Too Much Power, Too Little Restraint: How the FCC Expands its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements

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Those who really deserve praise are the people who, while human enough to enjoy power, nevertheless pay more attention to justice than they are compelled to do by their situation.

— ***Thucyclides***

I. INTRODUCTION

The character of a regulatory agency is most severely tested at the zenith of its power. When the Federal Communications Commission ("FCC" or "Commission") breaks free of the limitations imposed by the law, the Commission's leadership sets its own course. It is at these times, when legal oversight is at a minimum, that it becomes most important for the agency to "pay more attention to justice." Unfortunately, as outlined below and in Commissioner Furchtgott-Roth's separate statements, the FCC has often failed this test of institutional character.[1] Indeed, the Commission seems to capitalize on these situations to achieve goals that would not be attainable through traditional policymaking. The result is a far-reaching, unenforceable, opaque and ultimately arbitrary policy and process that undermines both the Commission's standing and the public interest.

These criticisms spring from three fundamental principles of regulatory policy: (1) an agency should never act beyond its jurisdiction—even when it may "get away with it"—because it detracts from its statutorily defined mission, (2) an agency should not promulgate obligations that it is not prepared to enforce fully because it undermines the agency's credibility, and (3) rules should be generally applicable and transparent to the public. Following these principles, the Commission can

1. Many of the concerns and issues outlined grow out of positions developed over the past few years in Commissioner Furchtgott-Roth's office.

readily achieve its public policy objectives without resorting to its current circuitous approach.

Nonetheless, in at least the three contexts set forth below—license transfers, national security review, and consent decrees—the Commission has proven to be something less than a benevolent master. In each case, the Commission has an appropriate and limited role to play under the Communications Act of 1934 ("Act"). In each case, however, that role lies outside the traditional scope of judicial review. Unfortunately, in each case, the current Commission leadership uses the confluence of the vulnerability of licensees and the absence of legal oversight to advance its particular public policy agenda; impose many requirements it cannot or will not enforce; and facilitate the creation of vast company-specific regulatory regimes that undermine transparency and predictability.

II. EVASION OF LEGAL OVERSIGHT

The Commission's ability to exploit its power to achieve policies outside its mandate depends on the agency's ability to escape judicial and, to a lesser degree, congressional review. In theory, a number of forces should constrain the FCC's authority. Most fundamentally, the Act, like other delegations of congressional authority, delineates the scope of the Commission's authority over the communications marketplace.[2] Essential to this statutory scheme is the ability of aggrieved parties to obtain judicial review of the FCC's actions.[3] Through judicial review, the courts limit the Commission's discretion to act by enforcing legislative limitations and holding the FCC to standards of reasoned decisionmaking and constitutional norms.[4] Beyond the limits imposed by the Act and the courts, Congress impacts the FCC's authority through appropriations and oversight.[5] Theoretically, these constraints require the Commission to stay

2. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

3. 47 U.S.C. § 402 (Supp. IV 1998).

4. Courts have not been shy in holding the Commission to these standards. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997); United States Telecom Ass'n v. FCC, 2000 WL 1059852 (D.C. Cir. 2000); US West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999).

5. Among the three areas discussed below, congressional oversight has come closest to tempering the Commission's approach to license transfers. *See, e.g., Fairness in Telecommunications License Transfers Act of 1999: Hearings on H.R. 2533 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Commerce Comm.,* 106th Cong. (1999); *Expeditious Action on Telecommunications Merger Act: Hearings on S. 467 Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Judiciary Comm.,* 106th Cong. (1999). The prospect of a legislative solution, which would put specific limits on the agency's license transfer authority, has not gone unnoticed at the agency. These activities and the vigorous dissents of Commissioner Furchtgott-Roth have contributed to some license reforms. *See* Chairman's

within its regulatory and jurisdictional boundaries and to engage in reasoned and publicly documented decision-making procedures.

In practice, however, traditional limitations on the Commission's authority have not always applied. In license transfer proceedings, national security reviews, and consent decrees, procedural loopholes and circumstance create opportunities for the Commission to operate free of the discipline imposed by the statute and administrative procedure.

Certain license transfer proceedings provide perhaps the most visible example. When license-holding companies merge, the FCC reviews the proposed license transfer to the new merged entity. The FCC's statutory licensing authority only requires that the transfer be in the "public interest, convenience, and necessity," which provides little detailed guidance on the structure or standards that should be associated with the review process.[6] Months after the initial merger plans are announced, the FCC's license transfer approval is often the only thing that stands in the way of consummation of the transaction. Sometimes these transactions, such as the mergers of SBC/Ameritech and Bell Atlantic/GTE, are worth billions of dollars.[7] In these mega-merger license transfers, the Commission and applicants typically engage in a high-stakes regulatory dance in which applicants "volunteer" to take certain actions or to refrain from certain actions as the quid pro quo for favorable agency consideration. The resulting "voluntary" conditions emerge from an elaborate and often secret process of demands and "negotiations." The licensees are left with little choice but to engage in this process or face tremendous delays or outright rejection of the transfer.[8] Indeed, there appears to be very little

News Release, "FCC Implements Predictable, Transparent, and Streamlined Merger Review Process" (Jan. 12, 2000) (creating Merger Review Team).

6. 47 U.S.C. § 310(d) (stating that no wireless station license "shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."); *id.* § 214(a) (stating that "[n]o carrier . . . [may] acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.").

