

Do State Reviews of Communications Mergers Serve the Public Interest?

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I. INTRODUCTION

This study presents an empirical analysis of the effects of public utility commission (“PUC”) oversight of mergers involving communications carriers. The analysis is based on a data set covering major communications sector transactions from January 1, 2010 through June 30, 2017. Specifically, we gathered and analyzed data on all 40 major transactions approved by the Federal Communications Commission (“FCC”) during this period to: (a) determine the extent of PUC involvement in these transactions; and (b) for the transactions in which PUCs were actively engaged, to assess both the procedural and substantive effects of their interventions.¹

The appropriate role of state governments in the merger review process has been the subject of vigorous debate among academics and policymakers. Supporters of state involvement argue that states may have unique local knowledge of competitive conditions or other comparative advantages that allow them to add value to the enforcement efforts of federal antitrust watchdogs at the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).² Critics question the benefits of state intervention and also point to the costs, arguing that state reviews are duplicative, costly, and involve unnecessary delays.³ Critics also note that state enforcers face incentives to place parochial political interests ahead of overall consumer welfare or the broader public interest and thus to impose merger conditions that benefit narrower constituencies to the detriment of the public at large.⁴ As we explain below, our data suggest that these concerns are especially apposite to PUC reviews of communications mergers.

In particular, we explain that PUCs typically operate—like the FCC—under a broad and nebulous “public interest” standard, where the burden of proof is with the merging parties, unlike in antitrust review, where the burden is on the government.⁵ Also like the FCC, PUCs’ decisions not to approve mergers are, for procedural reasons, almost impossible to challenge in court.⁶ Thus, PUCs have a high degree of hold-up power over transactions, which allows them to extract “voluntary” concessions with little oversight.⁷ Further, unlike the FCC—which assesses the public interest from a national perspective—PUC interventions under the public interest mantle are often

1. FCC approved transactions involving only assets located in U.S. territories are excluded from the universe of data.

2. See, e.g., Elinor R. Hoffman, *State and Federal Antitrust Enforcement: Complementary or Just Confusing?*, 11 CPI ANTITRUST CHRONICLE 1, 2-7 (Nov. 2012).

3. See, e.g., Richard Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 15 GEO. J.L. & PUB. POL. 2, 5-15 (2004) [hereinafter *Posner 2004*].

4. See, e.g., *Testimony of Michael E. DeBow Before the Antitrust Modernization Commission*, ANTITRUST MODERNIZATION COMM’N (Oct. 26, 2005), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-DeBow.pdf [<https://perma.cc/2FQV-Y9G4>] [hereinafter *DeBow Testimony*].

5. See *infra* note 4, 6, 8.

6. Samuel L. Feder, *Proposals to Streamline Federal and State Regulatory Review of Transactions in the Communications Industry*, JENNER & BLOCK at 27 (Oct. 11, 2017), http://res.cloudinary.com/njk/image/upload/v1508414616/Merger_Reform_Paper_Final_1_tqqr8v.pdf.

7. See *infra* notes 10-12.

motivated by parochial concerns and local political interest.⁸ Thus, perversely, the merger conditions imposed by PUCs frequently come at the direct expense of other states and undermine the achievement of national merger efficiencies.⁹

Our analysis of the frequency and characteristics of PUC interventions in communications mergers provides new evidence that states impose significant and unnecessary costs in the form of procedural burdens and delays and that the concessions they extract tend to serve narrow interests rather than the overall public interest. Because mergers are a key mechanism for reallocating resources to their highest valued economic uses, the costs and delays imposed by PUCs ultimately harm overall consumer welfare and economic performance. Accordingly, policymakers at both the federal and state level should consider reforms that would significantly constrain the ability of PUCs to intervene in communications mergers.

The remainder of this paper is organized as follows. Section II discusses the law and economics of merger enforcement, focusing on both the substantive and procedural factors that bear on the appropriate role of state regulatory bodies in the review process. Section III presents our empirical findings regarding the extent and nature of PUC interventions in communications mergers. Section IV presents a brief summary of our findings.

II. THE LAW AND ECONOMICS OF STATE MERGER ENFORCEMENT

This Section discusses the analytical framework that motivates our empirical analysis. It begins with a discussion of the goals of merger enforcement policy—in broad terms, to maximize the net benefits of mergers by prohibiting transactions that are harmful to competition and consumer welfare without deterring those that are beneficial. Next, we provide a brief overview of the merger review process at the federal level, including the roles of the economy-wide enforcement agencies, the DOJ and FTC and, with respect to communications mergers, the FCC. Finally, we turn to role of state merger enforcement and provide a law-and-economics-based framework for evaluating the benefits and costs of state merger enforcement.

Our discussion focuses on two sets of incentive issues that are present in merger enforcement, and that we refer to as (a) *hold-up power* and (b) the *externality problem*. Hold-up power refers to the ability of merger enforcers to use the threat of blocking a transaction to extract conditions from the merging parties that they could not lawfully impose absent the transaction. While all merger enforcers have some degree of hold-up power, we argue that the broad authority and practical impunity from appeal enjoyed by the FCC and PUCs enhances their hold-up power relative to antitrust enforcers. The externality problem refers to the fact that state enforcers are likely influenced

8. See *infra* note 25.

9. See *infra* notes 12-13.

by the ability to impose conditions whose benefits are concentrated in their home states while the costs are borne more widely.

A. Merger Enforcement, Consumer Welfare, and the Public Interest

All U.S. mergers that involve a substantial volume of interstate commerce are subject to federal review under the Clayton Act.¹⁰ Mergers are reviewed by either the DOJ or the FTC, with the assignment of responsibility typically going to the agency with the most prior experience in the industry involved; mergers involving communications providers typically fall under the purview of the DOJ.¹¹ For industries subject to sector-specific regulation, transactions are also reviewed by the relevant sector-specific regulator, such as the FCC for communications mergers or the Federal Energy Regulatory Commission for oil and gas pipelines.¹²

The process for review by the antitrust agencies is governed by the Hart-Scott-Rodino (“HSR”) Act,¹³ which requires parties engaging in transactions above an annually-adjusted monetary threshold to notify the government at least 30 days prior to consummating the transaction (15 days in the case of a cash tender offer or a bankruptcy).¹⁴ If the agency reviewing the merger grants an early termination of the waiting period or allows the initial waiting period to expire, the parties are free to proceed.¹⁵ Alternatively, the reviewing agency may issue a Request for Additional Information (a “Second Request”), which extends the waiting period until the parties attest that they have “substantially complied” with the Second Request.¹⁶ At that point, the reviewing agency has 30 days (10 days in the case of a cash tender offer or bankruptcy) to decide whether it will (1) allow the transaction to proceed, (2) enter into a consent agreement that seeks to remedy potential

10. 15 USC § 18a. See generally *Antitrust Laws and You*, U.S. DEP’T OF JUST. (Jan. 5, 2017), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/W467-UKQZ>].

11. *The Enforcers*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> [<https://perma.cc/2PSK-9CX9>]. See generally *Telecommunications and Broadband Section*, U.S. DEP’T OF JUST. (Apr. 11, 2018), <https://www.justice.gov/atr/about-division/telecommunications-and-broadband-section> [hereinafter *Telecommunications and Broadband Section*] [<https://perma.cc/3EH6-F3PS>].

12. See generally *Telecommunications and Broadband Section*, *supra* note 11; Jon Sallet, *FCC Transaction Review; Competition and the Public Interest*, FCC (Aug. 12, 2014), <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest> [<https://perma.cc/ZF7B-XWKL>]; *Mergers and Sections 201 and 203 Transactions*, FERC (Sept. 25, 2017), <https://www.ferc.gov/industries/electric/gen-info/mergers.asp?csr=3884934691573532513> [<https://perma.cc/SBKE-RMQ7>].

13. 15 USC § 18a. See generally U.S. DEP’T OF JUST. & FTC, *HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2015* (Aug. 2016), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf> [<https://perma.cc/Q7DE-JAYM>].

14. 15 USC § 18a (b)(1).

15. 15 USC § 18a (b)(2).

16. *Premerger Notification and the Merger Review Process*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review> [<https://perma.cc/MB2J-5AXV>].

competitive harms through the imposition of conditions, or (3) file for an injunction to block the merger.¹⁷

The substantive standard for merger review by the antitrust agencies is embodied in Section 7 of the Clayton Act, which prohibits mergers for which the effect “may be substantially to lessen competition, or to tend to create a monopoly.”¹⁸ To successfully block a merger in court, the government must demonstrate by a preponderance of the evidence that it would be likely to result in “a substantial lessening of competition.”¹⁹ There is broad agreement among policy makers and scholars that merger enforcement should be based exclusively on competition concerns. For example, the U.S. explained in a recent submission to an Organization for Economic Co-operation and Development working party that “U.S. antitrust law and policy, including merger review, are implemented based on the belief, borne out by our economic history, that the public interest is best served by focusing *exclusively* on competition considerations.”²⁰ Or, as former FTC Chairwoman Edith Ramirez recently commented, a “core feature that we [the FTC] have learned leads to sound competition enforcement is a focus on competition factors alone, rather than on consideration of other economic and social policies.”²¹

In this context, both the antitrust agencies and the reviewing courts are heavily influenced by economic analysis, as codified in the DOJ/FTC *Horizontal Merger Guidelines (Guidelines)* and embodied in decades of antitrust jurisprudence.²²

The *Guidelines* provide that “mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise,” meaning that mergers will be challenged if they are “likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm

17. At this stage, the parties (the agency and the merging firms) have the option to extend the review in order to avoid litigation and attempt to come to a settlement. *Id.*

18. 15 USC § 18.

19. ROBERT S. SCHLOSSBERG, *MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES*, 4-5 (ABA Section of Antitrust Law, 2d ed. 2004).

20. *Organization for Economic Co-operation and Development Working Party No. 3 on Co-operation and Enforcement*, Note by the United States, PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL at 2 (June 2016), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2016\)10&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)10&docLanguage=En) [<https://perma.cc/4RWJ-R92C>] (emphasis added).

21. Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC*, Antitrust in Asia Conference: ABA Section of Antitrust Law and Expert Advisory Committee of the Anti-Monopoly Commission of the State Council (May 2014) at 6 [<https://perma.cc/7S37-U6RY>].

22. U.S. DEP’T OF JUST. & FTC, *HORIZONTAL MERGER GUIDELINES* (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [<https://perma.cc/9AM6-G8BF>] [hereinafter *Horizontal Merger Guidelines* or *Guidelines*]; see also RICHARD POSNER, *ANTITRUST LAW* viii-ix (University of Chicago Press ed., 2d ed. 2001) (“Antitrust has to a great extent been normalized . . . Its political, its ideological character has receded in tandem with growing agreement on its premises . . . Almost everyone professionally involved in antitrust today . . . not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.”).

customers as a result of diminished competitive constraints or incentives.”²³ The *Guidelines* also recognize that mergers create substantial benefits by reallocating scarce resources to higher valued uses, thereby enhancing consumer welfare and promoting economic growth.²⁴

Thus, antitrust policy seeks to strike a balance, permitting mergers that enhance consumer welfare while prohibiting those that reduce it.²⁵ The agencies often seek to achieve this balance by imposing remedies that aim to eliminate or ameliorate potential anticompetitive effects, such as requirements to divest assets or refrain from specific business practices.²⁶ When such conditions are imposed by the DOJ or the FTC, they are embodied in consent decrees entered into by the parties, which are subject to automatic court review under the Tunney Act.²⁷

In the context of this study, it is worth noting that the antitrust agencies have historically taken an active role in reviewing communications sector mergers. For example, between 2010 and 2014, nine percent (13 out of 138) of telecommunications mergers for which HSR notifications were filed received a Second Request, compared to just three percent of mergers among firms in other information technology sectors.²⁸

While the Clayton Act gives the FCC authority to review mergers under the same Section 7 standard used by the antitrust agencies, the FCC chooses instead to rely on Sections 214(a) and 310(d) of the Communications Act, which require it to determine whether the transfers of licenses and authorizations are in the “public interest.”²⁹ In doing so, it employs “a balancing test weighing any potential public interest harms of the proposed

23. *Guidelines*, *supra* note 22, at 2. See also JEFFREY A. EISENACH, US MERGER ENFORCEMENT IN THE INFORMATION TECHNOLOGY SECTOR 445 (Roger Blair & Daniel Sokol, eds., 2017) [hereinafter *Eisenach 2017*] (“Competition is harmed when a transaction results in a significant increase in market power, defined as the ability of a firm, or group of firms, to set and maintain prices above (or reduce quality below) the competitive level, thereby harming consumer welfare; or, in an increase in the incentive and ability of a dominant firm to engage in anticompetitive activities, such as raising rivals’ costs.”).

24. See *Guidelines*, *supra* note 22, at 29 (“[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.”).

25. One way of thinking about this objective is in terms of Type I and Type II errors: that is, antitrust policy should aim to minimize the combined costs of erroneously permitting harmful mergers (Type I error), on the one hand, and of erroneously prohibiting beneficial ones (Type II error), on the other hand. See Frank Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984); see also Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 158-59 (2010).

26. See *Policy Guide to Merger Remedies*, U.S. DEP’T OF JUST. at 4 (June 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> [<https://perma.cc/G838-HTY7>] (“Effective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.”).

27. 15 U.S.C. § 16.

28. *Eisenach 2017*, *supra* note 23, at 452.

29. 47 USC § 214(a); 47 USC § 310(d).

transaction against any potential public interest benefits.”³⁰ As the FCC explained in its 2016 Order approving the Charter-Time Warner merger, its competitive analysis “is informed by, but not limited to, traditional antitrust principles.”³¹ Specifically:

The DOJ . . . reviews telecommunications mergers pursuant to Section 7 of the Clayton Act, and if it sues to enjoin a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly. The DOJ review is consequently limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations. Moreover, the [FCC]’s competitive analysis under the public interest standard is broader. For example, the [FCC] considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.³²

Furthermore, whereas the Clayton Act requires the antitrust agencies to demonstrate to a court that a merger would harm competition, the FCC can effectively block a merger simply by failing to find that it is in the public interest, in which case it must designate the issue for an administrative hearing.³³ Only after such a hearing is complete do the merging parties have access to judicial review.³⁴

As a result of these differences, FCC reviews sometimes take longer and often require more concessions from the merging parties than the DOJ’s reviews of the same transactions,³⁵ and the FCC has been criticized for using the resulting hold-up power to impose conditions that bear little or no relation to the effects (competitive or otherwise) of the transaction under review and that it could not achieve (or successfully defend in court) through formal

30. See Applications Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 16-59, para. 26 (May 5, 2016) [hereinafter *Charter-Time Warner Order*].

31. *Id.* at para. 28.

32. *Id.* at para. 29.

33. ABA, *TELECOM ANTITRUST HANDBOOK* 93 (Chicago, IL: ABA Publishing, 2d. ed. 2013).

34. FCC, *Administrative Law Judges*, <https://www.fcc.gov/administrative-law-judges> [<https://perma.cc/4UP7-LYAE>]. Moreover, there is no time limit on FCC reviews, just a voluntary (and frequently “tolled”) 180-day shot clock. See ABA SECTION OF ANTITRUST LAW, *TELECOM ANTITRUST HANDBOOK* 92-99 (2d. ed., 2013) [hereinafter *Telecom Antitrust Handbook*]; FCC, *Overview of the FCC’s Review of Significant Transactions*, (July 10, 2014), <https://www.fcc.gov/reports-research/guides/review-of-significant-transactions> [<https://perma.cc/JT2V-WLHB>].

35. See Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 1, 31-32 (2000).

rulemaking.³⁶ As former FCC chief economist Howard Shelanski has written, the FCC has “extracted conditions from the merging parties that the agency never could have obtained under the antitrust laws, that were beyond the FCC’s regulatory power to mandate (hence the conditions had to be voluntarily binding, for the carriers), and that were not reviewable by a court of law.”³⁷

The opaque nature of the FCC process has also raised concerns. For example, in his dissent to the FCC’s Order approving the Charter-Time Warner Cable merger, then-FCC Commissioner (now Chairman) Ajit Pai bemoaned the lack of transparency in negotiations over merger conditions (even among commissioners): “[T]he parties are required to negotiate behind closed doors with the Chairman’s Office or Office of General Counsel . . . on conditions to be attached to the deal. Months can go by without any transparency, internal or external, regarding the ornaments that the Chairman’s Office is seeking to place on the Christmas tree.”³⁸

B. State Interventions in Merger Enforcement

State attorneys general (“AGs”) have authority under Section 16 of the Clayton Act to seek injunctive relief or merger conditions under the federal antitrust laws on behalf of the consumers in their states, acting as *parens patriae*.³⁹ In addition, a few states have adopted state-level antitrust statutes, and state AGs also sometimes represent state governments as complainants in their proprietary capacities as customers of the merging parties.⁴⁰ In federal litigation, state AGs operate under the procedural and substantive provisions of the Clayton Act.⁴¹

36. See generally Barkow & Huber, *supra* note 35, at 29-83; Thomas Koutsky & Lawrence Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the ‘Public Interest’ Standard*, 18 COMM.LAW CONSPECTUS: J. OF COMMS. L. & POL. 329 (2010); Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 R. OF INDUS. ORG. 295 (2014).

37. See generally Howard A. Shelanski, *From Sector-Specific Regulation to Antitrust Law for US Telecommunications: The Prospects for Transition*, 26 TELECOMM. POL’Y 335, 341 (2002); see generally Jeffrey A. Eisenach & Hal J. Singer, *Avoiding Rent- Seeking in Secondary Market Spectrum Transactions*, 65 FED. COMM. L.J. 3 (2013) [hereinafter *Eisenach and Singer 2013*]; see generally Koutsky & Spiwak, *supra* note 36.

38. *Charter-Time Warner Order*, *supra* note 30, at 343. Commissioner Pai was also highly critical of the substance of the conditions imposed on the transaction, arguing in his dissent that the majority had “turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy.” See *id.* at 340. In April 2017, the FCC issued an Order on Reconsideration eliminating requirements that Charter deploy new broadband infrastructure in areas already served by competing broadband providers. See Applications Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Order on Reconsideration*, FCC 15-149, paras. 1-2, 12 (2017).

39. 15 USC § 15c.

40. See generally *Telecom Antitrust Handbook*, *supra* note 34, at 93-99. See also Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.U. L. REV. 1047 (1990) [hereinafter *Lande 1990*].

41. *Telecom Antitrust Handbook*, *supra* note 34, at 94.

PUC reviews of communications mergers are authorized under state laws, which differ from state to state.⁴² In general, however, PUC authority to review transactions is tied to the transfers of operating certificates and tariffs required for the provision of regulated intrastate services, such as local exchange and intrastate toll wireline telephone service, or other services directly regulated by the PUC; like the FCC, the burden of proof falls on the merging parties to demonstrate the transaction is in the public interest.⁴³

While broadband and Internet Protocol-based services and most aspects of wireless services (rate and entry regulation) are exempt from PUC jurisdiction under federal law, most communications providers offer some type of intrastate service.⁴⁴ Moreover, PUCs often interpret their jurisdiction broadly, and our data show they review nearly all major wireline and cable mergers and even assert jurisdiction in some primarily wireless transactions.⁴⁵ As more and more services become IP-based, the use of merger reviews by PUCs to impose conditions on firms offering such services—including conditions specifically relating to broadband—is increasingly at odds with the intent of federal policy, which is that IP-services be regulated (if at all) on a national basis.⁴⁶

The role of states in merger reviews has long been a source of controversy.⁴⁷ On the one hand, the benefits of state review depend on the assumption that states have some form of comparative advantage either in assessing the benefits and costs of mergers or in identifying remedies that allow mergers to proceed while ameliorating competitive harms. Defenders of state intervention often argue that state regulators have more complete knowledge about local markets and therefore are better able to detect harmful mergers.⁴⁸ While this argument may once have had merit, it seems less

42. See, e.g., GAO, GAO/RCED-99-223, *PROCESS BY WHICH MERGERS OF LOCAL TELEPHONE COMPANIES ARE REVIEWED*, at 10 (1999) (“State statutes that provide the authority to public utility commissions (sometimes called public service or commerce commissions) vary a great deal with regard to their merger review authority.”).

