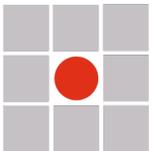


A Guide to Federal Review of Mergers

brought to you by Harold Feld



Recently, recently there has been a series of high-profile mega-mergers proposed by companies like Comcast and TWC. Each of these proposals has been covered extensively in the press in terms of their varying effects on consumers and the public interest, and broader implications for the digital corporate landscape in the 21st century. And each proposal will have to be reviewed on a case-by-case basis. This is a mechanical guide that breaks down exactly how this complex review process will proceed as a general matter so folks at home can follow along on the action.

Each deal gets both an antitrust review and a separate review by the Federal Communications Commission (FCC) under the Communications Act. These reviews, while related, actually apply very different procedures and standards of review. The clock doesn't start ticking on the review cycle until the companies proposing - for example, Comcast and Time Warner Cable (TWC) or AT&T and DirecTV - send their official

application to the FCC and the official notice under the Hart-Scott-Rodino Act (HSRA) to the antitrust agencies. Note that for our purposes, we will use Comcast-TWC here as an example, but each merger has unique competitive and public interest implications to consider.

>>> WHO HANDLES THE ANTITRUST REVIEW BETWEEN THE DOJ AND FTC, AND HOW DOES IT WORK?

Under the antitrust laws, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) share jurisdiction for merger

review and antitrust enforcement. As a practical matter, the agencies have long-standing divisions of expertise that cover most standard merger categories, so usually it is pretty straightforward. In the case of Comcast-TWC, it is a bit more complicated.

Traditionally, the FTC has handled pure cable mergers, but the DoJ handled the Comcast/NBCU deal back in 2010 - sometimes, if a review implicates provisions of a former agreement, the same agency that handled the previous deal will take jurisdiction in the upcoming agreement. In the case of Comcast/TWC, the DOJ did indeed win the toss-up and will retain jurisdiction over the transaction. In theory, both antitrust agencies work under the same standards and procedures, so it shouldn't matter all that much, but in practice, some differences between the agencies, such as familiarity with issues through handling of other transactions, can have an effect in terms of influencing the outcome.

Whichever the outcome, the reviewing agency (in this case, the DOJ) reviews the proposed deal to determine if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" (15 U.S.C. 18). The scope of the review in theory covers "any line of commerce, or any activity affecting commerce." Also, because the statute uses the word "may," rather than "will," it does not require absolute certainty.

The reviewing agency will treat this as a civil investigation. Once the antitrust agency figures out the relevant markets and whether it sees potential problems resulting from the merger, the agency will decide whether to challenge the merger in court or try to impose conditions on the merger.

Challenging the merger means filing a complaint in federal court that outlines the markets in which the merger would cause competitive harm, and explaining the underlying theory of why the merger would cause this kind of harm in these markets. The companies - e.g. Comcast and Time Warner Cable - would then have the chance to

respond. Ultimately, the antitrust agency would have the burden of proof, and if the court remained unconvinced then the antitrust review would be over.

Alternatively, the agency may negotiate with the parties for conditions. These can be either divestitures (such as the three million customers Comcast promises to spin off after their merger) or "behavioral conditions." Behavioral conditions are things designed to promote competition in a way that will offset the harm to competition the agency sees happening as a result of the merger. If the antitrust agency and Comcast agree on conditions, the agency will still file a complaint in federal court alleging that the deal violates the antitrust law. At the same time, Comcast and the antitrust agency will file a settlement of the complaint which sets out the conditions.

After taking public comment on the proposed settlement, the district court will determine whether or not the settlement is in the public interest. If the court finds the settlement serves the public interest, then it enters the proposed consent decree as a final judgment and the merger is done.

>>> MERGER REVIEW PROCEDURES AND STANDARDS AT THE FCC

While the FCC and the DoJ will coordinate their reviews and work together, the two agencies have very different procedures and operate under very different legal standards. Unlike the antitrust agency, the FCC operates under the "public interest" standard of the Communications Act of 1934 (specifically 47 U.S.C. 214(a) and 47 U.S.C. 310(d)). Comcast and Time Warner Cable apply to the FCC to transfer their licenses from Time Warner Cable to Comcast (which is why we refer to them as "Applicants"). Comcast and TWC must not only show that the merger does no harm, but that it actually will affirmatively somehow benefit the public for this transfer to take place.

Critically, unlike in the antitrust case, the burden rests with the Applicants - Comcast/TWC must show how the merger makes the world a better place, rather than the burden resting on the government to show how the merger would threaten competition. Furthermore, while the FCC must consider the

impact of competition, the public interest standard extends beyond traditional competitive calculations.