7. *See Dow, Nasdaq Rise in Shortened Session*, WASH. POST, July 3, 2000, at E02 ("Verizon, the company formed from the completion of the $59 billion merger of Bell Atlantic and GTE."); Seth Schiesel, *A Practical Solution; FCC's Give and Take in SBC-Ameritech Merger Deal*, N.Y. TIMES, July 1, 1999, at C1 ("At first blush, the $72 billion deal announced Tuesday with the Federal Communications Commission seems a high-stakes gamble—with SBC Communications Inc. betting as much as $2.3 billion that it can compete in 30 markets within 30 months for the right to acquire Ameritech.").

8. If licensees decline to negotiate, the Commission has the authority, for example, to subject the licensees to an extended hearing before an administrative law judge to resolve

"voluntariness" about this process.

When the licensee proposes the "voluntary conditions" and the Commission adopts them, there is little or no basis for judicial review because the conditions are all characterized as "voluntary."[9] Although Congress has questioned the FCC's process at times, it has thus far chosen not to offer a legislative solution to the unpredictable, lengthy, and demanding FCC license transfer process.[10] Absent judicial or congressional oversight, the Commission has a free hand to impose its view of the public interest without many of the legal or procedural restraints that typically cabin FCC activities.

The license transfer process not only is used by the Commission to achieve its goals outside the traditional policy-making process, it also has provided a similar opportunity for the Executive Branch to act away from the bright lights of legal scrutiny. When license transfers involve foreign ownership,[11] the Justice Department and the Federal Bureau of Investigations ("FBI") have at times raised national security concerns. Rather than utilizing the statutory process designed for such Executive Branch review, these agencies instead have latched onto the FCC's license transfer process.[12] Under this strategy, the Executive Branch files an

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any factual issues arising out of the transaction. *Id.* § 309(e) "If . . . a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified . . . [public interest, convenience and necessity] . . . it shall formally designate the application for hearing . . . ." *Id.*

9. Conceivably, other parties could challenge the merger approval, but their ability to succeed on the merits based on a claim that the transfer is not in the "public interest" seems remote at best. Moreover, parties outside the transaction are unlikely to challenge the conditions as beyond the FCC's jurisdiction—the central premise of this Article.

10. Nonetheless, a great deal of legislation is currently pending. *See* S. 467, 106th Cong. (1999); H.R. 2783, 106th Cong. (1999); S. 1125, 106th Cong. (1999). This bill would "restrict the authority of the [FCC] to review mergers and to impose conditions on licenses and other authorizations assigned or transferred in the course of mergers or other transactions subject to review by the Department of Justice or the Federal Trade Commission." S. 1125, 106th Cong. (1999); *See also* H.R. 2533, 106th Cong. (1999) (designed to amend the Clayton Act and Administrative Procedures Act.); H.R. 4019, 106th Cong. (1999) (The Telecommunications Merger Review Act of 2000 would amend the Act to prohibit the FCC, in any proceeding to approve an application to assign or transfer control of a telecommunications license, permit, or certificate, from (1) denying such application unless such assignment will result in a violation of FCC rules and such violation cannot be cured by a conditional approval, or (2) conditioning such approval except to the extent necessary to ensure compliance with such rules. The bill would also require all action on such applications to be completed within ninety days after FCC receipt of the application, unless the applicant requests an extension.).

11. *See, e.g.*, 47 U.S.C. § 310(a)-(b) (mandating that station licenses may not be granted to or held by foreign governments or by any corporation organized or controlled by a foreign government).

12. 50 U.S.C. app. § 2170(a)-(k) (1994). Pursuant to section 721 of the Defense

objection to the license transfers with the Commission—often late in the process—and then offers to withdraw that objection only if the licensees "volunteer" to undertake certain obligations.[13] Once again, the "voluntary" nature of the obligations insulates the Executive Branch's demands from judicial review. The FCC, for its part, uses its procedural discretion to wait for the Executive Branch to withdraw its objection before it will approve the transaction. The entire process leaves the licensee all too willing to accede to any Executive Branch demands, because, as discussed above, the license transfer process itself is largely free from judicial review.

Finally, the Commission also uses the consent decree process to attain policy goals outside the strictures of the statute and the courts. Licensees who have engaged in wrongdoing are most often either (1) approached privately by the FCC in the hope of reaching a consent decree before the alleged violations become public, or (2) subjected to Notices of Apparent Liability (sometimes amounting to millions of dollars) that commence an enforcement proceeding.[14] Facing immense liability, horrible publicity, and the prospect of a potentially prolonged hearing process (possibly at both the Commission and in the courts), licensees understandably seek a "voluntary" deal. Licensees, who deal with the FCC virtually every day on a wide variety of issues, cannot afford to risk their relationships with the agency for a prolonged period. This is especially true in an era when high-ranking Commission officials openly discuss the impact of various policy battles on the "good will" of the agency.[15] Therefore, the licensee has every incentive to reach a "voluntary" decree as soon as practicable. Voluntary

Production Act of 1950 (also known as the "Exon-Florio Provision"), the President authorized the Committee on Foreign Investment in the United States ("CFIUS") to handle these issues. *See* 53 Fed. Reg. 43999 (1988); *see also* Robert N. Cappucci, *Notes*: *Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism?*, 16 FORDHAM INT'L L.J. 652 (1993). CFIUS may not address each license transfer that has been subjected to Executive Branch comment. That limitation on their authority, however, provides all the more reason not to allow the Executive Branch to use the FCC's process to expand its congressionally defined reach. *See* 31 C.F.R. pt. 800 (1999).

