustrate the confusing and unpredictable nature of dual agency review of telecommunications mergers. Despite years of precedent and the existence of so-called guidelines, telecommunications merger review remains an *ad hoc* process.

In general, one would think that the antitrust activities of the FCC and the DOJ do not completely overlap. In many respects, as the agency responsible for telecommunications policy, the FCC’s antitrust activities are prospective, establishing rules to ensure or strengthen competition in the nation’s telecom markets. By contrast, the Justice Department’s antitrust activities are generally geared toward case-by-case enforcement, reviewing industry conduct or proposed deals for compliance with the antitrust laws.

But one area where this theoretical difference breaks down is the shared authority of the FCC

* James R. Weiss and Martin L. Stern are partners in the antitrust and telecommunications practice groups in the Washington, D.C. office of Preston Gates & Ellis, LLP. Prior to joining Preston Gates, Mr. Weiss was the Chief of the Transportation, Energy and Agriculture Section of the Antitrust Division of the U.S. Department of Justice. Previously, Mr. Stern was Deputy Chief of the Competition Division of the FCC’s Office of the General Counsel and is currently Vice Chair of the Communications Industry Committee of the ABA Antitrust Section. The authors gratefully acknowledge the assistance of William H. Davenport, a telecommunications associate at Preston Gates and David L. Rice, formerly of Preston Gates, in drafting and researching this article.

¹ See *FCC Approves \$21-Billion Bell Atlantic-NYNEX Merger With 8 Conditions*, COMM. DAILY, Aug. 15, 1997, at 1.

² United States Department of Justice, *Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger* (Apr. 24, 1997) <<http://www.usdoj.gov/opa/pr/1997/April97/173at.htm>>.

³ See In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 19993-94 (1997) [hereinafter *Bell Atlantic/NYNEX*].

⁴ See *FCC Approves \$21-Billion Bell Atlantic-NYNEX Merger With 8 Conditions*, *supra* note 1, at 2.

⁵ *Id.* at 2.

and the DOJ in reviewing telecommunications mergers. Unlike the Commission's establishment of prospective rules governing industry structure and activities, its review of telecommunications transactions, like that of the DOJ, involves the merits of specific, concrete transactions.

While there were significant telecommunications mergers prior to the 1990s, there has been a significant increase in such mergers since the mid-1990s, particularly after passage of the Telecommunications Act of 1996 ("1996 Act").⁶ In 1996, for example, there were more than 100 transactions just involving cable companies, valued at over \$16 billion.⁷ Recent telecom mergers not only have been numerous, but of enormous scale. The following mergers have occurred since January 1, 1996: Westinghouse Electric Corporation and Infinity Broadcasting Corporation (\$3.9 billion),⁸ Time Warner, Inc. and Turner Broadcasting System, Inc. (\$7.5 billion),⁹ Continental Cablevision, Inc. and US West, Inc. (\$11.8 billion),¹⁰ WorldCom, Inc. and MFS Communications Co. (\$14 billion),¹¹ SBC Communications, Inc. and Pacific Telesis Group, Inc. ("PacTel") (\$16.5 billion),¹² and Bell Atlantic Corporation and NYNEX Corporation (\$25.6 billion).¹³ Nineteen Ninety Eight has been similarly active, with the pending mergers of Alltel and 360° Communications Co. (\$6 billion),¹⁴ SBC Communications, Inc. and Southern New England Telecommunications Corp. ("SNET") (\$4.4 billion),¹⁵ Qwest Communications International, Inc. and LCI International, Inc. (\$4.4 billion),¹⁶ AT&T Corporation and Teleport Communications Group, Inc. ("TCG") (\$11.3 billion),¹⁷ and one of the largest telecommunications mergers in U.S. history, WorldCom, Inc. and MCI Communications Corporation (\$37 billion).¹⁸

The volume and size of these transactions suggest that a critical examination of the dual jurisdiction of the FCC and the DOJ is warranted. From the perspective of the merging parties, dual agency review imposes significant delays and costs both explicitly in terms of out-of-pocket legal and administrative costs as well as an implicit cost associated with the distraction of the enterprise and its executives from their business. On the other hand, dual merger review may be appropriate, given the volume and enormity of these mergers and their potential impact on public policy and consumer welfare.

This article reviews the aspects and consequences of this overlapping agency authority, including its impact on the telecommunications industry and the public, by focusing on FCC/DOJ review of mergers in the post-1996 Act environment. We recommend that the FCC and the DOJ reevaluate their relationship and focus on harnessing the benefits of their concurrent authority while minimizing the transaction costs imposed on the parties and consumers. Although Congress may be best suited to remedy the problems associated with this dual jurisdiction, the FCC and the DOJ can take several steps to improve the telecommunications merger review process.

II. BACKGROUND AND OVERVIEW OF ISSUES

Telecommunications competition is regulated by three agencies: the FCC, the Justice Department, and the Federal Trade Commission ("FTC"). Because virtually all telecommunications mergers, particularly those involving common carriers, are within the jurisdiction of the FCC and the DOJ, we concentrate on that rela-

⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.).

⁷ See *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, 13 FCC Rcd. 1034, 1057-58, 1188 (1998).

⁸ See, e.g., *F.C.C. approves Merger of Westinghouse and Infinity*, N.Y. TIMES, Dec. 27, 1996, at D3.

⁹ See, e.g., *Time Warner, Turner Shareholders Approve \$7.5 Billion Merger*, CHI. TRIB., Dec. 10, 1996, at 1.

¹⁰ See, e.g., *US West Completes Continental Purchase*, L.A. TIMES, Nov. 16, 1996, at D2.

¹¹ See, e.g., *WorldCom Acquires MFS*, WALL ST. J., Jan. 3, 1997, at B3.

¹² See, e.g., *SBC Completes \$16.7 Billion Merger with Pacific*

Telesis, N.Y. TIMES, Apr. 2, 1997, at D4.

¹³ See, e.g., Mark Landler, *Bell Atlantic and Nynex: Match Made in . . . Where?*, N.Y. TIMES, Aug. 15, 1997, at D1.

¹⁴ See, e.g., *\$6-Billion Alltel Purchase of 360° Said to Bolster 2 Rural Businesses*, COMM. DAILY, Mar. 17, 1998, at 1.

¹⁵ See, e.g., *SBC to Buy Southern New England Telephone in \$4.4-Billion Stock Deal*, COMM. DAILY, Jan. 6, 1998, at 1.

¹⁶ See, e.g., Mike Mills, *LCI To Be Acquired In \$4.4 Billion Deal*, WASH. POST, Mar. 10, 1998, at C1.

¹⁷ See, e.g., Seth Schiesel, *Qwest Set to Acquire LIC for \$4.4 Billion in Stock*, N.Y. TIMES, Mar. 10, 1998, at D2.

¹⁸ See, e.g., Seth Schiesel, *Shareholders Vote to Approve Merger of MCI and Worldcom*, N.Y. TIMES, Mar. 12, 1998, at D2; Mark Ribbing, *Upstart Wins Battle for MCI*, BALT. SUN, Nov. 11, 1997, at 1A.

tionship.¹⁹

While the DOJ and the FCC have authority to review the same mergers and acquisitions, the jurisdictional basis—as well as the scope—of their authority differs. As an independent regulatory agency, the FCC has broad authority and expertise regarding telecommunications issues in general. Historically, however, the FCC has been subject to public pressure and strict congressional oversight. Conversely, as an enforcement agency operating in the Executive Branch, the DOJ focuses exclusively on competition issues rather than general public policy goals. Although its mission is narrower, the DOJ appears less susceptible to direct political pressure in reviewing competition issues than the FCC. These differences provide the framework for our examination of the dual jurisdiction of the agencies over telecommunications competition issues.

A. Statutory Aspects of Agency Authority

The FCC draws its power over telecommunica-

tions mergers and acquisitions from two statutory sources. The first is the Communications Act of 1934 (“Communications Act”),²⁰ which requires parties to obtain Commission authorization before engaging in a number of activities.²¹ Typically, a merger involving the transfer of these authorizations or licenses requires Commission approval. Since telecommunications providers generally have one or more of these authorizations, application to and approval by the Commission must occur before the merger can be consummated.²²

The Communications Act provides the FCC with a great deal of discretion in reviewing mergers and acquisitions. As both the investigatory and decisionmaking body, the FCC may base its decision on evidence that would not be admissible in court²³ and can reject a transaction if the merging parties fail to prove that their deal serves the public interest.²⁴ The FCC is “entrusted with the responsibility to determine when and to what extent the public interest would be served by com-

¹⁹ In general, the FTC is the independent agency that has authority to review mergers and acquisitions under sections 1 and 6 of the FTC Act, 15 U.S.C. §§ 41, 46 (1994). As a practical matter, the FTC and the DOJ have formalized a “clearance” process by which the two agencies mutually agree on which agency will review a particular transaction. *See infra* text accompanying notes 116-118. With respect to telecommunications mergers, the Clayton Act, as amended, expressly excludes mergers and acquisitions between common carriers from the FTC’s authority and gives it to the FCC. *See* 15 U.S.C. § 21(a) (1994 & Supp. I 1995). FTC involvement in telecommunications competition is therefore generally restricted to cable and mass media mergers like the Time Warner/Turner Broadcasting merger. *See infra* text accompanying note 123. These mergers can be and often are reviewed by the FCC under its authority over the transfer of radio licenses. *See* 15 U.S.C. § 21(a).