Comcast and TWC will submit an Application for Transfer to the FCC, which details the assets and systems TWC will transfer to Comcast, as well as "Public Interest Statement" explaining why the application is in the public interest. The FCC will then issue a public notice, essentially saying: "Hey, world, we got this application. Anyone who thinks this matters to them, file in this docket number over here." Parties will then have some designated period of time to file "Petitions to Deny" the Application for Transfer. Comcast/TWC will have some set period of time to file an "Opposition to Petition to Deny," and then parties may file "Replies to Opposition." People supporting the transaction or seeking conditions rather than outright denial can file as well, but they (and other parties that fail to comply with the formal pleading requirements) are designated "informal comments" rather than parties.

The FCC here is the adjudicator, not the prosecutor. Its job is to make a separate determination on whether this serves the public interest. It is the parties opposing the transaction that are officially parties and have the right to present evidence and argument against the Applicants. Rather than take the Applicants to court to block the deal, the FCC itself plays the role of the court in deciding whether to go ahead with the deal or not.

Almost always, the FCC will find that grant of an application "serves the public interest" and that no issues of material fact remain - allowing the Commission to decide the matter without sending it to an Administrative Law Judge (ALJ).¹ Technically, the FCC does not "impose" conditions on the transfer. Rather, the Applicants voluntarily agree to accept conditions to resolve concerns that would otherwise require an ALJ to adjudicate. As part of the license transfer, the FCC incorporates the "voluntary" conditions into the licenses, making them binding as a matter of law and

¹ The ALJ is an official who presides at an administrative trial-type hearing to resolve a dispute between a government agency and someone affected by a decision of that agency.

enforceable by the Commission. Opponents of the transfer who don't like the approval of the deal can either file a Petition for Reconsideration by the Commission, or file an appeal with the D.C. Circuit Court of Appeals.

On rare occasions, when the FCC decides that conditions won't cut it, the FCC does not deny the application outright. Instead, the FCC writes a long Order determining that there are "issues of material fact" as to whether the license transfer would serve the public interest and refers the matter to an ALJ for a full evidentiary hearing to resolve the issues outlined in the Order. In theory, the Applicants can then go to an ALJ. But this never happens. Why? Because the parties to the ALJ proceeding are the parties that filed Petitions to Deny to block the merger. As a result, referral to an ALJ for a hearing is pretty much considered the kiss of death for a merger. The two times it has happened in the last 10+ years, the DISH/DirecTV deal and the AT&T/T-Mobile deal, the applicants dropped the deal a few weeks later.

>>> CONGRESS, THE WHITE HOUSE, THE PUBLIC, AND POLITICAL PRESSURE

Technically, the antitrust agency (remember, either FTC or the DOJ) and the FCC make their decision in the merits following their respective processes and subject to their respective statutes and legal standards. But ignoring politics in D.C. is like ignoring the weather in sports. It's a factor that tends to influence things outside the formal structure of the rules of the game.

The "Role" of Congress:

Congress doesn't officially play a role, but it exercises oversight and serves as something of a political barometer for the deal through public hearings. Congress also serves as something of a feedback loop for the agencies. Strong Congressional opposition to the deal – especially if bipartisan – can encourage the agencies to challenge the deal. By the same token, strong Congressional support (or absence of strong opposition) can pressure the agencies to approve the deal.

The "Role" of the White House:

The White House plays even less of a role. The FCC is an independent agency and the White House has no direct means of influencing the agency. Of course, White House officials can talk to the Chairperson of the FCC, but direct public efforts by the White House to influence the FCC (either for or against the merger) would be seen as undue political influence and kick up quite a fuss. Yes, everyone notes how Comcast CEO Brian Roberts plays golf with Obama, etc. That has symbolic value, but not a practical effect. If anything, it pushes the White House to remain even more scrupulously neutral to avoid any accusation of "crony capitalism."

Where does the public fit in?

Public input comes in two ways and plays a significant role. First, the FCC will take comments – both at official deadline times and throughout the merger. Commissioners and members of Congress will look to the strength and level of opposition as one more factor when thinking about how to respond to the deal.

Second, members of Congress in particular will look to see whether they get calls or letters from supporters or opponents. In an election year, this matters a great deal. If members of Congress think that the public want Big Government to stay out of the way of business, then they may mute opposition or actively support. By contrast, if calls show significant public outrage against further consolidation, then members may mute their support or want to be seen opposing (or striking a middle ground by pushing for conditions).

>>> CONCLUSION

With the example of Comcast/TWC, it's hard to say at this point how it will turn out on the merits, or how long it will take. For a merger this large, the process is extraordinarily complicated and can easily stretch on for up to a year. Hopefully the above information has provided an understanding of the process which will help folks track these developments and enable people to participate, during the Comcast-TWC review process as well as merger reviews to come.