43. See *Telecom Antitrust Handbook*, *supra* note 34, at 98 (“Many of the state statutes providing for review of proposed telecommunications and cable industry mergers apply a public interest standard similar to that used by the FCC.”).

44. *Intrastate Telecommunications Services*, VERIZON, http://www.verizonenterprise.com/us/publications/service_guide/products/intrastate_current_products/ [https://perma.cc/GMR2-FMGY]; *Tariffs*, SPRINT (June 21, 2010), <https://www.sprint.com/tariffs/> [https://perma.cc/TPX5-RDT5]; *Intrastate Detariffed Guidebook*, AT&T, https://www.att.com/public_affairs/long_distance_news/product_reference_and_pricing_guid_e/EAST%20LD/INTRASTATE/intra_fulldoc.pdf [https://perma.cc/96TH-C2Z5].

45. See *infra* at Table 1.

46. See generally *Charter Advanced Servs. v. Lange*, No. 17-2290, 2018 U.S. App. LEXIS 34238 (8th Cir. 2018); Charles Davidson & Michael Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L.J. 1132, 1154-56 (2015).

47. See generally *Posner 2004*, *supra* note 3; S. Paul Posner, *The Proper Relationship between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Davidson & Santorelli, *supra* note 46, at 1132-1204.

48. See Hoffman, *supra* note 2, at 3-5; Lande 1990, *supra* note 40; Richard Blumenthal et al., *Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat*, 67 CONN. B. J. 2, 10-11 (1993).

compelling in the era of big data and in view of the sophisticated, market-by-market analyses conducted by the federal antitrust regulators. Indeed, the settlement conditions imposed by the federal agencies on merging parties often involve geographically-specific divestitures.⁴⁹ Critics of state review thus conclude that the incremental benefits of state merger review are likely small or non-existent.⁵⁰

On the other hand, critics argue, the costs of state intervention—both direct and indirect—are significant.⁵¹ The direct costs arise from procedural burdens associated with complying with multiple, duplicative regulatory proceedings involving at least one federal agency and several, even dozens, of state regulatory proceedings.⁵² As detailed below, the direct costs can be particularly large in the case of communications mergers that are reviewed by PUCs.⁵³ The most active PUCs (e.g., those in California, New York, and West Virginia) often review mergers by means of administrative proceedings, which include substantial information and document demands, direct and rebuttal submissions (and often expert reports) by the merging parties and

49. For example, in its order approving the merger of Verizon and Alltel, the FCC required divestiture in five local markets—Muskegon, Michigan, Lyon, Iowa, Manistee, Michigan, Newaygo, Michigan, and Johnson, Tennessee. See Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manger and De Factor Transfer Leasing Arrangements, *Memorandum Opinion and Order and Declaratory Ruling*, WT Docket No. 08-95, para. 159 (Nov. 4, 2008). Similarly, the DOJ approved the merger of AMC and Starplex Cinemas in 2015 conditional on the divestiture of a single movie theater in Berlin, Connecticut and a single movie theater in East Windsor, New Jersey. See *United States v. AMC Entm't Holdings, Inc.*, No. 1:15-cv- 02181-BAH, 2016 U.S. Dist. LEXIS 50091 (D.D.C. Mar. 2, 2016). The DOJ approved the merger of Verizon and MCI conditional on the divestiture of over 300 Lateral Connections specified on an address by address basis within each Metropolitan Area where divestiture was required. See *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007).

50. See, e.g., *DeBow Testimony*, *supra* note 4, at 2 (“[T]he states’ involvement in antitrust to date has not been particularly significant in overall terms . . . This suggests fairly strongly that the benefit from sparing the states from federal preemption is small.”). Critics also note that state antitrust enforcers lack the resources and expertise to contribute significantly to merger enforcement and thus end up “free-riding” off of the efforts of Federal enforcers. See, e.g., Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL’Y 877, 890 (2003); *Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission’s Request for Public Comment Regarding Government Enforcement Institutions: The Enforcement Role of the States With Respect to Federal Antitrust Laws in Merger Cases*, ABA (2005), at 7 https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2005_comments/ [<https://perma.cc/R7JA-TAAX>]. (“With respect to delays and expenses associated with dual review, while it is not uncommon for state attorneys general to participate in such review by requesting and obtaining documents and information, in the view of party counsel, there are instances where a state attorney general contributed few resources, provided little expertise, and conducted little or no document review. In these instances, dual review appeared to add costs with little corresponding benefit.”)

51. See, e.g., Bill Peacock et. al, *Protecting Innovation: The Role of State Attorneys General in Antitrust Enforcement*, TEX. PUB. POL’Y FOUND. (Jan. 2013), at 3, <https://files.texaspolicy.com/uploads/2018/08/16101831/2013-01-RR01-ProtectingInnovationAntitrust-CTAS-CEF-BillPeacockMarioLoyolaJosiahNeeley.pdf> [<https://perma.cc/9WJU-GJDD>].

52. See, e.g., Antitrust Modernization Commission, *Report and Recommendations* at 127 (Apr. 2007) (“Multiple enforcers may investigate the same conduct or transaction, increasing the burdens on companies, and ultimately, costs to consumers.”).

53. See *infra* at Tables 2-8.

intervenors (including publicly funded “public interest” groups), and sometimes full-fledged evidentiary hearings presided over by administrative law judges (“ALJs”) who issue recommended decisions that PUC commissioners then consider.⁵⁴ The direct cost to the merging parties of participating in these procedures likely runs into the tens of millions of dollars per transaction.⁵⁵

While the direct costs of complying with state procedural demands are substantial, the indirect costs—i.e., the costs of increased risk and delay⁵⁶ and the uneconomic conditions extracted by state AGs and PUCs in return for allowing mergers to proceed—are likely of greater economic consequence.⁵⁷

To begin, state antitrust enforcers, like those at the federal level, possess hold-up power in proportion to the breadth of their statutory mandates and their ability to impose conditions without having to engage in litigation. Like the federal antitrust agencies, AGs operate primarily under a relatively well-defined “harm to competition” standard and must go to court in order to block a transaction.⁵⁸ Like the FCC, PUCs operate under the relatively ambiguous public interest standard and must affirmatively approve a transaction in order for it to proceed.⁵⁹ Further, because communications networks are not easily divided along state lines, disapproval by any PUC with jurisdiction may be sufficient to prevent a transaction from going forward.

In addition to the hold-up problem, state enforcers are subject to what economists refer to as an externality problem: The benefits of any favors extracted by state antitrust reviewers accrue entirely or primarily to their states, while the costs (both direct and indirect) are shared across consumers

54. See *infra* notes 17-19.

55. In 2003, the average cost of complying with a Second Request alone was estimated at \$2.5 million in legal and consulting fees. See Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27, 42 (2003). As detailed below, the obligations associated with complying with state level reviews are substantial.

56. Recent economic literature has emphasized uncertainty in the closing process as a major factor deterring merger activity. See Vineet Bhagwat et al., *The Real Effects of Uncertainty on Merger Activity*, Working Paper (Feb. 2016) (“Deals for public targets take significant time to complete. During the interim, firm values can change substantially, inducing the parties to prefer deal renegotiation or termination. We predict the related costs will lead to increases in interim risk attenuating deal activity . . . We conclude interim uncertainty is an important factor in understanding the timing and intensity of merger waves.”).

57. On the social costs of delaying transactions in the communications sector, see *Eisenach and Singer 2013, supra* note 37, at 291 (“Thus, the lost consumer surplus from delays is substantially greater than the private costs with the annual loss of consumer surplus equal to roughly the transaction’s price.”); see also Evan Kwerel & Alex D. Felker, *Using Auctions to Select FCC Licensees* at 11-12, FCC OPP Working Paper No. 16 (1985) (finding that each year of delay in approving license transfers raises the cost to the merging parties by nine percent). See Antitrust Modernization Commission, *Report and Recommendations* at 130 (Apr. 2007) (“These delays impose significant burdens on companies with time-sensitive transactions that potentially provide great value to consumers and shareholders alike.”).

58. Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.U. L. REV. (1050), 1047-1094 (1989).

59. Feder, *supra* note 6. For example, the process in California parallels that at the federal level: If the California PUC withholds approval the merger can be referred to an administrative hearing; only after the hearing is complete would the parties have access to appeal in state court. See CAL. PUB. UTIL. § 1756.

in all states (as well as the firms' shareholders).⁶⁰ In the case of state AGs, empirical research has shown not only that they are subject to such incentive problems, but also—perhaps not surprisingly—that they become more prone to such conduct during election years.⁶¹ Thus, the externality problem makes state enforcers prone to imposing conditions that, even if beneficial to their own citizens, harm consumer welfare overall.

Figure 1 illustrates how the hold-up and externality problems affect federal and state enforcement agencies. As the figure shows, both federal and state enforcers possess hold-up power, but the antitrust agencies' hold-up power is attenuated by their narrower authority and the need for court review. At the state level, both AGs and PUCs have the ability to extract conditions that benefit their constituents while externalizing costs, but PUCs are unique in having both strong hold-up power and the ability to internalize the benefits and externalize the costs of the conditions they extract.

60. See, e.g., *Posner 2004*, *supra* note 3, at 7 (“States also have opportunities to export costs in much the same way that a polluting firm can export costs in the absence of legal liability . . . For example, a rule that exempted negligent in-state manufacturers from liability to nonresidents injured by their negligence, or that imposed strict liability on nonresidents who injured state residents however careless the residents were, can operate to export costs. State antitrust suits, which are a form of tort suits, can have the same result.”); Seth L. Cooper, *Multiple Government Regulatory Reviews Burden Telecom Mergers with Too Many Conditions*, 5 FREE STATE FOUND. PERSPECTIVES 1, 7 (2010) [hereinafter *Cooper 2010*] (“But whenever state regulators withhold approval, they effectively preclude completion of mergers involving interstate telecom providers. So long as even one state PUC drags out its merger review process, consumers in other states who would otherwise stand to experience long-term benefits from service offerings provided by a merged entity are denied those benefits. This essentially makes one state PUC’s delays in approving a merger an externality imposed on out-of-state consumers in the form of lost opportunity costs.”).