²⁰ Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

²¹ For example, section 214 of the Communications Act, 47 U.S.C. § 214 (1994), controls common carrier authorizations, while section 310 of the same act, 47 U.S.C. § 310 (1994), governs radio licenses, and 47 U.S.C. §§ 34-39 (1994) covers submarine cable landing licenses.

²² For example, in the WorldCom/MCI merger, WorldCom sought approval of the transfer of 35 international Section 214 authorizations, several hundred radio licenses, and 21 cable landing licenses. *See In re Applications of WorldCom, Inc. and Howard A. White, Trustee, for Transfers of Control of MCI Communications Corporation and Request for Special Temporary Authority, Applications and Request for Special Temporary Authority*, CC 97-21, (filed Oct. 2, 1997) [hereinafter *WorldCom/MCI*]; *In re The Merger of MCI Communications Corp. and British Telecommunication plc, Memorandum and Order*, 12 FCC Rcd. 15351, 15372 (1997) (“Finally we recognize that, in evaluating proposed mergers

in telecommunications markets that are subject to change and uncertainty, we will necessarily be making predictions about future market conditions and the likely success of individual competitors. In making our predictions, however, we are not bound by the rules of evidence that may apply in judicial conflicts.”); *see also* *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981).

²³ Section 308 of the Communications Act, for example, requires the Commission to consider the same factors in reviewing a license transfer as in granting a license in the first place. *See* 47 U.S.C. § 308(b) (1994). Those conditions are listed in Section 308(b) of the Communications Act: “All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.” *Id.*

²⁴ *See, e.g.*, 47 U.S.C. §§ 214, 310(d) (requiring that the FCC determine whether the “public interest, convenience and necessity” will be served by the transfer of control of a company holding radio licenses). Numerous provisions of

petition in the industry."²⁵ Under the public interest test, the FCC considers the competitive effects of the merger or acquisition as one factor among several.²⁶ Other factors include the effects of the proposed transaction on universal service, national security, spectrum efficiency, technological innovation, and the diversity of views and content.²⁷

The second source of the FCC's statutory antitrust authority may come as a surprise to many practitioners. Under Sections 7 and 11 of the Clayton Act, the FCC has the authority to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy . . . where in any line of 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."²⁸ In contrast to the Communications Act, the Clayton Act requires the FCC to proceed through an administrative complaint proceeding if it seeks to challenge a merger under Section 7.²⁹

The FCC has discretion as to whether to exercise its Clayton Act authority³⁰ and rarely does so beyond paying lip service in its orders. Indeed, we have not found a case in the last forty years where the Commission proceeded under the Clayton Act. In numerous Commission decisions reviewing communications industry mergers, the FCC mentions the Clayton Act, but never uses the

Clayton Act as its basis for proceeding.³¹

Although the advantages inherent in its Communications Act authority are certainly a factor in the FCC's infrequent use of Clayton Act authority, the FCC's exclusive reliance on its Communications Act power is mostly rooted in the belief that the proper role of competitive forces in the telecommunications industry should be determined not so much by the letter of the antitrust laws but by the "special circumstances of the industry."³² As the FCC explained in discussing the relationship between its public interest test and its review under the antitrust statutes, "[o]ur examination of a proposed merger under the public interest standard includes consideration of the competition policies underlying the [antitrust laws]. . . but the public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws."³³

In contrast to the FCC, the Justice Department generally acts as an enforcement agency rather than a policy-making body. Accordingly, instead of the FCC's broad policy-making "public interest" test, the DOJ proceeds against mergers under the antitrust laws, typically Section 7 of the Clayton Act. The merger review processes of the two agencies also differ markedly.³⁴ As noted above, in reviewing a merger under the Communications Act, the FCC is the decision maker and generally relies exclusively on the public record and the

the Communications Act authorize or require the FCC to examine competition issues.) See Douglas B. McFadden, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 457, 462-63 (1997) (listing 47 U.S.C. §§ 202, 205, 309(a), and 314 as provisions requiring the Commission to consider competition issues).

²⁵ *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

²⁶ See *Bell Atlantic/NYNEX*, *supra* note 3, at 19987; *In re Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, *Memorandum Opinion and Order*, 12 FCC Rcd. 2624, 2661 (1997) [hereinafter *SBC/PacTel*].

²⁷ See *Bell Atlantic/NYNEX*, *supra* note 3, at 20003 n.67.

²⁸ 15 U.S.C. § 21(a), 18 (1994). Indeed, until 1996, the FCC had the authority to grant limited antitrust immunity to certain mergers. See *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 601(b), 110 Stat. 56, 143.

²⁹ In such a proceeding, the Commission issues a complaint setting forth the violation of Section 7 and holds a hearing in which the Attorney General and other persons, upon good cause shown, may testify. After such hearing, if the Commission believes that Section 7 has been violated, it may issue an order requiring the defendant to cease and desist from such violation and to divest itself of the stock or

other interest acquired in violation of that Section.

³⁰ *United States v. FCC*, 652 F.2d at 88.

³¹ See, e.g., *SBC/PacTel*, *supra* note 26, at 2631 (where the FCC held that "[w]e choose not to exercise [our Clayton Act authority] in this case because we find our jurisdiction under the Communications Act to be sufficient to address all competitive effects of the proposed transfer—including the issue of whether the proposed transfer may substantially lessen competition or tend to create a monopoly.").

³² *United States v. FCC*, 652 F.2d at 88 (noting that the Commission is not responsible for enforcing the antitrust laws); see *SBC/PacTel*; *Bell Atlantic/NYNEX*, *supra* note 3, at 19988 ("As courts have previously recognized, in evaluating whether applicants have demonstrated that the transaction is in the public interest, we consider the transaction in light of 'the trends and needs of the industry' as a whole, the factors that 'influenced Congress to make special provision for the particular industry,' and the complexity and rapidity of change in the industry.") (citing *FCC v. RCA*, 346 U.S. at 93-95, 98).

³³ *Bell Atlantic/NYNEX*, *supra* note 3, at 19987.

³⁴ As noted above, under the Clayton (and Sherman) Acts, the agency has the burden of proving to a federal district court that the transaction is impermissible and, in proving that case, the agency may not use evidence that would be inadmissible before a court.

pleadings as the basis for its decision. By contrast, the Justice Department, in its merger review, must conduct a detailed investigation, relying heavily on staff inquiries and document requests and must ultimately bring suit in federal court.

Nevertheless, while the inputs into the processes of the two agencies may differ, the antitrust analysis of the FCC and the DOJ is very similar. Where the two agencies differ in substance is that the public interest test is somewhat more flexible and forward-looking and takes into account issues at least arguably beyond antitrust considerations. Thus, for example, under the public interest test, even if a transaction is likely to harm competition in any relevant market, it may nevertheless be permitted if other factors sufficiently mitigate that harm.³⁵ If the same conclusion is reached under the Clayton Act analysis, the approach historically taken by the DOJ would lead it to challenge the transaction even if it may bring other public benefits.³⁶ Similarly, using the public interest test, the Commission has imposed certain conditions on a particular merger that, while not directly flowing from competitive considerations resulting from the merger itself, might nonetheless be perceived by the Commission to be required by the greater public interest.³⁷ That being said, the DOJ has shown similar creativity in

imposing conditions as part of antitrust consent decrees permitting a transaction to go forward under the Clayton Act. And like the FCC's consideration of such mergers under the Communications Act, such consent decrees are effective and final only if they are in "the public interest."³⁸

B. Political Aspects of Agency Review

FCC and DOJ decisionmaking is influenced not only by statutory considerations but also by political pressure emanating from many sources. This pressure tends to have substantial influence on the level of scrutiny directed at particular mergers.

Generally speaking, as an independent policymaking agency, the FCC faces substantial political pressure that tends to influence decisionmaking in all areas under the FCC's jurisdiction, not just merger review. This factor is most prevalent during the FCC rulemaking process, where political pressure is brought to bear on the Commission through letters and inquiries from Congress, as well as through exercise of Congress' oversight authority over the FCC.³⁹ The practical result of this politicization is that the Commission is buffeted by competing, powerful forces on virtually every important decision it makes.⁴⁰

³⁵ See *United States v. FCC*, 652 F.2d at 104.

³⁶ Public interest benefits of a merger do not ordinarily rebut anticompetitive facts of a merger. See Department of Justice and Federal Trade Commission 1992 Merger Guidelines, 4 Trad. Reg. Rep. (CCH) ¶ 13,104 (1992) [hereinafter, 1992 Merger Guidelines]. However, the FTC has indicated that it is receptive to claims of efficiencies arising from mergers. See *Roundtable Conference with Enforcement Officials*, 65 ANTITRUST L.J. 929, 947 (1997). As stated by FTC Chairman Pitofsky, "the Guidelines say it would be unusual or rare . . . that efficiencies would justify merger to monopoly. My own view is I don't ever expect efficiencies to justify merger to monopoly. But if . . . there is a substantial claim of efficiency, and it's a close call in the first place . . . that's where we ought to take such claims into account." *Id.* The DOJ may also be willing to consider efficiencies in some cases. Joel Klein recently noted that, "[w]hen you see the kinds of efficiencies that go to marginal costs, that have the potential for tangible price reduction, in general when we've seen them, they have been convincing at times; we've seen evidence that satisfied us with respect to them." *Id.* at 946.

³⁷ For programming diversity reasons, the FTC required Time Warner cable outlets to carry all-news cable network in addition to CNN). See Paul Farhi, *Pulling the Plug on Capitol Hill*, WASH. POST, Mar. 13, 1997, at C1.

³⁸ 15 U.S.C. § 16(d)-(e) (1994).