13. *See infra* Section II.B.2 (discussing various transactions subject to Executive Branch review).

14. *See* Qwest Comm. Int'l, Inc., *Order*, FCC 00-254 (July 21, 2000), 2000 WL 1015429 (F.C.C.) [hereinafter Qwest, *Order*] (holding Qwest liable for forfeiture in the amount of $2,080,000); Business Discount Plan, Inc., *Order for Forfeiture*, FCC 00-239 (July 17, 2000), 2000 WL 973258 (F.C.C.) [hereinafter Business Discount Plan, *Order*] (assessing a $2,400,000 forfeiture against Business Discount Plan, Inc.); *see generally* 47 U.S.C. § 503(b)(4) (establishing liability for forfeiture).

15. FCC Chairman William E. Kennard, Broadcasting and Digital: The Best of Two Futures, Remarks Before the National Association of Broadcasters (Apr. 11, 2000) ("Why have you squandered your goodwill to fight churches and schools and community organizations?").

consent decrees with narrow terms closely linked to the alleged misconduct can serve an important function in bringing a prompt and just end to enforcement proceedings. The current Commission has been far more aggressive, however, in defining the scope of these voluntary decrees. This aggressiveness is made possible because there is nothing that limits the scope of such "voluntary" decrees. Even if there were such formal limitations on the agency, consent decrees often require licensees to waive their rights to judicial review.[16] Thus, in enforcement proceedings as well, the FCC retains a virtual free hand.

III. USING LICENSEES' VULNERABILITY TO PURSUE GOALS OUTSIDE THE TRADITIONAL POLICY-MAKING PROCESS

Having freed itself from the legal boundaries that traditionally inform and contain its policy initiatives, the current Commission in these three contexts has been able to pursue its version of the public interest with particular zeal. As described above, the Commission has the advantage of an anxious, if not willing, victim: the licensees. Perhaps this result would not be so troubling except that the Commission uses this remarkable power to override the its statutory limits. Most fundamentally, the Commission uses these situations to achieve policy outcomes it could not gain through judicially reviewable channels.[17] As an independent agency, the Commission exists to exercise certain enumerated functions delegated by Congress.[18] When an agency exceeds its limited functions, it undermines the very foundation of its own legal existence. Moreover, the Commission creates conditions it cannot and will not enforce, undermining transparency, efficiency, and basic fairness by creating vast company-specific regulatory regimes. The pattern is remarkably consistent and consistently disturbing.

A. License Transfers

1. The Proper Scope of License Transfer Decisions

The Commission has clear authority, under sections 214 and 310 of

16. *See* MCI WorldCom Comms., Inc., *Order*, FCC 00-205, para. 7 (June 6, 2000), 2000 WL 725473 (F.C.C.) [hereinafter MCI, *Order*]; Qwest, *Order*, *supra* note 14, para. 7; *see also* New York State Dep't of Law v. FCC, 984 F.2d 1209, 1213-17 (D.C. Cir. 1993).

17. The Commission uses the indirect "voluntary" conditions path to achieve policy goals it cannot obtain directly. Such back-door tactics have troubled courts. *See* Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 763 n.23 (D.C. Cir. 1982).

18. In this way, independent agencies are certainly not like courts, free to fashion equitable relief as they see fit. Agencies like the FCC only have the powers that Congress grants them.

the Act, to review the transfers of licenses from one entity to another.[19] The Act also grants the Commission authority to condition section 310 license transfers and section 214 authorizations.[20] Nothing in either statutory provision contemplates FCC jurisdiction to approve or disapprove corporate mergers as a whole.[21]

The FCC's license transfer process should provide the Commission with an opportunity to review a proposed transfer to assess its compliance with current rules. Indeed, this is exactly what the Commission does for the vast majority of the tens of thousands of licenses that change hands every year.[22] The FCC's actions should be nondiscriminatory, routine, and predictable. As Commissioner Furchtgott-Roth has described, license transfers should be like trips to the Department of Motor Vehicles—where

19. Section 310 holds that:

> [n]o construction permit or station license . . . shall be transferred . . . directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(b)(4)(d). Similarly, section 214 mandates that:

> [n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require . . . such additional or extended line.

Id. § 214(a).

20. Section 303(r) provides that, except as otherwise provided in this Act, "the Commission . . . shall . . . prescribe such . . . conditions, *not inconsistent with law*, as may be necessary to carry out *the provisions of this* [*Act*]." *Id.* § 303(r) (emphasis added). And section 214(c) states that the Commission "may attach to the issuance of [a section 214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." *Id.* § 214(c).

21. The FCC does possess authority to review mergers under the Clayton Act. *Id*. § 21(a) (granting FCC authority to enforce Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy). That authority, however, has not been invoked in any of the examples discussed herein. The Commission's failure to invoke this authority may stem from its reluctance to face the judicial scrutiny that may accompany review of Clayton Act decisions in light of the substantial precedent that would constrain FCC authority. *See, e.g.*, California v. Am. Stores Co., 495 U.S. 271 (1990) (providing divestiture as a form of "injunctive relief" in Clayton Act cases); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) (requiring proof of antitrust injury); Bankamerica Corp. v. United States, 462 U.S. 122 (1983) (barring interlocking directorates between a bank and a competing insurance company)**.**

22. The Wireless Bureau alone processed more than 40,000 such licenses in 1999. *See* Thomas Sugrue, Chief of Wireless Telecom. Bureau, Wireless Bureau Chief Declares *Backlog Reduction Program A Success; 99% of Backlog Eliminated*, *available at* http://www.fcc.gov/wtb/reports/index.htm (last visited Oct. 26, 2000).