61. See, e.g., John A. Dove, *Antitrust Enforcement by State Attorneys General: Institutional, Legal and Political Considerations*, 16 BUS. & POL. 291 (2014); Matthew C. Cutillo, *Antitrust at the State Level: Incentives of Attorneys General and Determinants of Multi-Enforcer Case Durations*, Doctoral Dissertation (2013).

FIGURE 1: HOLD-UP POWER AND EXTERNALITIES IN STATE AND FEDERAL MERGER ENFORCEMENT

	Federal	State
Clayton Act/ Antitrust	<p>Hold-Up Power: Moderate</p> <p>Externality Problem: None</p>	<p>Hold-Up Power: Moderate</p> <p>Externality Problem: High</p>
Communications Act/Public Interest	<p>Hold-Up Power: High</p> <p>Externality Problem: None</p>	<p>Hold-Up Power: High</p> <p>Externality Problem: High</p>

To be clear, it is not our contention that *all* merger conditions imposed by PUCs (or AGs) are *prima facie* harmful. Rather, our point is that the incentive structures within which state enforcers operate are favorable to the imposition of conditions that benefit narrow constituencies over the larger, national public interest. For example, the efficiency benefits of a merger will typically be national or span a number of states, while the incentive of state agencies is to pursue conditions that benefit mainly local constituencies.⁶² In the extreme, the threat of delays and expensive conditions may cause welfare-enhancing mergers to not be undertaken at all. For mergers that are nevertheless consummated, the conditions sought by state regulatory authorities in some states may undermine the realization of the efficiencies that antitrust policy is meant to promote in other states.⁶³

Further, it is significant that state intervention can only affect the outcome of mergers that win the approval of federal antitrust authorities and (for communications mergers) the FCC—which is to say, mergers that have been found by the federal agencies to (a) not harm competition, and (b) be in the public interest.⁶⁴ Thus, states that extract parochial conditions that reduce

62. See *infra* at 25.

63. Because communications mergers often involve demand- and supply-side economies of scale, excessive state level interventions by PUCs pose particularly strong threats to the realization of efficiencies. See *Eisenach 2017, supra* note 23, at 445.

64. See *supra* notes 5-11.

or eliminate a transaction's benefits are actually harming states that forego the opportunity to engage in such beggar-thy-neighbor conduct.⁶⁵

Concerns about these and related issues have led numerous scholars to call for limits on state intervention in mergers. For example, in testimony before the Antitrust Modernization Commission, Professor Michael DeBow argued for legislation that would explicitly allow federal preemption of state antitrust laws and reduce the power of states to bring federal antitrust cases.⁶⁶ Other scholars have advocated limiting the scope or duration of state reviews, including limiting PUC reviews of communications transactions.⁶⁷

III. PUC INTERVENTIONS IN COMMUNICATIONS MERGERS

This Section presents an empirical analysis of PUC involvement in recent communications mergers. The evidence demonstrates that PUCs frequently intervene in major communications mergers, often impose significant costs and delays through lengthy proceedings, extract substantial concessions even for transactions that pose no threat to competition, impose settlement terms that come at the direct expense of other states, and impose conditions unrelated to or at odds with the goals of antitrust policy. The first section presents data on the frequency and extent of PUC intervention. The second section details the nature of that intervention and explains why we conclude it often fails to serve the public interest.

A. *Extent of State Intervention in Communications Mergers*

This section presents our analysis of PUC reviews of communications mergers since January 1, 2010. Specifically, we gathered and analyzed data on PUC reviews of the 40 mergers approved by the FCC under Sections 214(a) and 310(d) of the Communications Act of 1934.⁶⁸ For each of the 40 transactions, Table 1 indicates the merging parties, the year in which the merger gained FCC approval, whether the merger involved the exchange of wireless or cable assets, whether the merger was reviewed and approved by at least one PUC, and the PUCs involved. Overall, our inquiry indicates that 19 of these 40 mergers were reviewed and approved by at least one PUC, and that West Virginia (9), California (8), New York (6), and Virginia (6) were the most active PUCs in terms of the number of transactions reviewed.

65. FCC Orders approving mergers routinely contain a lengthy discussion assessing the net public interest effects of a merger at the national level; only mergers that the FCC finds to have net benefits are approved. Sallet, *supra* note 12 (“Congress has directed the [FCC] to review transactions involving licenses and authorizations under the Communications Act and to determine whether the proposed transaction would serve ‘the public interest, convenience, and necessity.’ . . . [T]he [FCC] can approve a transaction or it can approve a transaction with conditions designed to ensure the public interest is served.”).

66. *DeBow Testimony*, *supra* note 4, at 1-2.

67. *See, e.g., Cooper 2010*, *supra* note 60, at 4; *Lande 1990*, *supra* note 40, at 1085-88.

68. We do not include data on transactions, such as AT&T-T-Mobile and Comcast-Time Warner Cable, which were blocked by federal enforcers because in these cases the PUC review process was truncated and terminated without conclusion as a result of the federal challenge. We exclude mergers involving only assets in U.S. territories (Guam and the U.S. Virgin Islands) from the sample due to the unique issues raised in these cases.

TABLE 1: FCC APPROVED MERGERS, 2010-2017

Merging Parties	Year	PUC Approved	PUCs	Wireline/Cable
Bresnan Communications/Cablevision Systems Corporation	2010	Yes	2 (CO, UT)	Yes
Celco Partnership d/b/a/ Verizon Wireless/Atlantic Tele-Network	2010	No	None	No
Frontier Communications Corporation/Verizon Communications	2010	Yes	9 (AZ, CA, IL, NV, OH, OR, SC, WA, WV)	Yes
Hawaiian Telcom/Hawaiian Telcom Services Company	2010	Yes	1 (HI)	Yes
Q-Comm Corporation/Windstream Corporation	2010	Yes	7 (MD, MN, MS, MT, NE, NJ, NY, VA, WV)	Yes
SkyTerra Communications/Harbinger Capital Partners Funds	2010	No	None	No
Comcast Corporation/General Electric Company/NBC Universal	2011	No	None	No
Cumulus Media/Citadel Broadcasting Corporation	2011	No	None	No
EchoStar Corporation/Hughes Network Systems/BRH Holdings GP	2011	No	None	No
Global Crossing Limited/Level 3 Communications	2011	Yes	2 (MN, TX)	Yes
Qualcomm Incorporated/AT&T	2011	No	None	No
Qwest Communications International/CenturyLink	2011	Yes	22 (AZ, CA, CO, DC, GA, HI, IA, LA, MD, MN, MS, MT, NE, NJ, NY, OH, OR, PA, UT, VA, WA, WV)	Yes
AT&T Mobility Spectrum/New Cingular Wireless PCS/Comcast Corporation	2012	No	None	No
Celco Partnership d/b/a Verizon Wireless/SpectrumCo/Cox TMI	2012	No	None	No
Time Warner Cable/Insight Communications Company	2012	No	None	No
AT&T/Atlantic Tele-Network	2013	No	None	No
Belo Corp./Gannett Co.	2013	No	None	No
Cablevision Systems Corporation/Charter Communications	2013	Yes	1 (UT)	Yes
Deutsche Telekom AG/T-Mobile USA/MetroPCS Communications	2013	No	None	No
GCI Communications Corp./Unicom/The Alaska Wireless Network	2013	No	None	No
New Young Broadcasting Holding Co./Media General Communications	2013	No	None	No
Sprint Communications Company/SoffBank Corp./Starburst II	2013	Yes	6 (CA, DC, MS, NY, UT, WV)	Yes
Tribune Broadcasting Company II/LocalTV Holdings	2013	No	None	No
AT&T/Cricket License Company/Leap Wireless International	2014	Yes	5 (CA, IN, LA, OH, WV)	No
Frontier Communications Corporation/AT&T/Southern	2014	Yes	1 (CT)	Yes
New England Telephone Company				
Level 3 Communications/tw telecom	2014	Yes	8 (CO, DC, HI, MS, NJ, UT, VA, WV)	Yes
LIN Media/Post-Merger Media General	2014	No	None	No
Sinclair Television Group/Albritton Communications	2014	No	None	No
AT&T/DIRECTV	2015	No	None	No
Frontier Communications Corporation /Verizon Communications	2015	Yes	2 (CA, TX)	Yes
Alice N.V./Cablevision Systems Corporation	2016	Yes	2 (NJ, NY)	Yes
AT&T Mobility Spectrum/Tampnet/Broadpoint License Co.	2016	No	None	No
Celco Partnership d/b/a Verizon Wireless/Nextlink Wireless	2016	No	None	No
Charter Communications/Time Warner Cable/Advance/Newhouse Partnership	2016	Yes	5 (CA, HI, NJ, NY, WV)	Yes
SprintCom/Shenandoah Telecommunications Company/nTELOS Holding Group	2016	Yes	1 (WV)	No
Suddenlink Communications/Alice N.V./Cequel Corporation	2016	Yes	6 (CA, LA, MS, TX, VA, WV)	Yes
Unite Private Networks/Cox Communications	2016	Yes	1 (TX)	Yes
Verizon Communications/XO Holdings	2016	Yes	17 (CA, CO, DC, GA, HI, LA, MD, MN, MS, NJ, NY, OH, PA, TX, UT,	Yes
Consolidated Communications Holdings/FairPoint Communications	2017	Yes	11 (CO, GA, IL, KS, ME, NH, NY, OH, PA, VA, VT)	Yes
Nexstar Media Group/Media General	2017	No	None	No

Notes: The year assigned to each merger is based on the date of FCC approval

We classified a merger as having been reviewed and approved by a PUC if we were able to identify at least one decision, order, press release, or other public document evidencing formal PUC approval. Because PUCs do

not always issue formal decisions or orders,⁶⁹ it is possible (even likely) that we have not fully identified the universe of mergers reviewed and approved by PUCs or the universe of PUCs involved in each transaction. Thus, our results may underestimate the extent of PUC intervention (and, accordingly, the costs and delays involved). Nevertheless, our findings are consistent with the overall scope of PUC authority. For instance, PUCs typically are limited to jurisdiction over transactions involving the transfer of intrastate wireline assets and, in some cases, cable assets, while review of wireless mergers is typically limited to those involving incidental transfers of state-regulated facilities.⁷⁰ Our data show that all 17 of the FCC-approved transactions involving wireline or cable assets were reviewed and approved by at least one PUC, as compared with only two of the 23 transactions involving wireless providers or media companies.⁷¹

For the 19 PUC-reviewed transactions we identified, Table 2 indicates whether the merger was subject to conditions mandated by the federal authorities (FCC or DOJ) or by at least one PUC.