³⁹ The level of industry influence is suggested by the fact that, during the 1996 elections, telecom-related entities were among the highest donors to political campaigns. See 1996

Elections Cost More Than \$2 Billion; Telecom Gifts Ranked High, WASH. TELECOMM. WK., Dec. 5, 1997, at 10.

⁴⁰ One example of this phenomenon is the tribulations associated with the Universal Service Fund ("Fund"), a mechanism designed in part to subsidize telecommunications development for schools, libraries, and rural health care facilities. As of this writing, the FCC has not required Internet Service Providers ("ISPs") to contribute to the Fund because they are not considered "telecommunications carriers" under the Communications Act. Senate Appropriations Committee Chairman Ted Stevens (R-Ark.), representing a rural constituency, opposes the Commission's position on this issue. Consequently, he inserted a requirement into the Commission's 1998 budget authorization directing the FCC to prepare a report on the scope of Universal Service, presumably for the purpose of encouraging the FCC to revisit this issue and require ISPs to contribute to the Fund. See *Numerous Senators Expected to Sign Letter Disparaging USF Plan*, WASH. TELECOM WK., Dec. 5, 1997, at 1.

However, there are others who oppose forcing ISPs to contribute to universal service. While Senator Stevens has been conducting his campaign, a number of other Senators sent a letter to FCC Chairman William Kennard criticizing the proposed expansion of universal service. *Id.* The issue of ISP contributions to the Universal Service Fund has now been reduced to a political football, where opposing Members of Congress are attempting to influence the FCC against the backdrop of massive public hostility towards assessing fees on ISPs. *Id.* The Commission was to prepare its report on Uni-

In contrast, as a law enforcement agency, the DOJ has historically been less susceptible to direct political pressure on particular mergers than the FCC.⁴¹ Such political pressure is regarded as “un-seemly” when directed at particular mergers.⁴² Instead, the DOJ’s antitrust enforcement tends to be driven by general antitrust philosophies of the President and personalities within the DOJ, as suggested by the shift from lax antitrust enforcement under Reagan to a more aggressive antitrust approach under Clinton.⁴³ Thus, as described by Senator Bob Kerrey (D-Neb.) during Congress’ consideration of the 1996 Act, the FCC is “vulnerable to political pressure . . . a lot more vulnerable than the Department of Justice.”⁴⁴

Nevertheless, within the merger context, both agencies have been finding lately that they are targets of intensified political pressure. This pressure is rooted primarily in a growing Congressional perception that anti-competitive mergers are passing muster at the agencies without the imposition of adequate protections for consumers. These concerns rose to the surface recently when the leadership of the Senate Judiciary’s antitrust subcommittee sent a letter to both FCC Chairman

William Kennard and DOJ Antitrust Division Chief Joel Klein urging “vigorous review” of all proposed telecom mergers.⁴⁵ Referring to the proposed MCI/WorldCom merger, the letter advised both agencies to “closely scrutinize the final proposal, to ensure that consumers continue to benefit from competition in long distance and other communications markets” because “highly leveraged acquisitions could result in diminished competition in local markets and higher rates for local phone service.”⁴⁶ Reports indicate that “Klein, in particular, is being closely watched by the antitrust subcommittee leadership . . . because he allowed the Bell Atlantic/NYNEX merger to go forward virtually unscathed.”⁴⁷

MCI/WorldCom has not been the only merger to attract scrutiny on Capitol Hill. Recently, Congressman Ed Markey (D-Mass.), when commenting on the proposed SBC/SNET merger, stated that both the FCC and the DOJ should act aggressively during the review process, and in particular, the DOJ should “use every legal means at its disposal” to block the merger.⁴⁸ Given this pressure, agency scrutiny of upcoming mergers is bound to intensify.⁴⁹

versal Service based on mutually exclusive messages from Congress—a no-win situation for the Commission. *Id.* On April 10, 1998, the Commission issued its report, declining to impose universal service charges on ISPs, but expressing willingness to consider — on a case by case basis — imposing charges on providers of Internet telephony. See Report to Congress, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67, at para. 83 (April 10, 1998).

Another instance of the political element to FCC action concerns proposals to provide free or substantially reduced charge advertising for politicians. During his 1998 State of the Union address, President Clinton suggested that the FCC explore free advertising as a method of reducing the influence of political donations on campaigns. Chairman Kennard, apparently interpreting this remark as a go-ahead signal from the President that would provide him with political cover, came out in support of free advertising. When opponents learned the Chairman’s position, however, a political firestorm ensued. The controversy was capped by a phone conversation in which House Telecommunications Subcommittee Chairman Billy Tauzin (R-La.) informed Chairman Kennard that, should he not change his position on free advertising, he was in danger of having “the worst start ever of any FCC commissioner.” Chris McConnell, *Battle Lines Form Over Free Airtime*, BROAD. & CABLE, Feb. 2, 1998, at 6.

⁴¹ This is not to say that the DOJ’s enforcement priorities are not affected by political pressure. For example, one can compare today’s heightened level of antitrust review against the level of review during the Reagan administration. Nevertheless, the DOJ is more removed than the FCC from Congressional influence. For example, the different levels of congressional oversight were a key factor in Congress’ deci-

sion to allocate oversight of the regional holding companies (“RHCs”) entrance into in-region long-distance service to the FCC instead of the DOJ, the agency that had overseen the Modified Final Judgment since 1982. During the debate on the 1996 Act, then-FCC Chairman Reed Hundt described the choice facing Congress in terms of this oversight authority:

The debate ought to be about where the right place to put these responsibilities is, considering the separation of powers. For example, do you want these responsibilities in an independent commission that is subject to congressional oversight? Would you rather have them in the Executive Branch, where the Department of Justice has a rather different role, vis-à-vis congressional oversight?

Communications Law Reform: Hearings Before the Subcomm. On Telecomms. and Fin. of the House Comm. On Commerce, 104th Cong. 274 (1995) (statement of Reed Hundt, Chairman, FCC).

⁴² See 139 CONG. REC. S11468 (daily ed. Sept. 10, 1993) (statement of Sen. Simon).

⁴³ See Stephen Pearlstein, *Applying Brakes to Merger Mania: Antitrust Law Enjoys a Revival*, WASH. POST, Mar. 10, 1998, at C1.

⁴⁴ 141 CONG. REC. S8194 (daily ed. June 12, 1995) (statement of Sen. Kerrey).

⁴⁵ See Panel’s Leaders Urge Intense Study of Merger by Kennard, Klein, WASH. TELECOM WK., Nov. 14, 1997 at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *SBC to Buy Southern New England Telephone in \$4.4 Billion Stock Deal*, COMM. DAILY, Jan. 6, 1998 at 1.

⁴⁹ The FCC does have *ex parte* rules, which generally bar this sort of pressure in adjudicatory proceedings, including

These Congressional pressures may also have an inter-agency component that is fueled by the desire of both the DOJ and the FCC to influence telecommunications policy. This was evident during the debate on the 1996 Act, when the Justice Department sought review authority over Bell Operating Company ("BOC") entry into in-region inter Local Access and Transport Area ("LATA") markets. In testimony before Congress, then-DOJ Antitrust Chief Anne Bingaman unfavorably compared the FCC's oversight of competition in the cellular telephone market with the DOJ's oversight of the Modified Final Judgment that broke up AT&T and the BOCs. She then summed up by stating that "responsibility [for Section 271 review] should be delegated to the Department of Justice, the agency that has applied that standard for many years."⁵⁰ Nevertheless, Congress gave this authority to the FCC under Section 271 of the 1996 Act, relegating the DOJ to an influential but supplementary role by directing the FCC to accord "substantial weight" to the DOJ's comments.⁵¹

C. How Does this Dual Jurisdiction Play Out in the Context of Merger and Acquisition Review?

As noted above, with passage of the 1996 Act, the pace of telecommunications mergers and acquisitions has increased substantially. Although the 1996 Act itself made only a single change in the overlapping authority of the FCC and the DOJ—the elimination of the FCC's rarely-if-ever-used ability to immunize common carrier mergers

from antitrust challenge⁵²—the increase in mergers and acquisitions generated by the 1996 Act has increased the focus on the different statutory and political aspects to the authority of the FCC and the DOJ. A review of the DOJ and FCC treatment of these transactions, however, suggests a patchwork of decisions in which no clear pattern can be discerned.

Sometimes the DOJ and the FCC take complementary approaches toward merger review. For example, in the Fall of 1996, both the DOJ and the FCC acted on the proposed merger of the Bell Operating Company local exchange carrier ("LEC") USWest and a large cable provider, Continental Cablevision ("Continental").⁵³ The transaction made USWest one of the largest cable operators in the United States, with more than 16.2 million subscribers.⁵⁴

However, the transaction explicitly invoked the FCC's jurisdiction under the 1996 Act, specifically targeting the cable/telco anti-buyout rule, under which LECs and cable companies providing service in each other's service area may not acquire ten percent or more interest in each other.⁵⁵ Therefore, because Continental operated in USWest's telephone service area, the parties were required to seek a waiver from the FCC to allow them sufficient time to divest the in-region systems at non-"fire sale" prices.⁵⁶

At the same time, the merger raised additional competitive considerations because Continental owned 20 percent of Teleport Communications Group ("Teleport"), a Competitive Local Exchange Carrier ("CLEC") that competes with USWest in certain cities.⁵⁷ Therefore, the agencies

transfers of FCC licenses and authorizations. On the other hand, the FCC may, at its discretion, waive the applicability of its rules to adjudicatory proceedings for particular matters and has done so with respect to a number of industry mergers.