everyone is treated exactly the same.[23]

2. The Commission's Actual Practice

The current Commission takes a different view. Today's Commission singles out "important" license transfer cases for "special" treatment. Unfortunately, no publicly available criteria determine which licensees the FCC selects for this special treatment, nor is there any predictable timeframe for a decision. Instead, the transaction is left hanging—waiting for some word from the Commission. In many cases, all the other transaction processes have been completed long before the FCC signals its intentions. Companies—facing pressure from all quarters to close the transaction—feel they have little choice but to come calling on the Commission, hats in hand, prepared to "voluntarily" do almost anything to close the deal. In the end, the current Commission often insists on extensive "voluntary" license transfer conditions.[24] These conditions are based on some vague sense of competition and antitrust policy—areas clearly and effectively dealt with by the Justice Department or the Federal Trade Commission.[25]

3. The Weaknesses of the Current Commission's Approach

Faced with a willing licensee, the current FCC has been far too eager to use these circumstances to expand its regulatory reach and create vast and often unenforceable company-specific regulatory conditions—all in the name of the public interest. The ultimate decision leaves an administrative mess for the Enforcement Bureau and the public to sort out.

Through this process, the FCC has expanded its regulatory reach to

23. *See* FCC Commissioner Harold Furchtgott-Roth, *The Realpolitik of Regulation: Offensive and Defensive Strategies*, Speech Before the American Enterprise Institute, Amgen Forum (Apr. 28, 2000), *available at* http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr005.html; FCC Commissioner Harold Furchtgott-Roth, Competition and Regulation, Speech Before the David T. Chase Free Enterprise Institute (Apr. 26, 2000) *available at* http://www.fcc.gov/Speeches/Furchtgott_Roth/sphfr006.html.

24. Conditioning license grants is a time-honored and legitimate practice at the Commission. The current Commission differs, however, in its use of these conditions to achieve such far-reaching and sometimes unrelated policy goals that may not have been obtainable through the rulemaking process.

25. *See* 15 U.S.C. § 4301 (1994) (establishing the procedure under which businesses notify the Department of Justice and Federal Trade Commission of their cooperative ventures). If there was ever any doubt about the Justice Department's willingness to apply traditional antitrust principles in the telecommunications field, one need look no further than the proposed MCI/Sprint deal. *See* Peter S. Goodman, *U.S. Suit Sinks Merger Of WorldCom, Sprint*, WASH. POST, June 28, 2000, at A1. Regardless of how one feels about the merits of the Justice Department's decision, it leaves little doubt that DOJ is fully capable of evaluating these issues without the FCC checking its work.

include transfer conditions that go far beyond the rules applicable to other similarly situated providers. For example, in the SBC/Ameritech transaction, the "voluntary" conditions limit the number of services and facilities that may be offered to competitive local exchange carriers ("CLECs") on a promotional basis.[26] Once the caps are reached, some CLECs will be unable to obtain the same promotional deals as others. Not only does such intrusive regulation extend the FCC's regulatory reach into the internal business decisions of licensees, it potentially obligates the merged company to violate the terms of the Act itself.[27] Similarly, the FCC's decision also requires SBC/Ameritech to charge certain rates for surrogate line-sharing services.[28] Despite a specific section 252 process for setting these rates at the state commission level, the FCC has arrogated authority to itself over pricing matters for merging companies.[29] Thus, when faced with policy goals "obstructed" by statutory or judicial impediments, the Commission can simply achieve the same goals under the guise of "voluntary" merger conditions.

As Commissioner Furchtgott-Roth has pointed out, the vast regulatory regime created via merger conditions also generates intense pressure on the agency's enforcement apparatus.[30] For example, the new SBC/Ameritech entity now falls subject to the detailed requirements of thirty separate conditions filling seventy-two pages of text.[31] These requirements exist in addition to, and in some cases supplant, the rules and regulations that already apply to all similarly situated carriers. Even assuming the Commission diverts the resources to administer dozens of individualized regulatory regimes (which seems unlikely), the corresponding and inevitable decline in the Commission's non-merger

26. *See* Application of Ameritech Corp. and SBC Comms., Inc., *Memorandum Opinion and Order*, 14 F.C.C.R. 14,712, para. 217, 18 Comm. Reg. (P & F) 1 (1999) (Furchtgott-Roth concurring in part and dissenting in part) (explaining that the use of voluntary standards allows administrative agencies to effectively skirt statutory limits on their authority, an offense to the concept of administrative agencies in possession of only those powers delegated to them by Congress) [hereinafter Ameritech/SBC, *Memorandum Opinion and Order*].

27. *See* 47 U.S.C. § 251(c)(3) (Supp. IV 1998) (establishing a telecommunications carrier's duty to provide nondiscriminatory access to network elements on an unbundled basis); *id.* § 251(c)(4)(b) (imposing a duty on carriers not to prohibit or impose unreasonable or discriminatory conditions on the resale of telecommunications services).

28. Ameritech/SBC, *Memorandum Opinion and Order, supra* note 26, para. 365; *see also id.* app. C, para. 8(b).

29. *See* 47 U.S.C. § 252; 47 C.F.R. §§ 20, 50-51, 90 (1999).

30. There remains, however, a threshold issue of how enforceable a "voluntary" condition really is. If it were truly voluntary, then these conditions would have no binding legal impact on the licensee.