69. For example, some PUCs will approve mergers using advice letters. *See, e.g.,* Ca. Pub. Utilities Comm'n, *Joint Application of Broadwing Communications and Level 3 Communications and CenturyLink, Inc. for Approval of Transfer of Control of the Level 3 Operating Entities Pursuant to California Public Utilities Code Section 854(a), Consolidated Reply to the Joint Protest*, Proceeding A1703016 (Mar. 22, 2017) at n. 20 ("See XO AL 1281 (re transfer of XO to Verizon – Mar. 18, 2016); *see also* Qwest AL 172 (re transfer of control of Qwest to CenturyLink – May 14, 2010), tw telecom California AL 577 (re transfer of control of tw telecom to Level 3 – July 3, 2014)").

70. *See, e.g.,* Pa. Pub. Util. Comm'n, *Telecommunications*, http://www.puc.state.pa.us/utility_industry/telecommunications.aspx [<https://perma.cc/Q2VM-FZLZ>]; Me. Pub. Util. Comm'n, *Telecommunications*, <https://www.maine.gov/mpuc/telecom/index.shtml> [<https://perma.cc/XMA8-7ZGX>]; Pub. Util. Comm'n of Tx., *Utilities Not Regulated by the PUC*, <http://www.puc.texas.gov/consumer/complaint/utilitiesnot.aspx> [<https://perma.cc/QR4T-XEJT>]. N.Y. Dep't of Pub. Serv., *Study on the State of Telecommunications in New York State, Staff Assessment of Telecommunications Services*, No. 14-C-0370 at 23 (June 23, 2015) ("While the [FCC] has regulatory oversight over some wireline telephone and cable companies, as stated above, many telecommunications service providers do not currently fall under the [FCC]'s jurisdiction. For example, in 1997 the Legislature suspended the [FCC]'s authority to regulate wireless carriers pursuant to Public Service Law §5(6) and nomadic VoIP has been classified by the FCC as interstate service. Similarly, cable modem broadband service has been classified as an interstate information service until March 2015, when the FCC reclassified it as an interstate telecommunications service.").

71. The Sprint-Shentel and AT&T-Leap transactions are the only two transactions involving the transfer of wireless assets that we identified as being subject to review and approval by PUCs.

TABLE 2: MERGER CONDITIONS FOR MERGERS REVIEWED AND APPROVED BY PUCS

PUC Approved Mergers	FCC Conditions	DOJ Conditions	PUC Conditions
Bresnan/Cablevision (2010)	No	No	No
Frontier/Verizon (2010)	Yes	No	Yes
Hawaiian Telcom/Hawaiian Services (2010)	No	No	Yes
Q-Comm/Windstream (2010)	No	No	No
Global Crossing/Level 3 (2011)	Yes	No	No
Qwest/CenturyLink (2011)	Yes	No	Yes
Cablevision/Charter (2013)	No	No	No
Sprint/SoftBank/Starburst (2013)	Yes	No	No
AT&T/Cricket/Leap (2014)	Yes	No	Yes
Frontier/AT&T (2014)	No	No	Yes
Level 3/tw telecom (2014)	No	No	No
Frontier/Verizon (2015)	No	No	Yes
Alice/Cablevision (2016)	No	No	Yes
Charter/Time Warner Cable (2016)	Yes	Yes	Yes
Sprint/Shenandoah/nTELOS (2016)	Yes	No	No
Suddenlink/Alice (2016)	No	No	No
Unite/Cox (2016)	No	No	No
Verizon/XO (2016)	No	No	Yes
Consolidated/FairPoint (2017)	No	No	Yes

Of the 19 mergers reviewed by PUCs, 10 involved the imposition of conditions by at least one PUC.⁷² As noted above, the state-specific conditions imposed by PUCs in these cases are *prima facie* not necessary for the mergers to be in the national public interest, since any conditions necessary for a merger to meet a national public interest test presumably were applied by the FCC.⁷³ Moreover, six of the 10 transactions where PUCs imposed conditions were approved by both the FCC and the DOJ without *any* conditions.⁷⁴

B. Procedural Costs, Incremental Delays, and Extraneous Conditions

We now turn to evaluating the nature of PUC interventions and their effects on both companies and consumers.

To begin, Table 3 shows the durations of merger reviews conducted by PUCs for each of the 19 transactions. We present information on duration

72. This estimate is likely conservative. In some of the transactions requiring PUC approval but not subject to explicit conditions, PUCs appear to have influenced the final merger agreements between the merging parties despite the lack of explicit conditions. For instance, in its Sprint-Shentel proceeding, the West Virginia Public Service Commission did not explicitly impose conditions but noted in its discussion of the merger agreement that the parties to the transaction promised significant investment in the former nTelos coverage area including “approximately sixty cell sites in West Virginia.” See W. Va. Pub. Serv. Comm’n, Joint Petition for the Consent and Approval in Advance for Shenandoah’s Acquisition of NTELOS and Request for Approval of Debt Financing Pursuant to W.Va. Code §24-212, *Commission Order*, No. 15-1405-C-PC, at 2. (Oct. 27, 2015).

73. See *supra* notes 10-11.

74. See *supra* at Table 2.

because we believe it is a reasonable if imperfect proxy for burden: Other things equal, a longer review process is likely to impose larger compliance costs than a shorter one.

**TABLE 3: DURATION OF PUC MERGER REVIEW PROCESS
BY MERGER AND PUC**

Merger	Number of PUCs	Average Review Days	Maximum Review Days
Bresnan/Cablevision (2010)	2	50	63
Frontier/Verizon (2010)	9	251	349
Hawaiian Telcom/Hawaiian Services (2010)	1	261	261
Q-Comm/Windstream (2010)	7	62	118
Global Crossing/Level 3 (2011)	2	29	42
Qwest/CenturyLink (2011)	22	158	321
Cablevision/Charter (2013)	1	65	65
Sprint/SoftBank/Starburst (2013)	6	56	177
AT&T/Cricket/Leap (2014)	5	6	31
Frontier/AT&T (2014)	1	257	257
Level 3/tw telecom (2014)	8	65	92
Frontier/Verizon (2015)	2	211	260
Altice/Cablevision (2016)	2	214	224
Charter/Time Warner Cable (2016)	5	219	315
Sprint/Shenandoah/nTELOS (2016)	1	63	63
Suddenlink/Altice (2016)	6	80	192
Unite/Cox (2016)	1	43	43
Verizon/XO (2016)	17	85	314
Consolidated/FairPoint (2017)	11	121	179

As Table 3 demonstrates, state review of communications mergers often involves multiple PUC proceedings, each lasting for many months. For example, the 2010 transaction between Frontier and Verizon was reviewed by

nine PUCs, with the proceedings lasting between 147 and 349 days.⁷⁵ Altogether, the transaction involved over 2,171 filings, including 627 filings before the West Virginia PUC, 616 filings before the Washington PUC, 237 filings before the Illinois PUC, 226 filings before the Oregon PUC, and 188 filings before the Ohio PUC.⁷⁶

The procedural costs associated with such reviews are significant.⁷⁷ In 2015, despite receiving an advisory opinion from the California Attorney General that found that the transaction would not adversely affect competition, the California PUC (CPUC) engaged in a 261-day review of Verizon's divestiture of its California wireline assets to Frontier that involved at least 204 individual filings.⁷⁸ Eight different groups of "Protestors"—including customers and competitors as well as "public interest" groups

75. Cal. Pub. Utilities Comm'n, *Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., New Communications ILEC Holdings, Inc., New Communications of the Southwest Inc., Verizon West Coast Inc. (U1020C), Verizon California Inc. (U1002C), New Communications Online and Long Distance, Inc., Verizon Long Distance, LLC (U5732C) and Verizon Enterprise Solutions, LLC (U5658C) For Approval of the Sale of Assets, Transfer of Certificates and Customer Bases, and Issuance of Additional Certificates*, Joint Application of Frontier and Verizon, Application No. 09-06-005 (June 4, 2009); Cal. Pub. Utils. Comm'n, *Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., New Communications ILEC Holdings, Inc., New Communications of the Southwest Inc., Verizon West Coast Inc. (U1020C), Verizon California Inc. (U1002C), New Communications Online and Long Distance, Inc., Verizon Long Distance, LLC (U5732C) and Verizon Enterprise Solutions, LLC (U5658C) For Approval of the Sale of Assets, Transfer of Certificates and Customer Bases, and Issuance of Additional Certificates*, *Decision Granting the Joint Application of Frontier and Verizon*, Decision No. 09-10-056 (Oct. 29, 2009); W. Va. Pub. Serv. Comm'n, *Re Frontier Communications Corporation*, *Commission Order*, No. 09-0871-T-PC (May 13, 2010).