⁵⁰ *Hearing on Telecommunications Policy Reform Before the Senate Comm. On Commerce, Science, and Transportation*, S. REP. NO. 104-218, 25 (1995) (statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division).

⁵¹ Section 271(d)(2)(A) of the 1996 Act, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 89 (to be codified at 47 U.S.C. § 271(d)(2)(A)).

⁵² Former Section 221(a) of the Communications Act read, in relevant part:

If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts by Congress making the proposed transaction illegal shall not apply.

47 U.S.C. § 221(a) (1994), *repealed by* section 601 of the 1996 Act, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56 (1996).

⁵³ *See Continental Cablevision Accepts USWest's \$10.8 Billion Offer*, CNNfn (Feb. 27, 1996) <<http://cnnfn.com/archive/news/9602/27/uswest/index.html>>.

⁵⁴ *See id.*

⁵⁵ *See* section 572 of the 1996 Act, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 119 (1996) (to be codified at 47 U.S.C. § 572). The cable/telco anti-buyout rule has two purposes. First, the rule protects potential competition between the cable company and telephone company in providing both cable and telephone service. Second, the rule prevents a BOC from using the cable company's facilities to avoid the restrictions placed on its provision of in-region interLATA service.

⁵⁶ *In re US West, Inc. and Continental Cablevision, Inc., Memorandum and Order*, 11 FCC Rcd 13260, 13275-76 (1996).

⁵⁷ *See United States v. USWest, Inc. & Continental Cablevision, Inc.*; Proposed Final Judgment and Competitive Impact

also had to address any harm to competition in these local exchange markets resulting from the USWest/Continental merger.

The question of the cable-LEC overlap in certain markets is committed to the FCC's jurisdiction under the Communications Act.⁵⁸ At the same time, the DOJ has discretion under the Clayton Act to address not only that issue but also the Teleport question.

In October 1996, the FCC permitted the USWest/Continental merger to take place without the parties first divesting all of Continental's in-region cable systems. Citing the public interest benefits that would inure to allowing the transaction to proceed,⁵⁹ the Commission gave USWest additional time to divest the in-region systems after the merger.⁶⁰

Although the FCC never noted the CLEC ownership issue,⁶¹ the DOJ addressed this problem in its November 1996 consent decree with the parties.⁶² This decree allowed the merger to proceed but required the parties to relinquish their interest in Teleport by December 1, 1998.⁶³ The DOJ noted the in-region cable company issue, but passed on it because the FCC had already ruled on the issue.⁶⁴ In doing so, the DOJ stated that

Statement, 61 Fed. Reg. 58,703, 58,707 (Nov. 18, 1996). This issue, committed to FCC jurisdiction under the Communications Act, raises competitive issues under the Clayton Act.

⁵⁸ Section 572(d)(6) of the 1996 Act permits the Commission to waive the cable/telco anti-buyout rule under certain conditions, subject to the approval of the relevant local franchising authorities. Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.) 56, 119 (1996) (to be codified at 47 U.S.C. § 572(d)(6)).

⁵⁹ These benefits included that of increasing cable television competition by introducing out-of-region investment by telephone companies in the cable market and avoiding a "fire sale" of the in-region systems. *In re US West, Inc. and Continental Cablevision, Inc., Memorandum and Order*, 11 FCC Rcd. 13260, 13274-76 (1996).

⁶⁰ *Id.* at 13280. On February 27, 1998, the Commission granted USWest's petition for special relief granting an extension of its ownership of Minnesota cable systems it was to have sold pursuant to the earlier FCC decision. See *In re US West, Inc. and Continental Cablevision, Inc., Petition for Special Relief*, 11 FCC Rcd. 13260, 13280 (1996); *FCC Allows U S West To Retain Minn. Cable Systems*, COMM. DAILY, Feb. 27, 1998, at 3.

⁶¹ It is unclear whether the FCC had authority to address the Teleport issue under the Communications Act.

⁶² *United States v. US West, Inc. & Continental Cablevision, Inc.*, Proposed Final Judgment and Competitive Impact Statement, 61 Fed. Reg. 58,703, 58,707 (1996).

⁶³ *Id.* at 58,704.

⁶⁴ *Id.* at 58,708. It is unclear whether the FCC could have immunized the deal from the DOJ challenge pursuant

"[t]he divestiture of the in-region systems by a date certain, pursuant to the [FCC's] Order, as amended, is substantially similar to the divestiture relief the Department [of Justice] would seek in the event the USWest/Continental transaction was deemed to violate the Clayton Act, and thus will prevent any lessening of competition that might have resulted from the transaction."⁶⁵

In contrast to the almost cooperative approach shown in the USWest/Continental Cablevision transaction, there are times when the DOJ and the FCC reach completely different conclusions about a particular telecommunications deal. For example, the largest telecommunications merger to date that the FCC has approved and the DOJ declined to challenge is that of the BOCs Bell Atlantic and NYNEX.⁶⁶ In that transaction, the DOJ and the FCC took completely opposite approaches towards a merger that, to many observers, raised significant antitrust concerns on its face. As two of the largest providers of local telephone service in adjacent regions of the Eastern United States, the merger of Bell Atlantic and NYNEX would place a substantial portion of the Northeast and Mid Atlantic under a single local telephone company.⁶⁷ Moreover, this merger

to its authority under the Communications Act.

⁶⁵ *Id.*

⁶⁶ See *Common Carrier Action—FCC Approves Bell Atlantic/Nynex Merger Subject to Market-Opening Conditions* (Rpt. No. CC 97-43) FCC News, Aug. 14, 1997; *Antitrust Division Statement Regarding Bell Atlantic/Nynex Merger* (Apr. 24, 1997) <<http://www.usdoj.gov/opa/pr/1997/April97/173at.htm>> [hereinafter *DOJ Bell Atlantic/NYNEX Statement*]. The DOJ and the FCC also approved the \$16.7 billion merger between the BOCs SBC and PacTel. See *Antitrust Division Statement Regarding Pacific Telesis/SBC Communications Merger* (Nov. 5, 1996) <<http://www.usdoj.gov/opa/pr/1996/Nov96/542at.htm>> [hereinafter *DOJ SBC/PacTel Statement*]; In November 1996, the DOJ issued a Press Release stating that it had "concluded that the [SBC/PacTel] merger did not violate the antitrust laws." *Antitrust Division Statement Regarding Pacific Telesis/SBC Communications Merger* (Nov. 5, 1996) <<http://www.usdoj.gov/opa/pr/1996/Nov96/542at.htm>>. Three months after the DOJ decision, the FCC approved the merger, emphasizing that it did so not because of any efficiencies that might be gained from the proposed transfer, "but rather its lack of any significant and foreseeable anticompetitive effects . . ." *FCC Rejects Key Arguments of Opponents to SBC-Pacific Telecom Merger*, COMM. DAILY, Feb. 10, 1997. Unlike in the Bell Atlantic/NYNEX Order, the Commission found no likelihood that either SBC or PacTel would have entered each other's markets if the merger had not taken place. See *SBC/PacTel*, *supra* note 26, at 2636.

⁶⁷ See Mike Mills, *Bell Atlantic, Nynex Hold Talks on Partial or Complete Merger*, WASH. POST, Feb. 8, 1996, at D9.

would eliminate the possibility that either BOC would compete in the other's market for local service.⁶⁸ This last factor was accentuated by Bell Atlantic documents indicating that the company had plans to compete directly with NYNEX in the New York City metro area.⁶⁹

Nevertheless, the DOJ decided not to block or place conditions on the merger, finding no likelihood of adverse competitive impact.⁷⁰ This result echoed the DOJ's finding in the SBC/PacTel merger.⁷¹ The DOJ's decision on the Bell Atlantic/NYNEX merger, however, outraged many in Congress and contributed to the chilly, if not hostile, reception that then-Acting DOJ Antitrust Chief Klein received when he ventured to Capitol Hill for his confirmation hearing.⁷² Klein later defended the DOJ's decision not to challenge the merger in the following terms:

Based on a year-long analysis of millions of documents including, significantly, the non-public business plans of many of the affected players as well as lots of deposition testimony, interviews, expert commentary, and advice, I believed, then, and continue to believe, that the merger was not anticompetitive. In fact, the evidence indicated that real efficiencies were likely to result from the merger some of which have already been realized—and that, over time, those efficiencies would lead to better service in the affected areas.⁷³

In contrast to the DOJ's decision not to challenge the merger, the FCC seized upon the Bell Atlantic/NYNEX merger as an opportunity to outline the contours for its public interest analysis of future telecommunications mergers.⁷⁴ As then-

FCC Chairman Reed Hundt stated, "In my opinion, the *Bell Atlantic/NYNEX* decision is a landmark ruling—in the order, the FCC describes in detail its flexible and dynamic public interest approach to industry structure."⁷⁵

Although the public interest test under the Communications Act includes a number of factors in its analysis, the Commission paid only lip service to factors other than the effect of the transaction on competition. Instead, applying traditional antitrust analysis principles, including the DOJ/FTC Merger Guidelines,⁷⁶ the Commission examined not only the impact of the merger on markets as they currently existed, but also evaluated the likely effects of the merger on markets as they would exist after the local competition provisions of the 1996 Act are fully implemented.⁷⁷

Based on its review of the information provided by the parties, as well as many of the same documents provided to the DOJ pursuant to the Hart-Scott-Rodino premerger review process,⁷⁸ the Commission found that the merger eliminated Bell Atlantic as a likely competitor with NYNEX in the lucrative New York market.⁷⁹ It found that Bell Atlantic and NYNEX were two of the five likely most significant market participants that would compete to provide local exchange and telecommunications services to residential and small business customers in the New York area.⁸⁰

In the end, the FCC was prepared to block the

⁶⁸ See *\$23-Billion Bell Atlantic-Nynex Merger Draws Praise, Fire: Part II*, COMM. DAILY, Apr. 23, 1996, at 3.