31. *See* Ameritech/SBC, *Memorandum Opinion and Order*, *supra* note 26, app. C.

enforcement activities undoubtedly undermines the integrity of the FCC's other policies. Alternatively, if such resources are not diverted, the Commission appears to be busy promulgating rules it will not enforce. In either case, the development of extensive company-specific merger conditions raises difficult enforcement issues.[32]

Extracting detailed and ongoing "voluntary" regulatory concessions also harms transparency and thereby threatens consumer interests. If consumers wish to learn about the regulatory obligations of their local telecommunications company, they should be able to pick up a copy of the FCC's regulations and determine the scope of the carrier's responsibilities. Similarly, competitors (particularly interconnecting or reselling CLECs) should be able to expect uniform regulatory behavior by similarly situated companies. Indeed, one of the core appeals of federalizing certain areas of communications policy has been to develop uniform national standards that apply to all similarly situated carriers.[33] Regulation by merger condition undercuts this core value.

The Baby Bells illustrate this problem. Qwest/US West has one set of conditions, GTE/Bell Atlantic (now Verizon) another, and SBC/Ameritech/SNET/Pacific Telesis a third.[34] Only BellSouth customers can reliably look to the *Code of Federal Regulations* for any definitive insight into the applicable regulations. Moreover, the "voluntary" negotiation process seems to leave little substantive opportunity for the public to participate meaningfully in the policy-making process. Thus, virtually unreviewable agency power in license transfer proceedings spawns an unwieldy regulatory hydra that is difficult to enforce and even harder for the public to ascertain.

B. The Executive Branch's National Security Review

1. The Proper Scope of Executive Branch Participation in Licensing Decisions

Unfortunately, the FCC not only utilizes the licensing process to extract its own concessions, it actually allows other government agencies to

32. The Commission has compounded these problems in part by creating a Merger Compliance Oversight Team that has its own set of rules (never approved by the Commission) that has extraordinary discretion in the enforcement of license transfer related obligations. *See, e.g.*, Oversight Team to Monitor Compliance with Common Carrier Merger Conditions, *Public Notice*, DA 00-1553 (July 11, 2000), 2000 WL 958877 (F.C.C.).

33. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999).

34. For example, only SBC/Ameritech is obligated to provide competitive local service in thirty markets, where it does operate as an incumbent local exchange carrier ("ILECs"). *See* Ameritech/SBC, *Memorandum Opinion and Order*, *supra* note 26, app. C, para. 59(a).

do the same. The Act and FCC policy establish a role for Executive Branch agencies in the license transfer process. Under section 214, the FCC must notify a number of parties upon the receipt of an application: the Secretary of Defense, the Secretary of State, and the governor of each state in which the line will run.[35] The statute also creates a "right to those notified to be heard."[36] Similarly, the Commission has determined that "appropriate Executive Branch agencies" must be consulted whenever the agency reviews section 310 requests.[37]

Where the proposed section 214 license holder is a foreign or foreign-affiliated carrier, the Commission has explained that the FCC will consider "any such legitimate concerns [from the Executive Branch regarding national security or law enforcement] as we undertake our own independent analysis of whether grant of a particular authorization is in the public interest."[38] Such consideration is consistent with the FCC's international obligations, which provide for "essential security" exceptions under Articles XIV *bis* of the GATS.[39] Thus, consistent with our precedent and international obligations, the Commission should notify and consider the comments of the Executive Branch in assessing whether a given licensing decision is in the public interest.

To the extent that the Executive Branch has significant concerns about the national security implications of a given transaction, Congress has created an Executive Branch review process with strict timeframes to assess all transactions throughout the economy.[40] Under the statute, "[t]he

35. 47 U.S.C. § 214(b) (1994).

36. *Id*.

37. Rules and Policies on Foreign Participation in the U.S. Telecomm. Market, *Report and Order and Order on Recons*., 12 F.C.C.R. 23,891, para. 113, 10 Comm. Reg. (P & F) 750 (1998) (petition for reconsideration pending).

38. Amendment of the Comm'n's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and Int'l Service in the U.S., *Report and Order*, 12 F.C.C.R. 24,094, para. 179, 10 Comm. Reg. (P & F) 587 (1998). Ironically, "[w]e emphasize[d] . . . that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised in very rare circumstances. Contrary to the fears of some commentors [sic], the scope of the concerns that the Executive Branch will raise in the context [of transfers] . . . is narrow and well-defined [sic]." *Id.* para. 180.

39. *See* General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, 59 (1994).

40. *See* 50 U.S.C. app. § 2170(a)-(k) (1994). Pursuant to section 721 of the Defense Production Act, the President authorized the CFIUS to review foreign acquisitions of U.S. companies for national security purposes. According to the statute, the President conducts an investigation to determine the effects of proposed or pending mergers, acquisitions, and takeovers on national security. If it is determined that an investigation is necessary, the investigation must commence no later than thirty days after the President's receipt of written notification of the transaction in question, and the investigation must be completed no later

President . . . may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States."[41] The President may then "suspend or prohibit" such transaction if a number of statutory findings are made.[42] The President has delegated these responsibilities to the Committee on Foreign Investment in the United States ("CFIUS").[43] Thus, the Executive Branch has its own structure to review and potentially block, or condition, any communications-related transaction that creates substantial national security concerns.[44] Congress has explicitly set the respective roles of the Executive Branch and the Commission in these transactions. The Commission receives comment on national security and other public interest issues from the Executive Branch as part of its independent review of a given transaction.[45] The Executive Branch itself may block (or condition) transactions directly through the CFIUS. The statutes speak directly on these matters.