76. Ariz. Corp. Comm'n, *Docket Search*, <http://edocket.azcc.gov/Search/DocketDetailSearch> [<https://perma.cc/TX3K-PGX6>]; Pub. Serv. Comm'n of W. Va., *Web Docket*, <http://www.psc.state.wv.us/webdocket/default.htm> [<https://perma.cc/5P6G-YWX4>]; Cal. Pub. Utilities Comm'n, *CPUC Online Documents Search Form*, <http://docs.cpuc.ca.gov/advancedsearchform.aspx> [<https://perma.cc/A9E9-CEMF>]; Pub. Serv. Comm'n of S.C., *Docket Search*, <https://dms.psc.sc.gov/Web/Dockets> [<https://perma.cc/N354-BTSN>]; Nev. Pub. Utilities Comm'n, *Dockets*, <http://puc.nv.gov/Dockets/Dockets/> [<https://perma.cc/5C64-XV5X>]; Ohio Pub. Utilities Comm'n, *Docketing Information System*, <http://dis.puc.state.oh.us/> [<https://perma.cc/8YVP-B7F9>]; Or. Pub. Util. Comm'n, *eDockets*, <https://apps.puc.state.or.us/edockets/> [<https://perma.cc/DR2L-ZHCF>]; Ill. Commerce Comm'n, *Docket Search*, <https://www.icc.illinois.gov/docket/search.aspx> [<https://perma.cc/QZP3-TGXS>].

77. See *infra* notes 18-19, Table 4.

78. Cal. Pub. Utilities Comm'n, *Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, *Order*, Decision No. 15-12-005 (Dec. 3, 2015) at 4-5 [hereinafter *CPUC Order*]. One of the authors filed an expert report in that matter. See Cal. Pub. Utilities Comm'n, *Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, *Declaration of Jeffrey A Eisenach on Behalf of Verizon Communications*, No. A1503005 (Aug. 24, 2015).

funded by the state⁷⁹—filed formal interventions demanding a total of 54 specific conditions.⁸⁰ The CPUC’s summary of their demands filled over 20 pages of single-spaced text in its final Order approving the merger, which also included the summary table reproduced below.⁸¹

TABLE 4: SUMMARY OF “PROTESTOR” DEMANDS IN THE CPUC REVIEW OF THE 2015 FRONTIER-VERIZON TRANSACTION

Type of Condition	Number	Parties Proposing Conditions
Financial Commitments	5	ORA, CETF, Greenlining
Pricing Commitments	7	TURN, CETF
Investment Requirements	4	ORA, TURN, CETF
New Operatioanl Requirements	19	ORA, TURN, CforAT
New Reporting Requirement	19	ORA, TURN, CforAT
Total Proposed Conditions	54	

Notes: The original version of the table from the CPUC Order incorrectly reports a total of 53 conditions. This has been corrected in the table above. See CPUC Order at 16-17.

The CPUC provided over \$500,000 in compensation to intervenors,⁸² and Verizon and Frontier ultimately entered into settlements with 11 different parties.⁸³

Similarly, in the Oregon PUC’s Qwest-CenturyLink proceeding, which lasted for 304 days, there were at least 34 separate testimony filings.⁸⁴ Petitions to Intervene were filed by at least 14 parties, and while Qwest argued that many of these entities lacked standing to intervene, the ALJ overseeing

79. California is one of a several states offering an “Intervenor Compensation Program,” which “allows qualified parties in proceedings before the Commission to request compensation for their participation.” See Cal. Pub. Utilities Comm’n, *The Intervenor Compensation Program*, <http://www.cpuc.ca.gov/icompl/> [<https://perma.cc/AR3T-3NGX>] The propensity for ideologically-driven public interest groups to ally with private firms to engage in rentseeking is often referred to as the “Baptists and bootleggers” phenomenon. See *Eisenach and Singer 2013*, *supra* note 37, at 279.

80. See *CPUC Order*, *supra* note 78, at 16-17. The original version of the table from the CPUC Order incorrectly reports a total of 53 conditions, which has been corrected here.

81. See *CPUC Order*, *supra* note 78, at 16-47.

82. See Cal. Pub. Utilities Comm’n, Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc.(U5429 C) Verizon California Inc. (U 1002 C), Verizon Long Distance, LLC (U 5732 C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California Inc. and Related Approval of Transfer of Assets and Certifications, *Order*, Decision No. 16-04-031 (Apr. 21, 2016) at 1. See also Cal. Pub. Utilities Comm’n, Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429 C) Verizon California Inc. (U 1002 C), Verizon Long Distance, LLC (U 5732 C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California Inc. and Related Approval of Transfer of Assets and Certifications, *Order*, Decision No. 16-04-030 (Apr. 21, 2016) at 1.

83. *CPUC Order*, *supra* note 78, at Appendices A, B, C, E, F, and G.

84. See Pub. Util. Comm’n of Or., *eDockets*, Docket No. UM 1484, <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=16248> [<https://perma.cc/MX5T-AQB9>].

the proceeding ultimately admitted petitions from all potential intervenors.⁸⁵ Covad, tw telecom, Level 3, Charter, and Integra filed direct testimony as a group, and Level 3, Charter, Integra, and a number of additional parties also individually filed direct testimony.⁸⁶ In many cases, more than one witness testified on behalf of a given party; witnesses included both outside experts and company employees.⁸⁷ According to the final order, the proceeding was characterized by “virtually continuous litigation on matters of discovery requests and relevance of testimony among the Applicants and various intervenors.”⁸⁸

In addition to the burden created by multiple duplicative and protracted proceedings, the PUC review process frequently results in delays beyond those imposed by federal reviews.⁸⁹ For each PUC-reviewed merger, Table 5 indicates the length of the FCC review, the length of the longest PUC review, and the incremental number of days between the conclusion of the federal review process and the conclusion of the final PUC review.

TABLE 5: FCC VERSUS PUC REVIEW DURATION

Merger	FCC Review Days	Maximum PUC Review Days	PUC Incremental Days
Bresnan/Cablevision (2010)	82	63	0
Frontier/Verizon (2010)	357	349	0
Hawaiian Telecom/Hawaiian Services (2010)	189	261	7
Q-Comm/Windstream (2010)	92	118	13
Global Crossing/Level 3 (2011)	141	42	0
Qwest/CenturyLink (2011)	312	321	6
Cablevision/Charter (2013)	82	65	42
Sprint/SoftBank/Starburst (2013)	215	177	0
AT&T/Cricket/Leap (2014)	224	31	0
Frontier/AT&T (2014)	172	257	82
Level 3/tw telecom (2014)	108	92	0
Frontier/Verizon (2015)	190	260	92
Altice/Cablevision (2016)	202	224	43
Charter/Time Warner Cable (2016)	315	315	7
Sprint/Shenandoah/nTELOS (2016)	168	63	0
Suddenlink/Altice (2016)	336	192	0
Unite/Cox (2016)	85	43	44
Verizon/XO (2016)	257	314	72
Consolidated/FairPoint (2017)	138	179	51

Notes: Incremental days are measured in terms of the days between the final federal approval (FCC or DOJ) and the final PUC approval.

85. Pub. Util. Comm’n of Or., CenturyLink, INC., Application for Approval of Merger between CenturyTel, Inc., and Qwest Communications International, Inc., *Order*, Docket No. UM 1484 (Mar. 24, 2011) at 1- 2 [hereinafter *Oregon Order*].

86. *Oregon Order*, *supra* note 85, at 2.

87. Pub. Util. Comm’n of Or. *eDockets*, *supra* note 85.

88. *Id.* at 2.

89. *See infra* at Table 5.

As the table shows, PUC reviews persisted beyond the date of FCC approval in 10 of the 19 transactions in which PUCs intervened; in six of ten transactions PUCs delayed closure of the transaction by more than a month.⁹⁰ For the AT&T-Frontier transaction, final PUC approval created an additional delay of 82 days after the completion of the FCC's 172-day review. California's review of the 2015 Verizon-Frontier transaction, described above, delayed consummation of the merger by an additional 92 days beyond the 190 days required to gain FCC approval. The New York and Pennsylvania PUC reviews of the Verizon-XO transaction, which were essentially coterminous, delayed the transaction by an additional 72 days. As noted above, such delays impose significant costs on the merging parties and deny consumers the public interest benefits of the merger for the duration of the reviews.⁹¹

In addition to these procedural and temporal costs, the conditions imposed by PUCs on merging firms create substantial burdens that subvert the realization of merger efficiencies and reduce overall consumer welfare. Table 6 presents a breakdown of the types of conditions mandated by PUCs for each of the mergers where PUCs granted conditional approval.

TABLE 6: PUC IMPOSED MERGER CONDITIONS BY MERGER

Merger	Price Control Conditions	Employment Conditions	Investment Conditions	Other Conditions	Most Favored State
Frontier/Verizon (2010)	Yes	Yes	Yes	Yes	Yes
Hawaiian Telecom/Hawaiian Services (2010)	Yes	No	No	Yes	No
Qwest/CenturyLink (2011)	Yes	Yes	Yes	Yes	No
AT&T/Cricket/Leap (2014)	Yes	No	No	Yes	No
Frontier/AT&T (2014)	Yes	No	Yes	Yes	No
Frontier/Verizon (2015)	Yes	No	Yes	Yes	No
Altice/Cablevision (2016)	Yes	Yes	Yes	Yes	Yes
Charter/Time Warner Cable (2016)	Yes	Yes	Yes	Yes	Yes
Verizon/XO (2016)	No	Yes	No	No	Yes
Consolidated/FairPoint (2017)	Yes	Yes	Yes	Yes	Yes

Of the ten mergers subject to PUC conditions, nine involved imposition of price controls. For instance, consent by the New Jersey Board of Public Utilities to the Altice-Cablevision merger required that the company agree to offer 10 Mbps broadband service for \$24.95 per month or less for three

90. To the extent the FCC delays issuing a final order pending completion of PUC reviews, these figures are conservative.