⁶⁹ See Bob Woods, *Bell Atlantic/Nynex Merger Closer to Reality*, Newsbytes News Network, 1997 Westlaw 9491446 (Feb. 27, 1997); <<http://www.newsbytes.com/nbcgi-bin/udt/SHOW.NB.NEW?ID=86838>>.

⁷⁰ See *DOJ Bell Atlantic/NYNEX Statement*, *supra* note 66.

⁷¹ See *DOJ SBC/PacTel Statement*, *supra* note 66.

⁷² See Kirk Victor, *Reach Out and Crush Someone?*, NAT'L J., June 7, 1997, at 1133.

⁷³ Assistant Attorney General Joel Klein, DOJ Antitrust Division, Address Before the Federal Energy Regulatory Commission, Distinguished Speakers Series, *Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring*, (Jan. 21, 1998) <<http://www.usdoj.gov/atr/speeches/1332.htm>>.

⁷⁴ See *The Telecommunications Act: An Anti-Trust Perspective: Testimony of Reed E. Hundt, Chairman, FCC, Testimony Before the Senate Judiciary Comm., Subcomm. on Antitrust, Business Rights and Competition*, Federal Document Clearing House Congressional Testimony, Sept. 17, 1997, available in LEXIS, Legis Library, Cngtst file [hereinafter *Hundt Testimony*].

⁷⁵ *Id.*

⁷⁶ See 1992 Merger Guidelines, *supra* note 36.

⁷⁷ See *Bell Atlantic/NYNEX*, *supra* note 3, at 19989.

⁷⁸ See *id.* at 20000. In *Bell Atlantic/NYNEX*, the Common Carrier Bureau ordered the parties to provide them with certain of the Hart-Scott-Rodino ("HSR") documents pursuant to a protective order. See *id.* The parties did not contest the order and the Commission did not review its propriety. The portion of the Commission's Order discussing the HSR documents was issued under seal as a separate Appendix. See *id.* However, pursuant to section 201 of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, the DOJ and the FTC may not make public any information filed with them "except as may be relevant to any administrative or judicial action or proceeding." 15 U.S.C. 18a(h) (1994). No court has interpreted Section 18a(h). See *Lieberman v. FTC*, 771 F.2d 32, 37 n.12 (2d Cir. 1985) (noting that state attorneys general seeking HSR documents for use in state antitrust proceedings failed to assert Section 18a(h) as grounds for disclosure). The FTC has construed Section 18a(h) as permitting disclosure of HSR documents to the public to allow comment on a proposed consent order. See *In re General Motors Corp.*, 103 F.T.C. 58, 59 (1984) (order dismissing in part and denying in part petition for disclosure of certain non-public information).

⁷⁹ See *Bell Atlantic/NYNEX*, *supra* note 3, at 19991.

⁸⁰ See *id.*

merger and permitted it to occur only after Bell Atlantic and NYNEX agreed to numerous conditions.⁸¹ These conditions were actually proposed by the merging parties once it became clear that the FCC would reject the deal otherwise.⁸² The FCC warned that future BOC mergers would be reviewed under a stricter analysis.⁸³

Finally, the FCC and the DOJ in certain cases have reached essentially the same conclusions regarding the merger and imposed virtually identical conditions upon it. The FCC closely followed its Bell Atlantic/NYNEX merger analysis in its review of the proposed merger (valued at one point for as much as \$24 billion⁸⁴) between British Telecommunications, plc ("BT"), the dominant carrier in Great Britain, and MCI, the second largest U.S. long-distance carrier. Although this deal collapsed in the Fall of 1997 following WorldCom's competing bid for MCI,⁸⁵ that collapse came only after the DOJ consent decree and the FCC order approving the transaction.⁸⁶

Unlike in the Bell Atlantic/NYNEX deal, both the DOJ and the FCC refused to allow the BT/MCI deal to proceed without significant concessions by the merging parties. For its part, the DOJ essentially ordered an extension and expansion of the conditions imposed on a previous BT/MCI deal in which BT purchased 20 percent of MCI.⁸⁷ These conditions were intended to prevent BT from leveraging its market power in the U.K. to gain an unfair advantage in the U.S. and international markets.

The Justice Department also noted the con-

cerns of several potential competitors regarding the effect of the BT/MCI merger on the availability of backhaul, the transport of traffic from the head-end of an international cable to a point of interconnection with a carrier's domestic facilities in the U.S.⁸⁸ Presently, only a few carriers own backhaul facilities. The DOJ deferred on this issue to the FCC, however, and stated that it would merely monitor the "extent and nature of the problem, if any, raised by the merged entity's control of backhaul facilities in the U.S."⁸⁹

In its order, the FCC essentially followed the formula set forth in its Bell Atlantic/NYNEX Order. The Commission explained how its public interest test differed from the review performed by the DOJ, yet applied essentially the same analysis used by the DOJ in reviewing mergers under the Clayton and Sherman Acts.⁹⁰ Unlike the DOJ, and as the Commission had done in the Bell Atlantic/NYNEX Order, the FCC analyzed the merger's effect on two contexts of competition—the state of telecom competition currently and the state of competition at some unspecified future date when the local competition provisions of the 1996 Act are fully implemented. Despite this difference between its analysis and that of the Justice Department, the Commission also imposed several conditions on the BT/MCI merger which largely echoed those of the DOJ.⁹¹

The FCC noted the DOJ's concerns regarding access to U.S. backhaul facilities.⁹² Following the DOJ's decision, MCI informed the Commission that it would offer its backhaul facilities on a first-

⁸¹ See *id.* at 19992-93. See also *Hundt Testimony*, *supra* note 74. Then-FCC Chairman Hundt, in testimony before Congress, described the Commission's Bell Atlantic/NYNEX order as setting "forward a public interest analysis in which a telecommunications industry merger will be approved by the Commission only if it can be shown to advance the goal of promoting competition. In my opinion, the *Bell Atlantic-NYNEX* decision is a landmark ruling—in the order, the FCC describes in detail its flexible and dynamic public interest approach to industry structure." *Hundt Testimony*, *supra* note 74.

⁸² See Leslie Cauley, *Bell Atlantic, Nynex Agree to Measures Aimed at Fostering Rivalry in Northeast*, WALL ST. J., July 21, 1997, at B6.

⁸³ See *Bell Atlantic/NYNEX*, *supra* note 3, para. 16.

⁸⁴ See Gautam Naik & John J. Keller, *BT Cuts Purchase Price for MCI by \$5 Billion*, WALL ST. J., Aug. 25, 1997, at A4. The deal was originally valued at \$24 billion, but BT subsequently renegotiated the transaction for the lower price of \$19 billion. See *id.*

⁸⁵ See John J. Keller & Steven Lipin, *Wedding Bells: WorldCom, MCI Deal Could Rewrite Script for a New Phone Era*,

WALL ST. J., Nov. 11, 1997, at A1.

⁸⁶ See *In re The Merger of MCI Communications Corp. and British Telecoms. PLC*, 9 Communications Reg. (P&F) 657 (1997) [hereinafter *FCC BT-MCI Order*]; Proposed Final Judgment and Memorandum in Support of Modification, 2 Fed. Reg. 37594 (1997) [hereinafter *DOJ BT-MCI Modification*]; DOJ Antitrust Division News Release, *Justice Department Files Antitrust Suit and Consent Decree in British Telecom and MCI Joint Venture and Investment Agreement*, 1997 WL 265650 (June 15, 1994).

⁸⁷ See John R. Wilke, *British Telecom Purchase of MCI is Cleared by Justice Department*, WALL ST. J., July 8, 1997, at B4.

⁸⁸ See *Justice Suggests Few Modifications to BT-MCI Decree, Notes U.K. Resale Reforms*, COMM. RESALE REP., July 21, 1997.

⁸⁹ *DOJ BT-MCI Modification*, *supra* note 86, at 37599.

⁹⁰ For example, in both the Bell Atlantic/NYNEX and the SBC/PacTel decisions, the Commission used the 1992 Merger Guidelines. See *SBC/PacTel*, *supra* note 26, at 2632 n.35; *Bell Atlantic/NYNEX*, *supra* note 3, at 20008.

⁹¹ See John J. Keller, *BT-MCI Merger Reshapes Telecom Industry*, WALL ST. J., Nov. 5, 1996, at B1.

⁹² *Id.* para. 295 at 115.

come, first-served basis to other carriers that bought capacity on BT/MCI's submarine cable. The capacity would be sold at essentially the same price as similar domestic private line circuits. The FCC decided that this commitment resolved any concerns about BT/MCI's control of U.S. backhaul facilities and conditioned its approval of the merger on BT/MCI's compliance with its promise.⁹³

These are but three examples of the many telecommunications mergers reviewed by the DOJ and the FCC since passage of the 1996 Act. We next review how the DOJ and FCC's approach in analyzing these mergers impact industry and consumers.

