Merger Review at the North Pole: The Problems of Dual Review in Telecommunications Mergers and a Proposal for FCC Leadership

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TABLE OF CONTENTS

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I. INTRODUCTION

At Christmastime, Santa is the decision-maker. Every year, children write him notes, explaining their good behavior and why they deserve a toy truck rather than a lump of coal.[1] To increase their chances, they might even leave out milk and cookies on Christmas Eve.

Imagine, for a moment, that children had to obtain approval from both Santa *and* Mrs. Claus for that truck. A child would have several questions. Why do I have to write two letters instead of one? Do Mr. and Mrs. Claus have different definitions of "good" and "bad"? Why don't the Clauses divide up this task?

Whether or not one believes in Santa Claus, this anecdote may be familiar to readers in the telecommunications world. Both the FCC and the Department of Justice (DOJ) have authority to review telecommunications mergers, leading to a protracted and unpredictable review process. Many have advocated for a simpler review process, but few agree on what changes are best. A majority of scholars suggest that the DOJ should obtain primary authority over telecommunications mergers, while a minority would give it to the FCC.

The minority's view is correct for four reasons. First, the FCC's merger review process is more comprehensive than that of the DOJ. Second, the FCC has more expertise regarding telecommunications. Third, the FCC's merger review process is more transparent than that of the DOJ. Fourth, as an independent agency, the FCC is a more neutral decisionmaker than the DOJ, which is part of the executive branch. The FCC is not perfect, but its weaknesses can be addressed through simple reforms relating to time limits and voluntary commitments. In summary, this Note calls for Congress to pass a law granting the FCC sole authority over mergers involving transfers of telecommunications licenses.

Part II of this Note summarizes the current dual review system and identifies its weaknesses. The leading criticisms of the status quo are, first, that it is inefficient, and, second, that the FCC's use of voluntary commitments is problematic. Part II also provides a survey of suggested reforms, several of which call for the FCC to take on a smaller role than this Note proposes. Part III explains why a larger role for the FCC—paired with reforms to the FCC's own process—is the optimal solution. Part IV concludes that, with common sense reforms that focus on processing time and voluntary commitments, the FCC is well positioned to lead the review of telecommunications mergers.

1. In 2013, CNN reported that more than 1 million American children sent letters to Santa. *See* Eoghan Macguire & Inez Torre, *Dear Santa: How many letters do you get every year?*, CNN (Dec. 23, 2013), http://edition.cnn.com/2013/12/23/business/dear-santa-christmas-letters/index.html [https://perma.cc/VU9K-9WKS].

II. BACKGROUND

This section summarizes the dual review system. Sub-Parts A and B explain the FCC's and DOJ's authority to review mergers, focusing on their respective organic statutes, as well as their standards of review. In Sub-Part C, this Note discusses the interaction between the two agencies, which is characterized by inconsistency and a lack of transparency. Finally, Sub-Part D identifies the weaknesses of the status quo, which include a protracted review process, uncertainty stemming from voluntary commitments, and a waste of government resources.

A. FCC Process and Standard of Review

Under Sections 214(a) and 310(d) of the Communications Act of 1934,[2] the FCC reviews mergers that involve transfers of telecommunications licenses.[3] While small mergers are "granted quickly," large mergers take longer.[4] The FCC aims to review mergers within 180 days, but, as discussed below, it often pauses this "shot clock" due to internal or external delays.[5] The merger review process unfolds in four steps. First, the process begins when the parties file applications with the FCC and the FCC issues a notice permitting the public to submit comments on a transaction-specific webpage.[6] Second, merger applicants respond to public comments, and commenters respond in turn.[7] Third, the FCC requests additional information related to the merger.[8] Fourth, the FCC makes a determination.[9]

The FCC may decide that a merger would violate a statute or rule, and therefore deny the transaction.[10] The FCC may instead decide that the transaction would serve the public interest if the parties agree to specific

2. To be approved, license transfers must be "in the present or future public convenience and necessity." 47 U.S.C. § 214(a). Additionally, 47 U.S.C. § 310(d) references the "public interest, convenience and necessity" of a potential transfer. *See generally Merger Review Authority of the Federal Communications Commission*, CONG. RESEARCH SERV. (2009), https://www.everycrsreport.com/files/20091208_RS22940_15cb7faac8005895457c47c6d7928ced7778ca1d.pdf [https://perma.cc/Y4YV-XBV2].

3. *See* 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#fn3 [https://perma.cc/R8T7-HWQ3].

4. *Overview of the FCC's Review of Significant Transactions*, FCC (July 10, 2014), https://www.fcc.gov/reports-research/guides/review-of-significant-transactions [https://perma.cc/US9B-B5HM].

5. *Frequently Asked Questions About Transactions*, FCC (July 10, 2014), https://perma.cc/3VWX-SM6C.

6. *See Overview of the FCC's Review of Significant Transactions*, *supra* note 4.