91. Delays in achieving regulatory clearance can put an entire transaction at risk because mergers often rely on financing agreements whose terms depend on the duration of the closing process. See Linda L. Curtis & Melissa L. Barshop, *Financing Provisions in Acquisition Agreements*, CAL. BUS. L. PRAC. (Summer 2011) at 1 (“Regardless of form, many acquisitions are funded with a combination of equity financing from the buyer and debt financing from a lender or group of lenders identified by the buyer. Especially in public company acquisition transactions, there can be a long time-lag between execution of the acquisition agreement and consummation of the transaction, due to the need to satisfy closing conditions such as antitrust clearance and shareholder approval. Although lenders often provide financing commitments at the time of signing of the acquisition agreement, the commitments typically have some conditions to their obligation to consummate the financing.”).

years.⁹² This condition was imposed despite the fact that the transaction was approved by the FCC with no conditions and despite the fact that broadband service is exclusively an interstate service.⁹³ Indeed, in its order approving the merger, the FCC explicitly ruled out any threat to competition.⁹⁴

For the Frontier-AT&T transaction, the Connecticut Attorney General sought and won approval from the Public Utilities Regulatory Authority for a settlement that froze price increases for basic landline service, the basic broadband bundle, and standalone basic broadband for three years.⁹⁵ Again, the FCC approved this merger unconditionally, finding that “the transaction is not likely to harm competition or consumers and likely will result in public interest benefits.”⁹⁶ As discussed above, even as remedies to restore competition, price controls are a crude and unwieldy instrument that are more likely to harm than benefit consumers in the long-run.⁹⁷ However, in these instances, price controls were imposed absent any evidence of a threat to competition, suggesting that political considerations rather than economic welfare considerations were behind these interventions.

PUCs also frequently impose conditions relating to levels of post-merger employment or investment by the merging parties. Table 7 demonstrates that for each merger subject to employment and investment conditions and involving multiple states, there appear to be states acting opportunistically at the expense of other states that chose not to impose such conditions.

92. N.J. Bd. of Pub. Utilities, *Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Entities, Order Approving Stipulation of Settlement*, Docket No. CM15111255 at 12 (May 26, 2016).

93. Feder, *supra* note 6.

94. Applications Filed by Altice N.V. and Cablevision Systems Corporation to Transfer Control of Authorizations from Cablevision Systems Corporation to Altice N.V., *Memorandum Opinion and Order*, FCC 15-257, para. 15 (May 3, 2016) (“Based on the record evidence, we find the transaction is unlikely to have adverse competitive effects.”).

95. Frontier Communications, *Frontier Communications Reaches Acquisition Related Agreement with Connecticut Attorney General and Office of Consumer Counsel*, (Aug. 12, 2014), <http://investor.frontier.com/news-releases/news-release-details/frontier-communications-reaches-acquisition-related-agreement><http://investor.frontier.com/news-releases/news-release-details> [https://perma.cc/KH8X-ASE5].

96. Applications Filed by Frontier Communications Corporation and AT&T Inc. for the Assignment or Transfer of Control of Southern New England Telephone Company and SNET America, Inc., *Memorandum Opinion and Order*, FCC 14-22, para. 14 (July 25, 2014).

97. See, e.g., Kevin W. Caves & Jeffrey A. Eisenach, *What Happens When Local Phone Service is Deregulated?*, TELECOM & TECH (2012), http://www.aei.org/wp-content/uploads/2012/09/-eisenach-cato-phone-deregulation-paper_09341082848.pdf [https://perma.cc/3TEX-AB6X].

**TABLE 7: PUC INVESTMENT AND EMPLOYMENT
CONDITIONS IN TRANSACTIONS INVOLVING MULTIPLE
PUC REVIEWS**

Merger	Total PUCs	Imposing Employment Conditions	Imposing Investment Conditions
Frontier/Verizon (2010)	9	4	8
Qwest/CenturyLink (2011)	22	3	7
Frontier/Verizon (2015)	2	0	1
Altice/Cablevision (2016)	2	2	2
Charter/Time Warner Cable (2016)	5	1	3
Verizon/XO (2016)	17	2	0
Consolidated/FairPoint (2017)	7	2	3

For six of the seven transactions where PUCs imposed employment or investment conditions, at least one of the other states that reviewed the transaction chose not to impose such conditions. Further, most PUCs did not review these transactions at all. For example, while the Verizon-XO transaction could in theory have been subject to PUC jurisdiction in *every* state except Alaska,⁹⁸ only 17 PUCs actually reviewed the transaction. Thus, in 32 out of the 49 states where Verizon and XO overlapped, the states relied exclusively on federal reviews to ensure their consumers were protected.⁹⁹

As shown in Table 7, employment conditions were imposed in six of the seven transactions. The specific employment conditions mandated by PUCs are often targeted at small groups of employees, suggesting political motivations. For instance, in its Qwest-CenturyLink proceeding, the Minnesota Public Utilities Commission mandated that for up to 30 months, the merged company would not allow the union workforce to drop by more than 1.0 percent of the pre-merger total and would not allow the workforce of employees represented by the Communications Workers of America and the International Brotherhood of Electrical Workers to drop by more than 0.5 percent of the pre-merger total; the Minnesota PUC also stipulated that the combined firm not close call centers operated by union employees for over a year.¹⁰⁰ For the Verizon-XO transaction, the New York Public Service Commission prohibited layoffs only for customer-facing jobs at XO Communications.¹⁰¹ This condition was also imposed by the New York Public

98. Section 63.71 Application of XO Communications, LLC, *Section 63.71 Application*, FCC 14-225 at 2 (Oct. 31, 2014).

99. See *infra* at Table 7; Section 63.71 Application of XO Communications, LLC, *Section 63.71 Application*, WFCC 14-225 at 2 (Oct. 31, 2014).

100. Minn. Pub. Utilities Comm'n, Joint Petition for Approval of Indirect Transfer of Control of Qwest Operating Companies to CenturyLink, *Order Accepting Settlement Agreements and Approving Transfer of Control Subject to Conditions*, Docket No. PA-10-456 at 8 (Jan. 24, 2017).

101. N.Y. Pub. Serv. Comm'n, Petition of XO Holdings, XO Communications Services, LLC, and Verizon Communications Inc. for Approval of a Proposed Transaction Pursuant to Section 100 of the Public Service Law, *Order Granting Joint Petition Subject to Conditions*, No. 16-C-0288 at 17 (Jan. 24, 2017).

Service Commission in the Consolidated-FairPoint,¹⁰² Charter-Time Warner,¹⁰³ and Altice-Cablevision proceedings.¹⁰⁴

PUCs mandated investment conditions in seven of the 19 mergers they approved.¹⁰⁵ PUCs sometimes require investments of a specific dollar amount, but more often they specify a service or coverage goal that must be met following the merger.¹⁰⁶ The instances in which specific dollar amounts were mandated are summarized in Table 8.

102. N.Y. Pub. Serv. Comm'n, Joint Petition of FairPoint Communications, Inc., Berkshire Telephone Corporation d/b/a FairPoint Communications, Cautauqua and Erie Telephone Corporation d/b/a FairPoint Communications, Taconic Telephone Corporation d/b/a FairPoint Communications, FairPoint Business Services LLC, Consolidated Communications, Inc., and Consolidated Communications Holdings, Inc. for Approval of Proposed Transactions Pursuant to Sections 99, 100 and 101 of the New York State Public Service Law, *Order*, No. 17- C-0050 at 3 (June 15, 2017).

103. N.Y. Pub. Serv. Comm'n, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, *Order*, No. 15-M-0388 at 5 (Jan. 8, 2016).

104. N.Y. Pub. Serv. Comm'n, Joint Petition of Altice N.V. and Cablevision Systems Corporation and Subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements, *Order*, No. 15-M-0647 at 55 (June 15, 2016).

105. *See supra* at Table 6.

106. *See, e.g.*, S.C. Pub. Serv. Comm'n, In Re: Joint Application of Frontier Communications and Verizon for Approval of the Transfer of Assets, Authority and Certificates, *Order Approving Transfer of Assets, Authority, and Certificates*, Docket No. 2009-220-C at 9 (Oct. 29, 2009) ("Frontier and its subsidiaries operating in South Carolina shall meet its public interest commitments by . . . significantly expanding the availability of broadband [I]nternet access in their South Carolina territories . . ."); *see, e.g.*, Mont. Pub. Serv. Comm'n, Joint Application of Qwest Communications and CenturyLink for Approval of Indirect Transfer of Control of Qwest, *Final Order Approving Application Seeking Approval of Transfer*, Docket No. D2010.5.55 at 26 (Dec. 15, 2010) (" . . . the Merged Company will use and offer to wholesale customers the legacy Qwest Operational Support Systems (OSS) for at least two years, or until July 1, 2013, whichever is later, and thereafter provide a level of wholesale service quality that is not materially less than that provided by Qwest . . ."); *see infra* note 24.