III. THE COSTS OF DUAL AGENCY REVIEW: INCREASED COSTS TO TAXPAYERS, INDUSTRY, AND CONSUMERS

The current approach for reviewing mergers raises both substance and procedural concerns. While there is no doubt that the Commission's analysis of recent mergers has been thoughtful and thorough, the review conducted by the DOJ and the FCC often results in significant costs to the industry and society, suggesting that an examination of the benefits is appropriate.⁹⁴

A. Outcomes Are Unpredictable

The first factor creating unpredictability is that agency review appears to be on an *ad hoc* basis. This is suggested by FCC and DOJ actions with respect to the BT/MCI, Bell Atlantic/NYNEX, and USWest/Continental mergers, which follow no clear pattern and thus provide limited guidance as precedent. Although these cases may lay out the rationale for the agency's decisionmaking, the FCC and the DOJ often reach different if not opposite conclusions regarding the same specific transactions, and as a result, it is difficult to predict how the agencies will react to a particular deal. Thus, while there is always some unpredict-

ability with agency action, the current approach creates an especially high level of uncertainty, where it is very difficult to even determine which agency will act, let alone how that agency will evaluate the mergers.⁹⁵

Another factor frustrating attempts to predict agency actions is the uncertainty surrounding the continued popularity of antitrust theories at the FCC. The FCC's current emphasis on traditional antitrust analysis may be a product of the Hundt Commission and a reflection of the antitrust background of the Chairman and his close advisors. At this writing, it is unclear what approach will be taken by the new Chairman and the three new Commissioners. Moreover, even if the antitrust emphasis is retained, it is uncertain whether the FCC will adapt the antitrust approach to non-common carrier mergers.

Likewise, it is difficult to predict or explain the DOJ's actions because the DOJ typically declines to explain why it did not challenge particular mergers. Moreover, challenges to recent telecom mergers have typically led to consent decrees, rather than litigated results, and it is therefore increasingly difficult to determine the contours of antitrust law involving communications industry mergers. Because the DOJ rarely, if ever, litigates telecom mergers there is no recent body of antitrust decisions fleshing out these issues. The DOJ's decision to pursue consent decrees rather than aggressively litigate cases is also significant because consent decrees contain only a modest level of antitrust justification for the DOJ's actions, since a detailed explanation is unnecessary because the decree is by the consent of the parties. Indeed, even its own Merger Guidelines do not bind the Justice Department's analysis and, in any event, none of those Guidelines addresses the unique characteristics of the telecommunications industry.

The result is that, during the most active period of telecommunications mergers in history, there is no clear guidance for merging parties. Simply stated, it should not be so unclear how each

⁹³ *Id.* para. 297 at 116.

⁹⁴ See Robert Corn-Revere, *Mass Media Regulation and the FCC: An Agenda For Reform*, Citizens for a Sound Economy Foundation (Oct. 20, 1997) <<http://www.cse.org/ia65-csef-telecom.htm>> (stating that "[t]he FCC should not regulate matters that are committed to the jurisdiction of other agencies. . . . The Department of Justice, not the FCC, should be responsible for enforcing antitrust considerations in broad-

cast ownership decisions.").

⁹⁵ This concern led Former FCC Chairman Reed Hundt to recommend changing the review process to allow businesses to have greater certainty beforehand as to how a particular merger will be viewed. See *Hundt Sees Different Role for FCC, New Way to Judge Telecom Mergers*, COMM. TODAY, May 30, 1997, at 1.

agency will deal with particular telecom mergers and there should be some codification of principles governing telecommunications transactions.

B. There Is Duplication Of Effort

In analyzing whether a particular merger raises any competitive concerns, the FCC and the DOJ are performing essentially the same tasks. For example, at the FCC, a large part of the merger conditions contained in orders results from negotiations with the merging parties and as a result, FCC orders often reflect the consent of the parties.⁹⁶ The DOJ duplicates this effort by pursuing a consent decree process similar to the FCC, with the only difference being that the DOJ consent decree is later reviewed by a court to determine if it is in the public interest. The bottom line is that at least one important aspect of what both agencies are doing is the same.⁹⁷

As a result, while it is possible to draw legalistic distinctions between DOJ and FCC authority, there often appears to be only minor substantive differences at the end of the day between Section 7 of the Clayton Act and the Communications Act "public interest" analysis, with different outcomes merely reflecting the *ad hoc* nature of the process. This leads to increased costs to taxpayers and companies, while also giving merger opponents two bites at the apple.

C. Costs Are Significant

Finally, even if it can be argued that the DOJ and FCC are serving two different and legitimate goals rather than duplicating efforts, it is still unclear whether the cost to the public is justified. The merging parties incur significant expenses in responding to overlapping requests for information by both agencies. At the FCC, parties must apply for requisite authority, respond to comments, provide documents, and meet with Commission staff, resulting in significant costs. Similarly, a Justice Department investigation may require production of millions of pages of docu-

ments, consume the time of corporate executives in responding to discovery requests and depositions, and result in significant legal fees. There is also the cost to the taxpaying public of having two agencies perform what appears to be identical tasks.

Dual agency review also creates delay and uncertainty, since the merging companies wait for both agencies to assess the deal before it may be consummated, as evidenced by the still-pending WorldCom/MCI merger application filed on October 2, 1997.⁹⁸ In addition, Congress' removal of the FCC's authority to immunize mergers from antitrust challenge creates the possibility of the Justice Department challenging a merger previously approved by the FCC. Ultimately, the burden on the public is significant. The question raised by FCC and the DOJ review is plain—is it worth the cost?

IV. THE BENEFITS OF DUAL REVIEW: WHEN IS DUAL REGULATION NOT DUPLICATION?

Although the dual regulation of telecommunications mergers and acquisitions has several disadvantages, competition generally benefits from the review of these transactions by both the DOJ and the FCC. Even though these agencies regulate the same industry, the different characteristics of the FCC and the DOJ allow them to oversee telecommunications competition in different ways. Each agency brings to the table its own expertise and perspective. The key is to figure out how to tap into each agency's strengths without the resulting delay, uncertainty and costs that accompany the current approach.

The unique characteristics of the telecommunications industry require a specialized agency to regulate competition. The FCC has several attributes that allow it to account for these unique characteristics in reviewing telecommunications transactions. Probably the most important asset of the Commission for this purpose is its statutory authority under the Communications Act. Through

⁹⁶ See, e.g., *Bell Atlantic/NYNEX*, *supra* note 3.

⁹⁷ These concerns have not gone unnoticed. For example, in the context of radio mergers, Senate Communications Subcommittee Chairman Conrad Burns (R-Mont.) has commented that the FCC's review "adds unnecessary regulatory hurdles . . ." *Sen. Burns Says FCC Is Duplicating DOJ Antitrust Enforcement In Radio Sales*, COMM. DAILY, Feb. 20, 1997, at 2.

He argued that "[d]uplication of [DOJ] review by the FCC calls into question [the Commission's] allocation of limited government resources," concluding that "the independent and duplicative FCC evaluation of competitive impact negates the very deregulation of the radio industry that Congress intended." *Id.*

⁹⁸ See *WorldCom/MCI*, *supra* note 22.

its flexible "public interest" assessment under the Communications Act, the Commission is able to accommodate the special characteristics of the telecommunications industry. As the Commission stated in the Bell Atlantic/NYNEX decision, "in evaluating whether applicants have demonstrated that a transaction is in the public interest, we consider the transaction in light of the 'trends and needs of the industry' as a whole, the factors that 'influenced Congress to make specific provision for the particular industry,' and the complexity and rapidity of change in the industry."⁹⁹

Thus, the public interest test allows the Commission to consider not only whether a particular transaction will damage competition in any market, but also all the benefits of that transaction as well.¹⁰⁰ As the court in *United States v. FCC* stated, in discussing the Supreme Court's decision in *Denver & Rio Grande W. R.R. v. United States*:¹⁰¹

Any contention that Clayton Act considerations must outweigh other aspects of the public interest is belied by the Court's statement [in *Denver*] that the Commission is required to "consider[] . . . all important consequences including anticompetitive effects," . . . that the Commission has the responsibility "to weigh anticompetitive consequences," . . . and that "the Commission is, of course, required to consider anticompetitive issues under the public interest standard." . . . [T]he agency is required to consider anticompetitive consequences as one part of its public interest calculus. Neither *Denver* nor any other authority we have found makes the antitrust component of that analysis conclusive.¹⁰²

⁹⁹ *Bell Atlantic/NYNEX*, *supra* note 3, at 19988 (quoting *FCC v. RCA*, 346 U.S. at 93-95, 98).

¹⁰⁰ *FCC v. RCA Communications*, 346 U.S. at 98 (rejecting theory that Clayton Act antitrust principles control antitrust component of the public interest determination). As Judge Posner commented, "If the Commission were enforcing the antitrust laws, it would not be allowed to trade off a reduction in competition Since it is enforcing the nebulous public interest standard instead, it is permitted, and maybe even required, to make such a tradeoff—at least we do not understand any of the parties to question the Commission's authority to do so." *Schurz Comm., Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992).

¹⁰¹ 387 U.S. 485 (1967).

¹⁰² *United States v. FCC*, 652 F.2d at 87 (quoting *Denver*, 387 U.S. at 492, 494, 501).