7. *Id.*

8. *See id.*

9. *See id.*

10. *See Frequently Asked Questions About Transactions*, *supra* note 5.

conditions,"[11] the content of which vary widely.[12] These conditions are frequently referred to as "voluntary commitments."[13] Alternatively, the FCC may decide that the transaction would not serve the public interest—even with voluntary commitments.[14] In this scenario, the FCC "designates" the case to an Administrative Law Judge (ALJ).[15] Most merger applicants withdraw before the hearing, fearing a long and costly battle before the ALJ.[16]

The FCC's organic statute requires it to decide whether the proposed merger will serve the "public interest, convenience, and necessity."[17] In *FCC v. RCA Communications*, the Supreme Court grappled with the definition of public interest, admitting that it "no doubt leaves wide discretion and calls for imaginative interpretation."[18] The public interest standard requires the FCC to consider traditional competition concerns, an inquiry consistent with DOJ methods.[19] However, the FCC's review goes beyond competition concerns.[20] In its decision regarding the merger between satellite radio companies Sirius and XM, the Commission summarized its approach to the public interest standard as follows:

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11. *See id.*

12. For example, the FCC's 2011 approval of the Comcast and NBC Universal merger was conditioned on a long list of commitments, including the establishment of partnerships with non-profit news organizations and an increase in local news programs. These and other conditions were unrelated to competition concerns. *See* Michael Farr, *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, 70 FED. COMM. L.J. 237, 249 (2018).

13. *See id.*

14. *See Frequently Asked Questions About Transactions*, *supra* note 5.

15. *Id.*

16. Alexander (Alexi) Maltas, Tony Lin, & Robert F. Baldwin III, *A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective*, THE ANTITRUST SOURCE (Aug. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_maltas_8_5f.authcheckdam.pdf [https://perma.cc/Y6PK-ZHKV].

17. *See* Sallet, *supra* note 3.

18. 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. 29, 42 (2000) (citing *FCC v. RCA Communications*, 346 U.S. 86, 90 (1953)).

19. *See, e.g.*, *In the Matter of Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of License and Authorizations*, 30 F.C.C. Rcd. 9131, para. 20 (2015) [hereinafter *AT&T / DirecTV Order*], https://www.fcc.gov/transaction/att-directv [https://perma.cc/RUY7-SH5H] ("The Commission, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction.").

20. Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, FACULTY SCHOLARSHIP, Paper 1543 (2014), http://scholarship.law.upenn.edu/faculty_scholarship/1543 [https://perma.cc/66J4-PHNP] ("At the same time, the FCC has made clear that its public interest mandate includes considerations that fall outside the scope of traditional competition policy, such as diversity of content, universal service, localism, spectrum efficiency, national security, and the agency's continued ability to regulate in other areas.").

> [W]e evaluate whether the proposed transaction complies with the specific provisions of the [Communications Act of 1934, as amended], other applicable statutes, and the Commission's rules. We also consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. We employ a balancing process, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits. Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest. [21]

In summary, the FCC employs a holistic approach that extends beyond competition concerns.

B. DOJ Process and Standard of Review

Under the Clayton Act, the DOJ and FTC have authority to review and prevent a merger if its effect "may be substantially to lessen competition, or to tend to create a monopoly."[22] Telecommunications mergers are reviewed by the DOJ, not the FTC.[23] The process begins when the parties submit a notice of the proposed merger.[24] Shortly thereafter, the applicants may avoid further review by divesting themselves of any problematic assets.[25] If the applicants choose not to do this, and the DOJ needs additional information to evaluate the proposed merger, it will issue a request for additional information, also known as a "Second Request."[26] Following the parties' compliance with a Second Request, the DOJ has thirty days to make a decision regarding the transaction.[27] The DOJ may permit the transaction to proceed or negotiate conditions that lessen competition concerns.[28] Alternatively, the DOJ may decide to litigate the issue and seek an injunction

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21. *In the Matter of Applications for Consent to the Transfer of Control of Licenses Xm Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, 23 F.C.C. Rcd. 12348, 12363–64 ¶ 30 (2008) (citations omitted).

22. *See* Barkow, *supra* note 18, at 34 n. 20 (citing 15 USC §§ 18, 21(a) (1994 & Supp 1998)).

23. The DOJ and the FTC divide merger review responsibility according to their respective areas of expertise. The DOJ takes the lead on telecommunications mergers. *See generally* Kathleen Anne Ruane, *Pre-Merger Review and Challenges Under the Clayton Act and the Federal Trade Commission Act*, CONG. RESEARCH SERV. (Sept. 27, 2017), https://fas.org/sgp/crs/misc/R44971.pdf [https://perma.cc/SW5S-JS53] (citing 15 U.S.C. § 21).

24. *Practical Law Department of Justice (DOJ) Consent Order Process Flowchart*, Practical Law Antitrust, Thompson Reuters (2017).

25. *See id.*

26. *See id.*

27. Michael G. Egge & Jason D. Cruise, *Practical guide to the U.S. merger review process*, 1 CONCURRENCES, COMPETITION L.J. 1, 4 (2014), https://www.lw.com/thoughtleadership/practical-guide-us-merger-review-process-012014 [https://perma.cc/W2VS-YQNX] (last accessed Jan. 19, 2020).