2. The FCC's Actual Practice

Undeterred by the clear statutory language, today's FCC licensing process takes a different approach. The Commission facilitates the demands of the Executive Branch[46] by refusing to approve licensing until the applicants reach a "voluntary" agreement with the Executive Branch

than forty-five days after such a determination is made. The President must make an investigation in any case in which an entity controlled by a foreign government seeks to engage in a transaction that could affect national security, which is subject to the time limitations stated above. No documentary material may be made public, and such material is exempt from disclosure under 5 U.S.C. § 552 (2000). The President must announce a decision to take action to suspend or prohibit any transaction no later than fifteen days after an investigation is completed. National security considerations include, among other factors, domestic production required for national defense; availability of human resources, products, and technology to meet national defense requirements; control of domestic industries and commercial activities of foreign citizens; and potential effects of the transaction on sales of military goods, equipment, or technology to another country. The President must report to Congress the determination of whether to take action, and shall direct the issuance of regulations to carry out these efforts.

41. *Id.* § 2170(a).

42. *Id.* § 2170(d).

43. *See supra* note 12.

44. For example, in the recent NTT/Verio deal, CFIUS signed off on the transactions only after receiving assurances that certain steps would be taken to protect national security and law enforcement efforts. *See* Margo McCall, *NTT/Verio OK provides Hints for Voicestream*, WIRELESS WEEK, Aug. 21, 2000, at 10.

45. *See, e.g.*, 47 U.S.C. § 214(b) (1994).

46. Usually these agencies include the Department of Justice and the Federal Bureau of Investigations.

agencies.[47] The FCC does not require the Executive Branch to use its own statutory authority to evaluate the transaction. Instead, the Commission permits the Executive Branch to use the vulnerability and non-reviewability created by the licensing process to extract desired concessions.[48] For example, in one recent proceeding, the FCC accepted the Executive Branch's filing eleven months after the deadline for public comment, and then waited seven more months for the Executive Branch to reach its "voluntary" agreement with the applicants.[49] Only then did the Executive Branch withdraw its objections. The Executive Branch's withdrawal, however, was conditioned on the FCC's willingness to incorporate the "voluntary" side agreement as a merger condition.[50] The FCC approved the transaction only after this entire eighteen-month process was completed. By using the FCC's merger process, the Executive Branch avoids the more rigorous and defined standards and timetables that would constrain their CFIUS review.[51]

Licensees, for their part, have little choice but to go along. Absent agreement to the "voluntary" conditions, licensees have no certainty as to if or when the Commission will act on their applications. With their transactions hanging in the balance, licensees must accede to the Executive Branch's demands.

3. The Weaknesses of the Current Commission's Approach

Not surprisingly, with such eager licensees, the Executive Branch's conditions contain provisions that the FCC could never promulgate under

47. *See* Applications of SatCom Sys., Inc., TMI Comms. and Co., L.P. and SatCom Sys. Inc., *Order and Authorization*, 14 F.C.C.R. 20,798, 20,847, 18 Comm. Reg. (P & F) 1164 (1999) [hereinafter TMI/SatCom, *Order*] (lamenting the delay caused by the FBI, "effectively creat[ing] an 18-month freeze on our approval process"). If nothing else, the Commission could handle these Executive Branch concerns far more efficiently and effectively if the Executive Branch spoke with one voice on these matters (instead of hearing from the National Telecommunications and Information Administration, FBI, State Department, etc., independently) and if there were some reasonable timelines imposed on this process (preferably the standard notice and comment schedule).

48. *See* Neal King, Jr. & David S. Cloud, *Global Phone Deals Face Scrutiny from New Source: the FBI*, WALL ST. J., Aug. 24, 2000 at A1 (for an extensive discussion of these issues).

49. *See* TMI/SatCom, *Order*, *supra* note 47, 14 F.C.C.R. 20,798, paras. 2, 5, 7.1.

50. *Id.* para. 1. Although license transfer proceedings are most likely to grab headlines, initial licensing of foreign-affiliated companies may also be subject to this level of Executive Branch scrutiny. TMI/SatCom, for example, involved an initial ground station license for a Canadian company.

51. In addition, the independence of the FCC erodes each time the Commission contorts its processes to accommodate the Executive Branch.

its own authority.[52] For example, in the case of TMI/SatCom, the side agreement requires the company to furnish recent employment and residence history and biographical information for persons who occupy Sensitive Network Positions.[53] Certainly other similarly situated licensees are under no such obligation, and it is certainly not clear that the FCC alone has the authority to create such a requirement. In a similar vein, the side agreement requires TMI to make its facilities available for inspection and its employees available for interviews by Justice Department and FBI personnel.[54] Without the license transfer process, it seems unlikely that the FCC could independently impose such requirements.

From an enforcement perspective, such side agreements place the Commission in the awkward position of enforcing a contract between the licensee and a third party. Yet the license transfer is explicitly conditioned on that agreement, creating at least an implicit FCC obligation to enforce it.[55] In addition, the TMI side agreement calls for the parties to seek judicial enforcement of the agreement or "move for relief from the FCC."[56] The FCC is thus obligated to interpret and enforce another government agency's contract with a licensee. Is the FCC really prepared to intervene every time the Justice Department or the licensee wishes to substantively alter the mandates in the side agreement? Alternatively, if the FCC takes a more hands-off approach, the agreement does not appear to mean what it says.