¹⁰³ DOJ antitrust chief Joel Klein appears to recognize the Clayton Act's shortcomings in reviewing mergers in newly deregulated industries. In the context of discussing mergers between electric utilities, Klein has raised the prospect of a moratorium on such mergers or various methods of requiring the merging parties to prove that the anticompetitive effects of the proposed transaction are clearly outweighed by the public interest benefits accompanying the transaction. See Address by Joel Klein, Assistant Attorney General, Antitrust Division, Department of Justice, *Making the Transition from Regulation to Competition: Thinking About Merger Policy Dur-*

If the benefits sufficiently mitigate the harm, the Commission will allow the transaction to proceed. Under the antitrust laws, however, the likelihood of substantial harm to competition in any market, regardless of any accompanying benefits, might lead the FCC to block the transaction.¹⁰³

Similarly, the Communications Act allows the FCC to address one of the more unusual problems of telecommunications competition—obtaining access to existing infrastructure.¹⁰⁴ Conventional antitrust analysis under the Clayton Act rarely mandates such access,¹⁰⁵ but the flexibility of the "public interest" test allows the Commission to take actions against bottlenecks and other private restraints on crucial inputs that would be unobtainable under the antitrust laws.¹⁰⁶

For example, in *Bell Atlantic/NYNEX*, the Commission assessed whether or not the merger would harm competition by eliminating the most significant actual and potential competitors in the New York metropolitan market for local and long-distance service offered to residential and small business consumers. In reviewing the proposed merger, the FCC relied on the DOJ's 1984 Merger Guidelines, which discussed the use of the potential competition doctrine in merger review.

Under the 1984 Guidelines, the Justice Department has stated that it would be "unlikely" to challenge a merger that leaves at least three potential

ing the Process of Electric Power Restructuring, Federal Energy Regulatory Commission, Distinguished Speakers Series (Jan. 21, 1998) <<http://www.usdoj.gov/atr/speeches/1332.htm>>.

¹⁰⁴ See Robert Pitofsky, Chairman, FTC, Competition Policy in Communications Industries: New Antitrust Approaches, Prepared Remarks to Glasser LegalWorks Seminar on Competitive Policy in Communications Industries (Mar. 10, 1997) <<http://www.ftc.gov/speeches/pitofsky/newcomm.htm>> [hereafter Pitofsky, New Antitrust Approaches].

¹⁰⁵ *Id.* ("Antitrust rarely mandates access for several reasons: (1) if access is too easy, companies will be inclined to lay back and take no risks on the assumption they can free ride on the earlier investment and energy of their competitors; (2) permitting easy access for competitors can dampen the incentives for firms to undertake risky and costly investments in the first place, unless there are countervailing first-mover advantages; and (3) it achieves little to mandate access unless there is also provision to insure that price and other terms and conditions of sale are "reasonable;" otherwise the monopolist can agree to grant access but introduce terms that are so onerous that as a practical matter is unavailable. But regulating price and other terms of sale on a continuing basis is exactly the thing that antitrust (as opposed to the regulatory agency with ongoing oversight of firms in the industry) is ill-equipped to manage.")

¹⁰⁶ *Id.*

entrants into the relevant market that are equivalent to the merged entity.¹⁰⁷ Although the Bell Atlantic/NYNEX merger would have left several equivalent potential market entrants, the Commission questioned the merger because real competition had not yet occurred in local telecommunications markets. As the Commission observed, "in telecommunications markets that are virtual monopolies or that are not yet developed . . . the loss of even one significant market participant can adversely affect the development of competition and the attendant proposals for deregulation."¹⁰⁸ The Commission also noted that the 1984 Merger Guidelines were typically applied "to stable markets that potential entrants have decided not to enter."¹⁰⁹ By contrast, "telecommunications markets are undergoing major change, with new entry anticipated as implementation of the 1996 Act progresses."¹¹⁰

Telecommunications competition is driven both by regulatory *and* technological change, factors which distinguish the industry from most others.¹¹¹ Arguably, an expert agency such as the FCC, which is staffed with personnel capable of addressing many of these highly complex regulatory and technological issues, has a key role in evaluating the public interest implications of telecommunications mergers and acquisitions.¹¹²

But the DOJ also brings something to the table in reviewing telecommunications mergers and acquisitions. Through its review of such transactions, the DOJ ensures that telecommunications

transactions have a place in the uniform body of antitrust law. More importantly, pursuant to its investigatory authority under the Hart-Scott Rodino Act,¹¹³ the DOJ has access to much more information than the FCC in reviewing proposed mergers and acquisitions.¹¹⁴ Accordingly, the DOJ may consider competitive issues that the FCC, because of the nature of its process, might miss.

Accordingly, both agencies add something to the telecommunications merger review process. Nevertheless, the question remains—what changes can be made to ensure that the disadvantages associated with this dual jurisdiction are minimized, if not eliminated?

V. A BLUEPRINT FOR REFORM: DUAL JURISDICTION SHOULD BE RETAINED, SUBJECT TO MODIFICATION

This article proposes two alternatives which, by making the review process more predictable and less costly, should increase the utility of dual agency review. Under the first model, the agencies would coordinate their review to limit the costs to industry created by two separate agency inquiries. The second model would involve adopting a review approach similar to the Section 271 application process, where the FCC conducts the agency review and the DOJ submits comments. Either of these alternatives, explained in

¹⁰⁷ See *Bell Atlantic/NYNEX*, *supra* note 3, at 20022 n.153.

¹⁰⁸ *Id.* at 20023.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Pitofsky, *New Antitrust Approaches*, *supra* note 104.

¹¹² *See id.*

¹¹³ Pursuant to section 7A of the Clayton Act, added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1390, 15 U.S.C. § 18a (1994), parties to a proposed merger or asset acquisition must provide premerger information to the FTC and the DOJ if the transaction and the parties exceed certain size thresholds. The purpose of an HSR filing is to enable the agencies to review a transaction and take any appropriate enforcement before the "eggs have been scrambled." 47 Fed. Reg. 1662, 1939 (1982).

¹¹⁴ Pursuant to section 201 of the Hart-Scott-Rodino Act, the DOJ and the FTC may not make public any information filed with them "except as may be relevant to any administrative or judicial action or proceeding." 15 U.S.C. § 18a(h). No court has interpreted section 18a(h). *Cf.* Lieberman v. FTC, 771 F.2d 32, 37 n.12 (2d Cir. 1985) (noting that state attorneys general seeking HSR documents for use in state an-

titrust proceedings failed to assert Section 18a(h) as grounds for disclosure). However, the Federal Trade Commission has construed Section 18a(h) as permitting disclosure of HSR documents to the public to allow comment on a proposed consent order. See *In re General Motors Corp.*, 103 F.T.C. 58, 64 (1984). In *Bell Atlantic/NYNEX*, the FCC's Common Carrier Bureau ordered the parties to provide them with certain of the HSR documents pursuant to a protective order. The parties did not contest the order and the Commission did not review its propriety. The portion of the Commission's Order discussing the HSR documents was issued under seal as a separate Appendix. See *Bell Atlantic/NYNEX*, *supra* note 3, at 20000; see also, *In re Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Co, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, *Memorandum Opinion and Order*, 9 FCC Rcd. 5836, 5842-43 (1994) [hereinafter *AT&T/McCaw*] (Common Carrier Bureau requested AT&T and McCaw to make HSR documents available for inspection by FCC and by commenting parties; merging parties agreed to produce documents, but only after FCC and commenting parties agreed to protective order governing the confidentiality of the documents), *Order on Reconsideration*, 10 FCC Rcd. 11786 (1995).

greater detail below, would improve the efficiency of the dual agency review process.

A. Formalize Cooperation

Although the agencies already have some degree of informal communication and interaction,¹¹⁵ the FCC and the DOJ should expand and formalize their cooperation, either through new legislation or by interagency agreement.

One model for this approach is the Justice Department/FTC Hart-Scott-Rodino Premerger Program, or "Clearance Process," which formalizes the DOJ and FTC merger review. Under the Clearance Process, the DOJ and the FTC have a nine-day window to decide which agency will review the transaction. The agencies assign the merger review duty based on their past expertise and experience. For example, virtually all common carrier mergers are reviewed by the DOJ because of its expertise in this area, most memorably in its successful litigation against AT&T.¹¹⁶ Processing of merger applications has been facilitated by innovations such as model information request forms; internal appeals processes; "quick look" policies, focusing agency attention on important issues; and, upon request, joint meetings between the merging parties and the agencies to determine which agency will evaluate the merger.¹¹⁷ Additionally, the FTC and the Justice Department coordinate during the thirty-day waiting period so that requests for documents or information as well as arrangements for pre-clearance meetings are made jointly.¹¹⁸

Another example of joint agency cooperation that could serve as a model is the recently an-

nounced "Protocol" between the FTC, the DOJ, and the National Association of Attorneys General that formalizes the general framework for the conduct of joint federal/state merger investigations in order to improve cooperation and minimize the burdens on the public.¹¹⁹ The Protocol covers joint treatment of confidential information; strategic planning, document production, and interviews with witnesses; settlement discussions; and press statements.¹²⁰

The FCC and the DOJ could craft a review process adopting many of the approaches of the Clearance Process and the Protocol. The easiest change to implement would be to adopt the administrative and processing advances. This could be achieved by interagency agreement, without Congressional intervention to change the agencies' statutory power and authority. Another means to facilitate document sharing is the Antitrust Civil Process Act, which permits the DOJ to share subpoenaed documents with other government agencies, as long as those agencies are conducting ongoing proceedings and the DOJ submits the documents in the form of comments.¹²¹ In fact, it appears that the agencies have engaged in joint document management in the past, as in Bell Atlantic/NYNEX when the FCC reviewed documents obtained by the DOJ through the Hart-Scott-Rodino procedure with the consent of the merging parties.¹²² The close time between the release dates of the DOJ and FCC items on these mergers suggests that there may currently be some communication between the two agencies during their merger review. These examples suggest that the DOJ and the FCC are able to work together in concert to review mergers.

¹¹⁵ See 47 C.F.R. § 1.1204(8) (1996) (FCC ex parte rules permit communications between the FCC and either the DOJ or the FTC regarding any "telecommunications competition matter" meeting certain requirements; FCC must disclose any new factual information obtained through such communications that it relies upon in its decision).