28. *See id.*

from a federal court.[29] The thirty day waiting period can be extended by agreement of the parties.[30]

The Clayton Act requires the DOJ to apply for an injunction in court if, during the course of merger review, it wishes to prevent the closing of a deal.[31] In practice, however, the DOJ need not always apply for an injunction, as the parties cannot finalize a merger until FCC review is complete.[32] When reviewing potential telecommunications mergers, the DOJ follows Horizontal Merger Guidelines, which are maintained jointly by the DOJ and FTC.[33] The guide states that the agencies should seek to prevent mergers that would "enhance[e] market power."[34] Further, "[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[35] However, this thirty-four-page guide is only the starting point for defense lawyers, as merger review is a "fact-specific process."[36]

C. Coordination Between the DOJ and FCC During Merger Reviews

Public-facing DOJ and FCC materials say little about collaboration during merger review. The DOJ's website states that the Telecommunications and Broadband Section "works closely with the [FCC], coordinating merger reviews and filing comments in appropriate FCC proceedings."[37] Language on the FCC's website is similarly vague:

29. *See id.*

30. *See id.*

31. Laura Kaplan, *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and A Proposal for Reform*, 53 B.C. L. REV. 1571,1588-90 (2012).

32. *Id.* at 1590.

33. U.S. Dep't of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* 1 (Aug. 19, 2010), https://www.justice.gov/atr/file/810276/download, p. 2. [https://perma.cc/K7JZ-7U3X] (last visited Mar. 2, 2019).

34. *Id.* at 2.

35. *Id.*

36. *See* Sallet, *supra* note 3 (explaining that the public interest standard " . . . necessarily encompasses . . . a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. [The] public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.").

37. *Telecommunications and Broadband Section*, U.S. DEP'T OF JUSTICE, https://perma.cc/MCC8-VQCE (last visited Apr. 6, 2019).

> Looking at past transactions, the Department of Justice and the FCC have worked very successfully together to further their understanding of the issues, sharing their respective expertise. We coordinate with DOJ informally at both the top levels and the staff levels. We try to ensure that we do not create duplicate work or place excessive burdens on any of the parties. We work together to avoid conflict between the necessary remedies.[38]

Evidence of collaboration is sometimes evident in FCC orders approving mergers. For example, in the FCC's order approving the CenturyLink/Level 3 merger, the FCC referenced the DOJ's Consent Decree, in which Level 3 had agreed to divest itself of certain fiber assets.[39] Similarly, in the order approving the merger between Charter, Time Warner Cable, and Bright House, the FCC stated that it had worked closely with the DOJ on their Consent Decree.[40]

D. Weaknesses of the Current Merger Review System

The current dual review system contains at least three critical flaws. First, the dual review system is unduly time-consuming for both the government and the merging parties. Second, FCC-imposed voluntary commitments allow the FCC to skirt the rulemaking process and create uncertainty for parties. Third, the dual review process leads to a waste of government resources. This section addresses these problems in turn.

1. Merger Reviews Often Take More Than 180 Days

First, the protracted duration of merger reviews constitutes an unfair burden on merger applicants. The FCC aims for a maximum of 180 days between the date of the application's acceptance and the completion of their review.[41] However, the FCC frequently exceeds the 180-day limit.[42] The

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38. *Frequently Asked Questions About Transactions*, *supra* note 5.

39. *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. for Consent to Transfer Control of Licenses and Authorizations*, *Memorandum Opinion and Order*, 32 FCC Rcd. 958 n. 68 (2017) [hereinafter *Level 3/CenturyLink Order*] [https://perma.cc/BK45-LXV7].

40. *See Applications of 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*, 31 FCC Rcd 6327 n. 762 (2016), https://perma.cc/7CKF-N2FA ("Because the Applicants have agreed to an anti-retaliation provision as part of the consent decree resolving the action filed by the United States, we find it unnecessary to adopt an anti-retaliation remedy as suggested by Herring Networks.")

41. *See Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers*, FCC, https://perma.cc/P5DA-STMR ("The timeline represents the Commission's goal of completing action on assignment and transfer of control applications (i.e., granting, designating for hearing, or denying) within 180 days of the public notice accepting the applications.").

42. *See id.*

following chart identifies the timelines for the FCC's "Current and Recent Transactions,"[43] according to information on their website:

Merger	Start Date[44]	End Date[45]	Duration, including days when the FCC shot clock was paused
AT&T/DirecTV[46]	August 7, 2014	July 28, 2015	355 days
CenturyLink/Level 3[47]	December 21, 2016	October 30, 2017	327 days
Charter/Time Warner Cable/Bright House[48]	September 11, 2015	May 10, 2016	242 days
Gannett/Belo[49]	June 24, 2013	December 20, 2013	179 days
Nexstar/Media General[50]	February 17, 2016	January 11, 2017	329 days
Sinclair/Tribune[51]	July 6, 2017	Not approved; referred to ALJ in July 2018; parties ended merger efforts and sued one another[52]	N/A
T-Mobile/Sprint[53]	July 18, 2018	Not yet approved	N/A
Verizon/XO[54]	April 12, 2016	November 16, 2016	218

43. *See Archive of Major Transactions*, FCC, https://www.fcc.gov/proceedings-actions/mergers-transactions/major-transactions-archive [https://perma.cc/4JBJ-32LA] (last visited May 15, 2020).

44. This indicates the date on which the FCC released a Public Notice "accepting the application for filing and establishing a pleading cycle." In recent years, the FCC has used this exact language in its memorandum opinion and orders. In earlier orders, it has used a variant of the phrase to signify the date when it accepted the parties' applications. *See, e.g.*, *Gannett Co. and Belo Corp., MB Docket 13-189*, FCC, https://www.fcc.gov/transaction/gannett-belo [https://perma.cc/S7X6-WUHP].

45. This indicates the date on which the FCC released a Memorandum Opinion and Order approving the deal.

46. *AT&T and DirecTV, MB Docket 14-90*, FCC, https://perma.cc/H74L-BQWX.