**TABLE 8: MONETARY COMMITMENTS IMPOSED BY
PUCS FOR MERGERS INVOLVING INVESTMENT
REQUIREMENTS**

Merger	Explicit Monetary Commitment (Millions)	Additional Monetary Commitments	MFS Condition
Frontier/Verizon (2010)	\$356	Yes	Yes
Qwest/CenturyLink (2011)	\$330	Yes	No
Frontier/AT&T (2014)	\$64	Yes	No
Frontier/Verizon (2015)	\$192	Yes	No
Altice/Cablevision (2016)	\$3	Yes	Yes
Charter/Time Warner Cable (2016)	\$83	Yes	Yes
Consolidated/FairPoint (2017)	\$5	Yes	Yes

Overall, PUCs imposed explicit monetary commitments for these seven transactions of over \$1.03 billion dollars. In all these transactions, the explicit monetary requirements were accompanied by stipulations adding substantial costs where the total commitments were not specified.¹⁰⁷ For instance, the specified monetary commitment was \$5 million for the Consolidated-FairPoint transaction, but the Vermont PUC also stipulated that Consolidated commit to capital investment in Vermont of 14 percent of total Vermont

107. W. Va. Pub. Serv. Comm'n, In re Frontier Communications Corp., *Order*, No. 09-0871-T-PC/No. 09-1600-T-CN at Appendix A (May 13, 2010); Or. Pub. Util. Comm'n, *Verizon Communications Inc. and Frontier Communications Corporation Joint Application for an Order Declining to Assert Jurisdiction, or, in the Alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc., Joint Application Granted with Conditions*, Docket UM 1431 (Feb. 24, 2010) at 1; Wash. Utilities. & Transp. Comm'n, *Joint Application of Verizon Communications, Inc., and Frontier Communications Corporation For an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest, Inc., Final Order Approving and Adopting, Subject to Conditions, Multiparty Settlement Agreements and Authorizing Transaction*, Docket UT-090842 at 18 (Apr. 16, 2010); Ariz. Corp. Comm'n, *Joint Notice and Application of Qwest and CenturyLink for Approval of the Proposed Merger of Their Parent Corporations, Opinion and Order*, Docket Nos. T-01051B-10-0194, T-02811B-10-0194, T-04190A-10-0194, T-20443A-10-0194, T-03555A-10-0194, T-03902A-10-0194 at 17 (Mar. 9, 2011); Conn. Pub. Utilities Regulatory Authority, *Joint Application of Frontier Communications Corporation and AT&T Inc. for Approval of a Change of Control, Settlement Agreement*, Docket-No. 14-01-46 at 8 (Aug. 11, 2014); CPUC *Order*; N.Y. Pub. Serv. Comm'n, *Joint Petition of Altice N.V. and Cablevision Systems Corporation and subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions*, No. 15-M-0647 at 68 (June 15, 2016); N.J. Bd. Of Pub. Utils., *Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Order Approving Stipulation of Settlement*, Docket No. CM15111255 at 8 (May 26, 2016); N.Y. Pub. Serv. Comm'n, *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions*, No. 15-M-0388 at 32 (Jan. 8, 2016); Cal. Pub. Utilities Comm'n, *Joint Application of Charter Communications and Time Warner Cable for Approval of Transfer of Control, Decision Granting Application to Transfer Control Subject to Conditions*, A1507009 (May 12, 2016) at 56; Vt. Pub. Serv. Bd., *Joint Petition of Consolidated Communications Holding Inc. et al., for approval of a transfer of control by merger, pursuant to 30 V.S.A. §§ 107, 108, 109, 231(a), and 311, Order*, No. 8881 at 34 (June 26, 2017).

revenue for three years after the merger.¹⁰⁸ For the Altice-Cablevision transaction, while the explicitly specified monetary commitment was \$3 million, the New York Public Service Commission mandated increased network speed enhancements that it estimated would cost \$20 million.¹⁰⁹ Many of these investment requirements were for broadband service, which is an interstate service. Furthermore, four of these seven transactions were subject to most-favored-state (“MFS”) provisions, under which PUCs condition merger approvals on the agreement of the parties to abide by merger conditions imposed by PUCs in other states.¹¹⁰ While it is difficult to explicitly quantify the expenditures triggered by the MFS clauses, the broad scope of these provisions suggests the strong possibility of even greater hidden extractions.

In certain cases, the conditions imposed by PUCs are difficult to explain except as efforts to serve parochial interests as indicated by the following examples. For instance, as a condition of the Consolidated Communications-FairPoint transaction, the New York Public Service Commission mandated that the merged company bid in the second phase of Governor Cuomo’s NY Broadband Program.¹¹¹ In the Frontier-AT&T transaction, the Connecticut PUC (acting in conjunction with the state attorney general) extracted commitments to philanthropic giving, including \$875,000 for content creation on public, educational, and government access channels, \$512,500 for athletics at the University of Connecticut, \$75,000 for the Connecticut Open—a tennis tournament sponsored by a private company—and \$500,000 for other charities.¹¹² As a condition of granting approval for the 2010 Verizon-Frontier transaction, the West Virginia Commission required that Frontier maintain its regional headquarters in Charleston, West Virginia, housing all executive operations for West Virginia, Tennessee, North Carolina, South Carolina, Mississippi, Alabama, Georgia, and Florida.¹¹³ Before it would approve the 2015 Frontier-Verizon transaction, the California

108. Vt. Pub. Serv. Bd., Joint Petition of Consolidated Communications Holding Inc. et al., for approval of a transfer of control by merger, pursuant to 30 V.S.A. §§ 107, 108, 109, 231(a), and 311, *Order*, No. 8881 at 34 (June 26, 2017).

109. N.Y. Pub. Serv. Comm’n, Joint Petition of Altice N.V. and Cablevision Systems Corporation and subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements, *Order Granting Joint Petition Subject to Conditions*, No. 15-M-0647 (June 15, 2016) at 68. Altice also agreed to a similar commitment to increase network speeds in New Jersey, although the monetary value of the mandate was not explicitly stated. *See* N.J. Bd. of Pub. Utilities, Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, *Order Approving Stipulation of Settlement*, Docket No. CM15111255 at 8 (May 26, 2016).

110. *See supra* at Table 8.

111. N.Y. Pub. Serv. Comm’n, *Public Service Condition Conditionally Approves Financial Transactions for the Sale of Three Local Telephone Corporations in New York* (June 15, 2017).

112. Conn. Pub. Utilities Regulatory Authority, Joint Application of Frontier Communications Corporation and AT&T Inc. for Approval of a Change of Control, *Settlement Agreement*, Docket-No. 14-01-46 at 8 (Aug. 11, 2014).

113. W. Va. Pub. Serv. Comm’n, In re Frontier Communications Corp., *Order*, No. 09-0871-T-PC/No. 09-1600-T-CN at Appendix A, para. 5 (May 13, 2010).

Public Utilities Commission mandated that all of Frontier's future philanthropic contributions be reported to the Commission on an annual basis.¹¹⁴

Finally, perhaps the most pernicious types of conditions imposed by PUCs are MFS clauses. A representative example of this type of clause was contained in the New York Public Service Commission's Verizon-XO order:

[T]he Commission is aware that the Petitioners continue to pursue approval in other state jurisdictions, and that these jurisdictions may require commitments that would also be beneficial to New York. In order to ensure that New York gains the benefits of these commitments, we will require Petitioners to agree to a most favored state clause. If, in obtaining approval of the transaction in other jurisdictions, the Petitioners commit to any condition, they will within 30 days following such commitment, notify the Commission of its intent to provide those same benefits in New York at terms that are reasonably comparable to the other state or federal commitments.¹¹⁵

From an economic perspective, MFS conditions exacerbate the hold-up problem while significantly increasing the risk to the merging parties. MFS conditions aggravate the hold-up problem by effectively ensuring that all states (that is, all states that impose MFS conditions) obtain whatever conditions are extracted by the state with the largest bargaining advantage over the merging parties. Furthermore, MFS provisions are never a useful regulatory instrument for maximizing consumer welfare. Indeed, if appropriately defined relevant markets are local, then competition is unique to each relevant market, and remedies must be assessed on a market-by-market basis. In contrast, while MFS clauses do nothing to promote consumer welfare, they clearly have the potential to increase merger costs dramatically, and the very existence of such provisions is likely to deter merger activity.¹¹⁶ MFS provisions were imposed by the New York Public Service Commission in the Verizon-XO, Consolidated-FairPoint, Charter-Time Warner, and Altice-Cablevision proceedings, the New Jersey Board of Public Utilities in

114. Cal. Pub. Utils. Comm'n, Joint Application of Frontier at al. for Approval of Transfer of Control over Verizon California, Inc. and Related Approval of Transfer of Assets, *Decision*, No. 15-030995 at § 3.2.5 (Dec. 9, 2015).

115. N.Y. Pub. Serv. Comm'n, Petition of XO Holdings, XO Communications Services, LLC, and Verizon Communications Inc. for Approval of a Proposed Transaction Pursuant to Section 100 of the Public Service Law, *Order Granting Joint Petition Subject to Conditions*, No. 16-C-0288 at 20- 21 (Jan. 24, 2017).

116. Feder, *supra* note 6, at 15, 28-30.

the Altice-Cablevision proceeding, and the Oregon Public Utility Commission in the 2010 Frontier-Verizon transaction.¹¹⁷

IV. SUMMARY AND CONCLUSIONS

Our findings provide empirical support for concerns raised by academics and policymakers about the effects of state intervention in merger reviews, especially when interventions are undertaken by PUCs under a public interest standard in which the merging parties bear the burden of proof. Such interventions frequently delay transactions that have been found by federal authorities to generate public interest benefits, thereby postponing the gains to consumers from these transactions. Furthermore, PUC intervention imposes substantial direct costs on the merging parties and even larger indirect costs in the form of merger conditions, which—while possibly benefiting the states that engage in beggar-thy-neighbor interventions—harm the overall public interest on a national basis. Finally, the use of merger reviews by PUCs to impose conditions on firms offering IP-based services (including conditions specifically relating to broadband) is increasingly at odds with federal policy, which preempts such services from state oversight in favor of a uniform national approach.

117. *Id.* at 20; N.Y. Pub. Serv. Comm'n, Joint Petition of FairPoint Communications and Consolidated Communications, Inc. for Approval of Proposed Transactions Pursuant to Sections 99, 100 and 101 of the New York State Public Service Law, *Order Approving Joint Petition Subject to Conditions*, No. 16-C-0050 at 26 (June 15, 2017); N.Y. Pub. Serv. Comm'n, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, *Order Granting Joint Petition Subject to Conditions*, No. 15-M-0388 at 66 (Jan. 8, 2016); N.Y. Pub. Serv. Comm'n, Joint Petition of Altice N.V. and Cablevision Systems Corporation and subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements, *Order Granting Joint Petition Subject to Conditions*, No. 15-M-0647 at 84 (June 15, 2016); N.J. Bd. of Pub. Utilities, Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Entities, *Order Approving Stipulation of Settlement*, Docket No. CM15111255 at 7 (May 26, 2016); Or. Pub. Util. Comm'n, *Verizon Communications Inc. and Frontier Communications Corporation Joint Application for an Order Declining to Assert Jurisdiction, or, in the alternative, to Approve the Indirect Transfer of Control of Verizon Northwest Inc., Joint Application Granted with Conditions*, Docket UM 1431 at 1 (Feb. 24, 2010).