¹¹⁶ Because the Clayton Act generally grants merger review authority to the FTC except to certain industries, the Clayton Act's authorization of FCC review of common carrier mergers at 47 U.S.C. § 21, by implication, may negate any FTC authority to review such mergers. Although we have been unable to find any official support for this point, we believe that the FTC has maintained that Section 21 merely authorizes FCC review without depriving the FTC of authority.

¹¹⁷ *FTC and DOJ offer HSR Reg Revisions Designed to Speed Review, Exempt Some Deals*, FTC: WATCH, Mar. 27, 1995, at 2.

¹¹⁸ See *id.*

¹¹⁹ See Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, 4 Trad. Reg. Rep. (CCH) para. 13,420 (1998) [hereinafter "Protocol"]; FTC News Release, *Federal Antitrust Agencies and State Attorneys General Announce Protocol for Joint Federal/State Merger Investigations* (Mar. 11, 1998) <<http://www.ftc.gov/opa/9803/protocol.htm>>.

¹²⁰ See Protocol, *supra* note 119.

¹²¹ See 15 U.S.C. § 1313(d) (1994).

¹²² In a related matter, in April 1996, a court ruled that the DOJ had the legal authority to retain documents filed by AT&T pursuant to a Motion to Vacate the Modification of Final Judgment (later declared moot) for the purpose of sharing those documents with the FCC to the extent that they were found relevant to proceedings under the 1996 Act. See *United States v. Western Elec. Co.*, 1996-1 Trade Cas. (CCH) para. 71,364, 2 Communications Reg. 2d 1388 (P & F) (D.D.C. 1996).

Under the proposed model, this would increase and be formalized.

Although it would almost certainly require Congressional action,¹²³ the DOJ and FCC could agree to have only one agency perform the review. Under this approach, the DOJ and FCC could agree to divide merger review responsibility by the type of service which is implicated, such as common carrier or mass media. There seems to be some precedent for this in the DOJ/FTC context.

By implementing this proposal, the agencies would at the very least eliminate duplicative discovery and reduce the burden on the public by establishing jointly-developed deadlines. Under the single agency review approach, the costs to industry would be reduced by the fact that only one agency would be performing the review rather than two.

B. Section 271

A different approach would be to adapt the Section 271 approach to merger review. Briefly, Section 271 of the 1996 Act provides a mechanism by which BOCs can enter the long distance market in their service area by meeting a set of competitive criteria.¹²⁴ The FCC reviews requests under Section 271 and the DOJ submits comments that are given "substantial weight."¹²⁵ This presents a meaningful opportunity for the DOJ to participate in the proceedings.

This mechanism could be adapted to merger review, where the FCC would lead the inquiry and the DOJ would file comments on the merger. It would consolidate decision making, allow the industry to reap the efficiency benefits of single rather than dual agency review, and promote con-

sistency in merger evaluation. This would allow the DOJ expertise to be brought to bear without some of the disadvantages accompanying formal dual review.

A similar approach is currently being employed in the review process for rail mergers. With rail mergers, dual review is conducted by the Surface Transportation Board ("STB") and the DOJ, where the STB has rail merger review authority and the DOJ participates only as a commenting party.¹²⁶

One downside of conforming the FCC/DOJ approach to this model would be the loss of the investigative powers of the DOJ, which include the ability to seek documents and take depositions. Another possible problem is that the DOJ's concerns about the merger's impact on competition may be rejected or otherwise overlooked. For example, when the DOJ vigorously opposed the Union Pacific/Southern Pacific merger, citing considerable competitive concerns, its complaints fell on deaf ears at the STB, which approved the transfer in spite of the DOJ's opposition.¹²⁷ This suggests that, in a review process where the DOJ is a party before another agency, the DOJ may experience considerable frustration in attempting to influence the final outcome. On the other hand, the DOJ's role under such a model is little different than it is under Section 7 today. The difference is that an agency, rather than a court, would be the decision maker.

Indeed, the Justice Department resisted giving the STB merger review authority when Congress was considering whether the STB or the DOJ would assume the now-defunct Interstate Commerce Commission's responsibility for rail merger review. The Clinton administration lobbied vigorously on behalf of giving review authority to the

¹²³ Currently, the FCC is required to perform merger reviews under Section 214 and 310(d) of the Communications Act. Only the DOJ may pass on a merger, taking no action. Moreover, the FCC and the DOJ are empowered to make slightly different inquiries.

¹²⁴ See section 271 of the 1996 Act, Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.) 56, 89 (to be codified at 47 U.S.C. § 271).

¹²⁵ *Id.* at § 271(d)(2)(A). As the FCC commented in its review of Ameritech's application to provide interLATA service in Michigan, Section 271 requires that the Commission "accord substantial weight to the Attorney General's assessment of BOC compliance with the competitive checklist and other requirements of sections 271 and 272, as well as the impact of such compliance on the state of competition in the local exchange." *In re Application of Ameritech Michigan*

Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, *Memorandum Opinion And Order*, 12 FCC Rcd. 20543, 20566 (1997).

¹²⁶ See Samuel M. Sipe, Jr. & John D. Graubert, *United Railroad, Divided Views: The UP-SP Merger Leaves Shippers With Only Two Major Rail Competitors In The West*, LEGAL TIMES, Aug. 12, 1996, at S30. Note that this is the opposite of what happened with review of airline mergers, where Congress took review power away from the Department of Transportation and gave it to the DOJ. See Joan M. Feldman, *U.S. Airline Concentration Burden Shifts to Justice Department*, AIR TRANSPORT WORLD, Feb. 1989, at 34.

¹²⁷ See *Rail Deal a Little Too Generous: More Federal Vigor is Needed to Preserve Competition*, L.A. TIMES, July 15, 1996, at B4.

Justice Department rather than having DOJ participate as a party to a STB review proceeding.¹²⁸ This and DOJ's historic interest and expertise in telecom matters suggest that the DOJ would be unwilling to go along with a similar scenario in the context of telecommunications mergers.

As with the first approach modeled on the DOJ/FTC Clearance Process, the Section 271 approach would also require Congressional action. As noted above, the agencies' statutory authority is slightly different, and this prohibits the implementation of a Section 271 approach through interagency agreement. One variation that may make it more palatable politically would be to allow the FCC to conduct reviews with the DOJ as a commenting party, but leaving open the opportunity for the DOJ to initiate a separate inquiry or bring suit if necessary under exceptional circumstances.

Although this approach appears workable, there has been considerable criticism directed at the Section 271 approach recently that may make it politically difficult to implement it in the merger context. Although these criticisms are directed at the *substance* of the FCC's application of the fourteen-point Section 271 checklist (which plays no part in the proposed merger model) rather than the *procedure* whereby the FCC reviews mergers with comments by the DOJ (the model proposed above), these criticisms may have tainted the Section 271 process as a whole.

For instance, in response both to BOC frustration over the Commission's failure to approve any Section 271 applications thus far, as well as the recent decision by United States District Court Judge Joe Kendall holding that Sections 271 to 275 were unconstitutional,¹²⁹ FCC Commissioner Michael Powell authored a white paper in which he criticized the FCC's current approach on Section 271 applications. He characterized Judge Kendall's decision as probably incorrect but nevertheless a "wake-up call" to the FCC regarding the shortcomings of Section 271 and proposed a new "collaborative approach" in which the FCC would "partner with state commissions and the Justice Department, respecting and, where appropriate, deferring to their judgments, according to the unique strengths and perspectives they each

bring to the local market-opening process.¹³⁰ These comments elicited protests from the inter-exchange carrier ("IXC") and CLEC corner, where one critic suggested that such an approach would "abdicate federal responsibility for ensuring even-handed regulation of this industry."¹³¹ Regardless of the merits, it may be difficult to champion the utility of the Section 271 approach until the current storm has passed, despite its inherent conceptual appeal.

VI. CONCLUSION

Given the number and size of mergers sweeping the communications industry, there is a growing need to examine how those transactions are reviewed by the FCC and the DOJ. The dual jurisdiction of each agency over telecom deals imposes significant costs on merging parties, and involves a duplication of effort, which wastes taxpayer dollars. In many respects, the issues that both agencies evaluate when considering a merger are largely the same, going to the merger's effect on competition in a particular market. At the same time, each agency has a unique expertise and perspective involving competition policy as a fundamental Constitutional principle, having different governmental agencies involved in the same matter is neither unusual, nor necessarily a bad thing. On the other hand, lack of coordination between the two agencies and the *ad hoc* nature of the merger review process suggest that steps can be taken to minimize some of the infirmities associated with the current process, while preserving the benefits that each agency's participation brings to the process.

With this in mind, the agencies and Congress might consider various approaches that preserve each agency's role, but puts in place a more predictable, coordinated, and streamlined process. One minimalist approach is a clearance and more formalized coordination process between the two agencies akin to the formal process governing DOJ and FTC review of mergers. An alternative approach, which would likely face stiff resistance from the DOJ, is one where the FCC remains the decisionmaker, and DOJ would be a commenting party — the approach currently applicable to

¹²⁸ See Sipe & Graubert, *supra* note 126.

¹²⁹ See *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996, 1008 (N.D. Tex. 1997).

¹³⁰ *Powell's Essay Sends Chilling Message*, WASH. TELECOM WK., Jan. 30, 1998, at 9.

¹³¹ *Id.*

BOC entry into interLATA markets under Section 271 of the Communications Act, as well as involving mergers in certain other regulated industries. At bottom, proceeding with the status quo, given

the large stakes involved and the costs on the parties and society, the status quo makes little sense from a communications, antitrust, or regulatory policy perspective.