47. *CenturyLink and Level 3, WC Docket 16-403*, FCC, https://perma.cc/C94S-MKT3.

48. *Charter - Time Warner Cable - Bright House Networks, MB Docket 15-149*, FCC, https://perma.cc/Y8HQ-52LM.

49. *Gannett Co. and Belo Corp.*, *supra* note 44.

50. *Nexstar and Media General*, *MB Docket No.16-57*, FCC, https://www.fcc.gov/transaction/nexstar-media-general#block-menu-block-4 [https://perma.cc/89P8-ERD6].

51. *Sinclair and Tribune, MB Docket 17-179*, FCC, https://www.fcc.gov/transaction/sinclair-tribune [https://perma.cc/5M5T-AD8J].

52. Brian Fund & Tony Romm, *Tribune withdraws from Sinclair merger, sues for $1 billion in damages over 'breach' of contract*, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/technology/2018/08/09/tribune-withdraws-sinclair-merger-saying-it-will-sue-breach-contract/ [https://perma.cc/RD2C-9X25].

53. *T-Mobile and Sprint, WT Docket 18-197*, FCC, https://www.fcc.gov/transaction/t-mobile-sprint [https://perma.cc/RF4Z-3QPX].

54. *Verizon and XO, WC Docket 16-70*, FCC, https://www.fcc.gov/transaction/verizon-xo#block-menu-block-4 [https://perma.cc/L6RN-5RN7].

The FCC took an average of 275 days to review each of these deals. Both the agencies and the merging parties are responsible for these delays. Merging parties prolong the process when they provide supplemental information in the middle of the review process. For example, during the merger between CenturyLink and Level 3 Communications, CenturyLink notified the FCC on day 170 that it planned to submit additional information.[55] In response, the FCC paused the shot clock for nearly three months.[56] In other contexts, FCC may pause the clock for its own reasons. For example, during the Sinclair/Tribune merger, the FCC paused its clock from October 18, 2017 until November 2, 2017, to allow for additional public comments.[57]

In 2017, the Senate responded with the introduction of S.2847, a bill that would require the FCC to abide by the 180-day limit.[58] The bill would permit the FCC to apply to the United States District Court for the District of Columbia for a 30-day extension, but the court would only be able to grant the extension in one of three special scenarios. [59] Further, the FCC would bear the burden of proof in such cases.[60] The bill did not advance beyond the Judiciary Committee, leaving the status quo intact.[61]

The DOJ is also a source of undue delay. In 2017, the Deputy Assistant Attorney General for the DOJ's Antitrust Division delivered a speech on this topic to the American Bar Association's Antitrust Section.[62] He acknowledged that the average length of a significant merger review had grown from 7 to 11.6 months between 2011 and 2016,[63] and proposed five

55. *See CenturyLink and Level 3*, *supra* note 47.

56. *Id.*

57. *Media Bureau Pauses 180- Day Transaction Shot Clock in Sinclair Merger*, FCC (Oct. 18, 2017), https://www.fcc.gov/document/media-bureau-pauses-180-day-transaction-shot-clock-sinclair-merger [https://perma.cc/S5C5-7VLK].

58. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, S.2857, 115th Cong. (2018).

59. S.2847 would have permitted the United States District Court for the District of Columbia to grant a 30-day extension if:

"(I) the court finds that the applicants for the transfer of control or assignment have not substantially complied, in a timely manner, with a reasonable request by the Commission for information;

(II) the Commission shows, by clear and convincing evidence, that the Commission is unable to complete review within the 180-day review period; or

(III) an Executive agency (as defined in section 105 of title 5, United States Code) has requested in writing that the Commission delay a determination pending the Executive agency's national security review of the transfer of control or assignment." *Id.*

60. *See id.* ("Notwithstanding any other provision of law, including section 706 of title 5, United States Code, in a judicial appeal of a Commission decision to deny a covered application, the Commission shall bear the burden of persuasion to demonstrate that the decision is—(1) permitted under applicable statutes and regulations; and (2) supported by the required amount of factual evidence").

61. *Id.*

62. Donald G. Kempf, Jr., Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Address at American Bar Association Antitrust Section Fall Forum (Nov. 17, 2017), https://www.justice.gov/opa/speech/file/1012156/download [https://perma.cc/JQP2-372H].

63. *Id.* at 3-4.

strategies to ameliorate this trend.[64] Four of these strategies require the merging parties to make changes, such as meeting with the DOJ earlier in the process.[65] Only the fifth strategy—reducing the number of custodians involved in document requests—would be led by the DOJ.[66]

The FCC and DOJ have no incentive to chastise one another for these delays. The slower agency provides cover for the faster one. This protracted dual review process, coupled with international and state merger reviews, arguably creates an onerous barrier to merger activity.[67] As discussed below in Part III(B), the problem of delay will lessen with 1) elimination of the DOJ's authority over telecommunications mergers, and 2) a new law that requires the FCC to abide by its 180-day time limit, save for a judicial extension.

2. Some Voluntary Commitments Are Unrelated to the Merger Under Review

Another important criticism of the status quo is the FCC's practice of soliciting voluntary commitments as part of the merger review. Because the FCC's approval is often contingent upon parties' adherence to voluntary commitments, they become binding in nature, and the FCC may fine violating parties.[68] Critics express three main concerns. First, voluntary commitments often bear little relevance to the specific merger at hand. Second, their inconsistency introduces a high level of uncertainty into the merger process. Third, voluntary commitments enable the FCC to evade the rulemaking process. This Note will address each of these concerns in turn.