The Executive Branch's agreements also contribute to the proliferation of disparate regulatory obligations for seemingly similarly situated entities. There has never been a public and comprehensive look at the security risks posed by foreign investment in our telecommunications infrastructure. Carriers and the public have never really had full notice and opportunity to comment on what constitutes a reasonable set of technical and business mandates to maintain national security when a carrier is foreign-owned. Certainly, the Commission has not made any assessment in this regard. Equally troubling is the lack of consistency in the application of these side agreements. They have changed from proceeding to proceeding, and the Executive Branch has not imposed any industry-wide obligations. Instead, the approach has been one of stumbling incrementalism and remarkable delay; each proceeding has created its own evolved set of

52. *See* TMI/SatCom, *Order*, *supra* note 47, para. 3.6. Most prominently, the Executive Branch required that the companies keep all equipment for domestic traffic in the United States. *Id.*

53. *See id.* para. 7.3.

54. *Id.* para. 8.1.

55. *See id.* para. 2.1.

56. *See* TMI/SatCom, *Order*, *supra* note 47, para. 11.2.

obligations on a different time schedule.[57] Once again, the American public can thoroughly search in the *Code of Federal Regulations* but will not find the distinct obligations imposed on some foreign entrants. Such a company-specific approach under the auspices of the FCC does not promote consistency, transparency, or predictability.

C. Consent Decrees in Enforcement Actions

1. The Proper Scope of Consent Decrees

In addition to the commitments that can be extracted while awaiting approval of their license transfers, licensees are also particularly vulnerable to Commission demands in the context of enforcement proceedings. Formal enforcement actions are often initiated through a Notice of Apparent Liability.[58] After the pleading cycle is complete, the Commission issues an Order assessing all of the evidence and announcing any punishment. If the licensee then fails to pay any forfeiture or continues to contest the underlying facts, the government must bring suit in federal court for a trial *de novo* on the underlying claims in order to collect any forfeiture.[59] Rather than engage in this prolonged process, the licensee and the Commission's enforcement team—either prior to the initial notice or at some point during the enforcement action—will often sit down to

57. This point is illustrated by a comparison between the "Disputes" section in the November 1999 TMI/SatCom *Order* and the corresponding "Disputes and Non-Impact on Other Government Action" of the October 1999 AT&T/BT *Order*. *Compare id.* app. A art. 11.2 (noting that a "party may bring an appropriate action for judicial relief in a U.S. court of competent jurisdiction or move for relief from the FCC" and not discussing criminal sanctions) *with* In the Matter of AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications, *Memorandum Opinion and Order*, 14 F.C.C.R. 19,140, app. B art. 4.3.1, 18 Comm. Reg. (P & F) 420 (1999) (permitting any "Party to bring an action against the other Party for appropriate judicial relief" or "[a]lternatively (1) the DoJ, the FBI, or DoD may bring an action for relief (including equitable relief) before the FCC, and (2) the Affiliates and the Company may petition the FCC for a declaratory ruling with respect to the Affiliates' or the Company's obligations under this agreement"; also explicitly preserving the government's rights to pursue other remedies including criminal sanction under Article 4.4 of the agreement.).

58. *See* Notice of Apparent Liability for Forfeiture of Ensearch Corp., *Forfeiture Order*, FCC 00-268 (July 27, 2000), 2000 WL 1028741 (F.C.C.); Qwest, *Order*, *supra* note 14 (holding Qwest liable for forfeiture in the amount of $2,080,000); Business Discount Plan, *Order*, *supra* note 14 (assessing a $2,400,000 forfeiture against Business Discount Plan, Inc.). At times, the notification is less public through investigatory letters sent to the targeted companies. In these cases, the consent decrees adopted below may be issued without any public knowledge regarding the infraction. Obviously, these privately negotiated agreements have even greater appeal to licensees because they limit the public relations damage caused by the alleged violations.

59. As a practical matter, such federal court proceedings are extremely rare.

"negotiate" the terms of a consent decree.[60] As discussed above, there is no formal procedure through statute or regulation for the negotiation or judicial review of such decrees. Indeed, many of these decrees require the licensee to waive any rights to appeal.[61] Therefore, the Commission has tremendous leverage in these proceedings.

Consent decrees are a valuable procedural tool in the Commission's arsenal. They permit proceedings to be concluded in a prompt and efficient fashion without the consumption of vast litigation resources. Licensees who violate the FCC's rules should be punished and closely monitored for future violations. Repeat offenders should be subject to serious fines. Consent decrees also provide opportunities for the Commission to receive commitments from licensees that programs and policies are in place to prevent future misconduct. Decree terms, however, should be tied directly to the alleged misconduct and should impose only those mandates that the FCC intends to monitor and enforce.

2. The FCC's Actual Practice

The Commission's practice is far different. Licensees often spend months "negotiating" these consent decrees. The decrees often include large monetary payments and the compliance plans discussed above. The decrees, however, also often include extensive terms not directly related to the violations. From advertising campaigns to employment policies, the current Commission seeks to require licensees to do its version of the "right thing." Licensees, eager to reach agreements, often "volunteer" for additional measures in an effort to lessen the consent decrees' forfeiture amounts. This confluence of circumstances, together with the lack of judicial review, means virtually all business practices even remotely related to the conduct at issue are often on the table.

3. The Weaknesses of the Current Commission's Approach

The Commission's current consent decree approach often reaches far beyond the traditional scope of its jurisdiction, imposes conditions that are detailed and often unwieldy to enforce, and creates numerous and distinct company-specific regulatory requirements. Most disturbing, the Commission uses the consent decree process to achieve policy goals that it likely could not achieve through judicially reviewable regulatory action. These consent decrees are breathtaking in their scope. For example, under one recent decree, MCI WorldCom is required to fire employees the first

60. Negotiations often occur at various stages of the process, including before or after the Notice of Apparent Liability.