The FCC often uses voluntary commitments to exert influence over parties in ways that are unrelated to the merger.[69] For example, during the review of the merger between Bell Atlantic and NYNEX, the FCC required the parties to adopt a pricing model based on the Total Element Long-Run Incremental Cost, even though this condition was unrelated to the transaction under review.[70] In the merger between Comcast and NBC-Universal, the FCC required the parties to create a new Spanish-language channel.[71] This was part

64. *Id.*
65. *Id.* at 3.
66. *Id.*
67. Often, merging telecommunications companies must also pass the muster of foreign regulatory bodies and states. At the state level, both attorneys general and public utility commissions have legislative authority to challenge mergers. Between 2010 and 2017, public utility commissions reviewed nearly half of the mergers reviewed by the FCC. *See* Jeffrey Eisenach and Robert Kulick, *Do State Reviews of Communications Mergers Serve the Public Interest*?, NERA Economic Consulting (Oct. 2017), at 7, http://www.nera.com/content/dam/nera/publications/2017/Eisenach%20Kulick%20State%20Mergers%20Final%20101617.pdf [https://perma.cc/R8GK-LGJM].
68. *See* Farr, *supra* note 14, at 245.
69. *Infra* note 80.
70. *See* Yoo, *supra* note 21, at 29.
71. *See* Scott Jordan & Gwen L. Shaffer, *Classic conditioning: the FCC's use of merger conditions to advance policy goals*, 35 MEDIA, CULTURE & SOC'Y 392, 399-400 (2013).

of the FCC's effort to improve television offerings for Spanish speakers, and separate from the FCC's merger-related competition concerns.[72]

Critics point out that voluntary commitments introduce a high level of uncertainty into the merger process.[73] A comparison between the Echostar/DirectTV and Sirius/XM mergers, in which all parties were the sole satellite providers in the TV and radio industries, respectively,[74] demonstrates this point.[75] The FCC denied a potential merger between Echostar and DirectTV, finding that the deal would not be in the public interest.[76] By contrast, the FCC approved a similar merger between Sirius and XM.[77] In its order granting approval to Sirius and XM, the FCC acknowledged the similarity but brushed it aside for two reasons.[78] First, the FCC stated that a hearing would be futile because "it is not possible to use the normal tools of econometrics to define the relevant market or determine likely impacts on price."[79] Second, the FCC was confident that voluntary commitments would eliminate any harms to competition, despite the parties' previous disregard for FCC regulations.[80] In his dissent, Commissioner Michael Copps criticized the FCC for its inconsistency:

> The majority's argument is that it can stack up enough 'conditions' on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition. I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and Echostar.[81]

The result of this inconsistency is that parties do not know what to expect when approaching a deal. As a result, parties argue about the best path

72. *Id.* at 400.

73. *See* Farr, *supra* note 14, at 240.

74. *Id.*

75. Bradley Dugan, *The FCC's New Formula for Mergers*, 29 LOY. L.A. ENT. L. REV. 435, 461-65 (2009).

76. *Id.* at 450-52.

77. *Id.* at 463-65.

78. *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, *Memorandum Opinion and Order*, FCC 08-178, para. 58 (2008).

79. *Id.* at para. 58.

80. Dugan, *supra* note 78, at 457.

81. Statement of Commissioner Michael J. Copps, dissenting, *Re: In the Matter of Applications for Consent to the Transfer of Control of Licenses Xm Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, https://www.fcc.gov/document/application-consent-transfer-control-licenses-xm-0 [https://perma.cc/SG2R-4P4H].

to FCC approval.[82] During the Sinclair/Tribune merger, Tribune was adamant that Sinclair divest itself of certain television stations, fearing that the FCC would require this.[83] Sinclair had different expectations, and engaged in what Tribune has alleged was "belligerent and unnecessarily protracted negotiations" with the FCC and DOJ.[84] Differing expectations led to a failed merger and breach-of-contract litigation between the two parties.[85]

Third, critics point out that voluntary commitments permit the FCC to evade the rulemaking process mandated by the Administrative Procedure Act (APA).[86] For example, before the Ameritech/SBC merger review, the FCC was pursuing a rule regarding the deployment of wireline services.[87] Instead of continuing with the rulemaking process, the FCC converted the proposed rule into a voluntary commitment that applied only to Ameritech/SBC.[88]

Under the APA, the informal rulemaking process requires a notice-and-comment period.[89] Additionally, informal rules that constitute agency action are usually subject to judicial review.[90] Presently, the FCC extracts voluntary commitments that would routinely be subject to the informal rulemaking process.[91] This raises questions about the FCC's compliance with the APA, as well as whether the voluntary commitments are judicially reviewable.[92] If not, then parties have no means of redress when they believe that the FCC's requirements were arbitrary and capricious within the meaning of the APA.[93]

3. The Dual Review System Wastes Government Resources

A third criticism of the dual review system is that it wastes government resources. Although the DOJ and FCC do their best to coordinate merger reviews, their respective analyses have duplicative elements, leading to what Kaplan has called "redundancy."[94] This is unavoidable in the status quo, because the agencies' review standards overlap in substance. The FCC's public interest standard includes an evaluation of a potential merger's impact on competition, while the DOJ focuses on competition alone.[95] A quantitative study of government waste in dual review systems is beyond the scope of this

82. *See generally* Compl., *Tribune Media Company v. Sinclair Broadcast Group*, Aug. 9, 2018, at 4, available at http://www.tribunemedia.com/wp-content/uploads/2018/08/Complaint-for-Damages-Tribune-v-Sinclair_accepted.pdf [https://perma.cc/4BXC-NPCF].
83. *Id.* at 3.
84. *Id.* at 4.
85. *Id.* at 5.
86. Farr, *supra* note 14, at 240.
87. *Id.* at 247.
88. *Id.*
89. *Id.* at 243.
90. *Id.* at 245.
91. *Id.* at 249.
92. For an in-depth critique of voluntary commitments, *see id.* at 244.
93. *Id.* at 254.
94. *See* Kaplan, *supra* note 31, at 1572.
95. *Id.* at n. 21.

Note, but would be a valuable contribution to the discussion. The solution proposed in this Note provides a remedy for the problem of government waste.

E. Potential Reforms to the Merger Review System

In response to concerns about the dual review system, critics generally have advocated for one of two major reforms. Many would reduce the FCC's role, while a minority would reduce that of the DOJ. Those who would reduce the FCC's role differ on how to do so. Some would remove the FCC from the process entirely, while others would keep the dual review system but significantly reduce the FCC's authority with respect to mergers. Part i examines the literature calling for a reduction of the FCC's role, and Part ii examines the literature calling for the reduction of the DOJ's role.

1. Some Call for a Reduction of the FCC's Role

Several scholars have suggested that Congress reduce, or even eliminate, the role of the FCC in telecommunications mergers. These scholars tend to criticize the FCC for extracting voluntary commitments that are unrelated to the merger at hand. In *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, Philip Weiser suggested that the FCC defer to the antitrust bodies.[96] In *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, Thomas M. Koutsky and Lawrence J. Spiwak advocated for a narrowing of the FCC's public interest standard.[97] Specifically, they called for the FCC to focus on merger-related harms, rather than addressing general issues that are better suited to the traditional rulemaking process.[98] Finally, in *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, Michael Farr suggested that FCC-imposed voluntary commitments be subject to judicial review.[99]

In *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and A Proposal for Reform*, Kaplan discussed the weaknesses of eliminating either the FCC or the DOJ's role.[100] Kaplan also criticized a potential "clearance system," akin to the FTC/DOJ system, whereby one of the agencies would have sole reviewing authority over a specific merger.[101] Instead, she proposed that the dual review system remain,

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96. *See* Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167 (2008).

97. Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard*, 18 COMMLAW CONSPECTUS, 329 (2010).

98. *See generally id.* at 347.

99. *See* Farr, *supra* note 14.

100. Kaplan, *supra* note 31, at 1600-06.

101. *Id.* at 1606-08.

but with two important changes to the FCC portion of it:[102] first, Kaplan would impose enforceable time limits on FCC reviews;[103] second, she would limit the FCC's authority in merger review.[104] Thus, rather than considering whether the merger would benefit the public interest, it would only evaluate the effects of the license transfer itself.[105]

2. Some Call for a Reduction of the DOJ's Role

In *Rethinking Federal Review of Telecommunications Mergers*, David A. Curran called for the FCC to obtain sole review authority of telecommunications mergers.[106] Curran observed that the FCC's expertise in telecommunications is a critical component of merger review.[107] He noted that the DOJ's review is not necessary, as the FCC's public interest standard already contains a thorough review of competition concerns.[108] Despite his compelling arguments, Curran's proposal has not gained traction since its publication in 2002.[109] In recent years, voluntary commitments have become the focus of scholars' work,[110] precluding their serious consideration of a leadership role for the FCC. Scholars are correct to criticize the nature of voluntary commitments, but the FCC remains the ideal agency to conduct reviews of telecommunications mergers.

III. ANALYSIS

A. The Case for FCC Leadership in Telecommunications Mergers

Congress should revise federal law, granting the FCC sole authority to review mergers involving telecommunications licenses. A larger role for the FCC—paired with reforms to the FCC's own process—is the optimal way to address inefficiencies in the status quo.[111] The FCC is better suited than the DOJ to take the lead for four reasons. First, the scope of the FCC's merger review is more comprehensive than the DOJ's scope. Second, the FCC has more expertise regarding telecommunications than the DOJ. Third, the FCC's merger review process is more transparent than that of the DOJ. Fourth, as an independent rather than an executive agency, the FCC is more insulated from political processes, and is subject to both Congressional oversight and the independent Office of the Inspector General. However, as previously noted,

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102. *Id.* at 1608.
103. *Id.*
104. *Id.* at 1609.
105. *Id.*
106. David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 788 (2002).
107. *Id.*
108. *Id.*
109. This observation is based on my own survey of existing literature on this topic.
110. *See, e.g.*, Koutsky, *supra* note 102, at 345.
111. Telecommunications would not be the first industry to be subject to exclusive merger review authority by an expert agency. Railroad and airline alliance agreements also fall into this category. *See* Kaplan, *supra* note 31, at 1602 n. 281.

the FCC does have two weaknesses. First, the FCC frequently fails to complete mergers within 180 days. Second, the FCC has developed a practice of extracting voluntary commitments that are unrelated to the content of the merger at hand. Therefore, this Note proposes that Congress also reform the FCC by imposing stricter timelines and limiting the scope of voluntary commitments. This section discusses each of these points in turn.