61. *See* MCI, *Order*, *supra* note 16, para. 7; Qwest, *Order*, *supra* note 14, para. 7.

time the employee "use[s] . . . profanity during a sales call" or "harass[es]" a customer.[62] The same decree mandates that a new "Telemarketing Code of Conduct" be administered to all current and new employees.[63] These policies may well be the best business practices for any given licensee, but they clearly lie outside the traditional scope of the Commission's regulations. The FCC is not the Labor Department. The Commission does not have jurisdiction over telemarketing per se.[64] The vulnerable position of a licensee subject to an enforcement action should not be used to impose the Commission's view of "best practices" simply because, absent judicial review, the FCC has the ability to do so.

Not only do the consent decree terms extend far beyond the agency's normal reach, they impose detailed and extensive provisions that are difficult to monitor and enforce. For example, the FCC has neither the expertise nor the resources to police carriers' labor and employment practices. Is the FCC prepared to define and adjudicate what it means "harass"? What happens when an employee is fired for using profanity during a sales call? Does he sue his employer or the Commission? Is the FCC prepared to receive complaints from consumers and take actions against individual employees? Similar concerns arise vis-à-vis consent decree provisions regarding advertising practices, and business management.[65]

Even if the FCC had some level of expertise in these areas, consent decrees often mandate highly specific and detailed carrier actions that seem to go far beyond what the agency is prepared to enforce. For example, Qwest, as part of a mandated media campaign, must, within six months of approval of the decree, "distribute brochures and place media advertising for consumers who do not speak English as their primary language, in their language of choice."[66] Yet there are hundreds of "languages of choice," so the full scope of this obligation is not at all clear. If a Croatian immigrant complains to the Commission that Qwest failed to have advertising

62. *See* MCI, *Order*, *supra* note 16, para. 12.

63. *Id.*, para. 12.

64. For a general discussion of the proper scope of the Commission's role in advertising regulation, *see* Bryan Tramont, *Commission on the Verge of a Jurisdictional Breakdown: The FCC and its Quest to Regulate Advertising*, 8 COMMLAW CONSPECTUS 219 (Summer 2000).

65. *See* Qwest, *Order*, *supra* note 14, para. 23 (requiring Qwest to devise and implement a nationwide campaign to inform consumers who do not speak English of the dangers of slamming and to display media advertising in their language of choice).

66. *Id*. It is also not clear how effective such a campaign would be at resolving the apparent underlying problem. If, in response to a record of violations, the goal is to prevent language barriers from facilitating slamming, then multilingual operators provide a much more direct answer to this problem.

available in her "language of choice," is the FCC prepared to pursue enforcement action against Qwest? Similarly, if a licensee decides that holding back thirty percent of a telemarketer's commissions for ninety days is more appropriate than the decree's mandate to hold back twenty percent for sixty days, is the licensee really required to petition the FCC for "permission" to change this business practice? The Commission's consent decree philosophy is perhaps well-intentioned, but the decree's legally binding obligations must be no broader than the FCC will monitor and enforce. Anything less undermines the Commission's credibility with its licensees and the public.

Finally, consent decrees should attempt to limit, to the extent feasible, the amount of carrier-specific regulation imposed. There is every reason to treat those who disobey the Commission's rules differently from their peers. It does not seem appropriate, however, to modify our rules regarding the standards of care required, especially vis-à-vis consumers. For example, the Qwest consent decree requires a carrier to establish a "stay away" list of customers who have stated that they would never do business with Qwest; customers remain on the list for a minimum of one year, unless they request to be removed from the list.[67] The Commission has detailed (and different) regulations restricting telephone solicitation; in response to a consumer request, telephone solicitors must place the consumer on a "do-not-call list" for a period of ten years.[68] Presumably, the current rule adequately protects consumers. In any event, the creation of a seemingly more relaxed one-year period seems counterintuitive. Nonetheless, in setting a different standard for some companies, the FCC seems to imply that its generally applicable rules are inadequate. These differing requirements also make it much more difficult for consumers to know their rights or for outside parties to educate the public regarding those rights. Imagine the challenges associated with a consumer web site setting forth the FCC's telemarketing rules, with a separate section for each carrier bound by a different set of rules found in consent decrees scattered across the *FCC Record*. Consumers would also be frustrated (and ultimately unsuccessful) if they attempted to locate these standards in the *Code of Federal Regulations*. Individualized obligations in consent decrees ultimately hinder consumers' abilities to know their rights and to use the Commission's enforcement procedures to their benefits.

67. *Id.* para. 20. These rules also apply to customers who have accused the carrier of slamming.

68. 47 C.F.R. § 64.1200 (1999).

IV. CONCLUSION

There is little doubt that the current Commission's affinity for voluntary agreements is motivated by the goal of doing the "right thing" for the public. Doing the "right thing" in a series of company-specific adjudications, however, is not the job that Congress hired the FCC to do. By freelancing in this way, outside the scope of judicial review, the FCC undermines its institutional strength and public esteem. The true "right thing" is for the FCC to behave as if Congress, the courts, and the American people closely monitor its every move. By simply following the law, enforcing the law, and arming consumers with the law, the FCC can do the "right thing." There is no need for anyone to "volunteer" to do anything else.