1. The FCC's Merger Review Scope is More Comprehensive

The FCC is well-suited to lead review of telecommunications mergers because its public interest standard already incorporates the DOJ's antitrust concerns. The FCC and DOJ standards for competition issues are very similar. The DOJ's review places an emphasis on "unilateral effects (i.e., exercise of single-firm dominance) or coordinated effects (i.e., collusion)."[112] The DOJ also considers factors that would counteract these negative effects—for example, the chance of a new entry into the market in the near future—and potential positive effects stemming from the merger.[113] These general principles apply to both vertical and horizontal mergers.[114]

The FCC's competition review is similar. The FCC's Order approving the merger between AT&T and DirectTV stated these similarities as follows: "The Commission, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction."[115]

Further, both agencies employ a predictive, forward-looking approach. The FCC's website explains the public interest standard in predictive terms:

112. *See* Maltas, *supra* note 16, at 2.
113. *Id.*
114. *Id.*
115. *AT&T / DirecTV Order*, *supra* note 20.

> Under [S]ection 310(d) of the Communications Act, we determine whether a proposed transaction *will serve* the public interest, convenience and necessity. First, we determine if the application complies with provisions of the Act and our Commission rules. If it does, then we consider whether granting the application *could result in public interest harms* by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. Competition, diversity, localism, and encouraging the provision of advanced services to all Americans are among the principle objectives of the Act. We also consider *what potential public benefits might occur* because of the transaction . . . .[116]

The DOJ's horizontal merger guidelines are also forward-looking, noting that "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."[117]

One potential difference is the FCC's stated interest in enhancing, not merely preserving, competition. In its order approving the AT&T/DirectTV merger, the FCC stated that its competition review is "broader" because it "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."[118] However, this distinction has proven to be minor, and the FCC has never denied a merger on the grounds that it merely preserved but did not "enhance" competition.[119] In summary, the agencies employ similar methods with respect to competition review. Removing the DOJ from the process will not deprive it of thoughtful, market-oriented analysis. Both agencies are equally capable of upholding traditional antitrust principles.

However, taking non-competition concerns into account, the FCC's broad scope of review gives it a distinct advantage over the DOJ.[120] The DOJ and FTC's merger reviews "involve narrower issues than the public interest standard established by the Communications Act."[121] In addition to competition, the FCC considers other factors that fall within the scope of

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116. See *Frequently Asked Questions About Transactions*, *supra* note 5 (emphasis added).

117. Horizontal Merger Guidelines, *supra* note 34, at 1.

118. *AT&T / DirecTV Order*, *supra* note 20.

119. *See* Maltas, *supra* note 16, at 3.

120. In his proposal for FCC review, Curran makes a similar—but not identical—point. Curran explains that the FCC's non-merger work under the Telecommunications Act of 1996 already requires it to consider competition between industry actors. Therefore, he states that "economies of scale in information gathering" favor a leading role for the FCC. *See* Curran, *supra* note 108, at 775.

121. ISSUES MEMORANDUM FOR MARCH 1, 2000 TRANSACTIONS TEAM PUBLIC FORUM ON STREAMLINING FCC REVIEW OF APPLICATIONS RELATING TO MERGERS, https://www.fcc.gov/issues-memorandum-march-1-2000-transactions-team-public-forum-streamlining-fcc-review-applications [https://perma.cc/75PC-YKCB] (last visited Apr. 6, 2019).

"public interest."[122] These factors include "whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, [and] increase the availability of children's programming and Public, Educational, and Government programming."[123] For example, in the FCC's review of the potential merger between Comcast and NBC Universal, commenters worried that NBC News would "unduly influence" its journalistic independence.[124] The FCC's opinion granting the merger discussed this concern, and concluded "it is appropriate to condition our approval of this transaction on the Applicants' commitment to ensure the continued journalistic independence of the Applicants' news operations."[125] If the DOJ were to become the sole reviewer of telecommunications mergers, they would no longer be evaluated for these non-competition concerns.

2. The FCC Has More Expertise Regarding Telecommunications

As the Supreme Court stated in *Verizon v. Trinko*, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[126] For three reasons, the FCC has more expertise than the DOJ in telecommunications and related technology. First, as the body charged with regulating the telecommunications industry since 1934,[127] the FCC has been closely involved with the development of the industry's regulation. The FCC, then, is well-prepared to evaluate technical claims asserted by merging parties.[128] Second, the FCC is knowledgeable about the impact of telecommunications mergers on other FCC initiatives. For example, the FCC implements a universal service program.[129] As the program's regulator, the FCC is best equipped to understand how a merger will affect it, if at all.[130] Third, the FCC's structure lends itself to more specific areas of expertise. For example, it has subject matter experts on policy areas such as public safety and homeland security, wireless telecommunications, and wireline

122. Maltas, *supra* note 16, at 3.

123. *Id.*

124. Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd 4238, para. 203 (2011).

125. *Id.* at para. 207.

126. Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 399 (2004).

127. National Telecommunications and Information Administration, *U.S. Spectrum Management Policy: Agenda for the Future* (Sept. 3, 1998), https://www.ntia.gov/report/1998/us-spectrum-management-policy-agenda-future [https://perma.cc/2TJH-QAV3].

128. For example, during the AT&T/T-Mobile merger, AT&T alleged that it needed T-Mobile's spectrum space. Kaplan, *supra* note 31, at 1605.

129. Curran, *supra* note 111, at 771.

130. *Id.*

competition, all of whom contribute to merger review when relevant.[131] By contrast, the DOJ has just one "Telecommunications and Broadband Section" in its Antitrust Division, which is responsible for the broad category of "telecommunications equipment manufacturers and landline, wireless, and satellite telecommunications service providers."[132]

3. The FCC's Merger Review Process is More Transparent

Unlike the antitrust agencies, the FCC's merger review process provides opportunities for the public to comment on proposed transactions. In 2000, FCC Chairman Kennard submitted testimony before the House Committee on Commerce, highlighting this feature of the process:

> With respect to public participation, the FCC process offers the only forum where the merger is considered in a public proceeding conducted under the APA. The DOJ and FTC investigations are exercises in prosecutorial discretion, conducted under the cover of confidentiality, with no requirement to explain action or inaction unless a lawsuit is initiated.[133]

Critics argue that the FCC's negotiations with merging parties are not made public, and that these negotiations are often the basis for voluntary commitments.[134] However, this is still an improvement over the DOJ's process, which is entirely confidential until the lawsuit stage.

4. As an Independent Agency, the FCC is Better Insulated from Political Pressure

The FCC is also better equipped to lead merger reviews because of its status as an independent agency. The FCC has five commissioners who are appointed by the President and approved by the Senate.[135] One of these commissioners is chosen by the President to serve as chair.[136] However, only

131. ORGANIZATIONAL CHART OF THE FCC, https://www.fcc.gov/sites/default/files/fccorg-01302019.pdf [https://perma.cc/AGK2-E9XY] (last visited Apr. 6, 2019).

132. U.S. Dep't of Justice, Antitrust Division Manual, Fifth Edition, Page I-7 (updated 2018), https://www.justice.gov/atr/file/761126/download [https://perma.cc/A6Q2-GYJ9].

133. Statement of William E. Kennard, Chairman, Federal Communications Commission, before the House Committee on Commerce, Subcommittee on telecommunications, Trade, and Consumer Protection, March 14, 2000, https://transition.fcc.gov/Speeches/Kennard/Statements/2000/stwek021.html [https://perma.cc/U3RX-8DBA].

134. Weiser, *supra* note 98, at 170.

135. *See* 47 U.S.C. § 154(a).

136. *Id.*

three commissioners may be from the same political party.[137] Additionally, the President cannot remove a commissioner for any reason.[138]

The President is also limited in his ability to influence the FCC because of oversight mechanisms in Congress and at the FCC.[139] For example, in 2013, President Obama issued a video statement urging the FCC to pass net neutrality.[140] Concerned about a potential lack of independence, the Senate held hearings on the topic and issued their own report alleging impropriety.[141] In response, the FCC's Inspector General conducted an independent investigation, reviewing 600,000 emails.[142] The Inspector General's report concluded: "[W]e found no evidence of secret deals, promises or threats from anyone outside the Commission, nor any evidence of any other improper use of power to influence the FCC decision-making process."[143] Further, the report noted that the President's public support for Title II regulation of broadband providers was appropriately entered into the record.[144] This episode illustrated the power of both Congress and the FCC's Inspector General to keep the agency accountable.

Unlike the FCC, the DOJ falls within the President's vested executive powers under Article II of the Constitution.[145] The head of the DOJ, the Attorney General, is appointed by the President and confirmed by the Senate. The President can fire the Attorney General for any reason, without Congressional consent.[146] Therefore, the President has more legal power over the Attorney General than over FCC Commissioners. He or she can explicitly order the Attorney General to do something, so long as it is legal, and the Attorney General would be obligated to take that action. By contrast, FCC

137. *See* 47 U.S.C. § 154(b)(5).

138. Federal Communications Commission, ABOUT THE FCC: WHAT WE DO, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/2RH6-DBFW] (last visited Apr. 7, 2019).

139. *See generally* LEGAL SIDEBAR, SEPARATING POWER SERIES: PRESIDENTIAL INFLUENCE V. CONTROL OF INDEPENDENT AGENCIES, https://fas.org/sgp/crs/misc/presinf.pdf [https://perma.cc/F6QW-5LP9] (last visited Apr. 7, 2019).

140. The Obama White House, *President Obama's Statement on Keeping the Internet Open and Free*, YOUTUBE (Nov. 10, 2014), https://www.youtube.com/watch?time_continue=2&v=uKcjQPVwfDk [https://perma.cc/TF9X-YMDM].

141. MAJORITY STAFF OF S. COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, REGULATING THE INTERNET: HOW THE WHITE HOUSE BOWLED OVER FCC INDEPENDENCE (Feb. 29, 2016), https://www.hsgac.senate.gov/imo/media/doc/FCC%20Report_FINAL.pdf [https://perma.cc/8SRF-WXGU].

142. John Brodkin, *Obama didn't force FCC to impose net neutrality, investigation found*, ARS TECHNICA (Dec. 19, 2017, 12:38 PM), https://arstechnica.com/tech-policy/2017/12/obama-didnt-force-fcc-to-impose-net-neutrality-investigation-found/ [https://perma.cc/E8AM-DWCT].

143. Memorandum from F.C.C. IG David L. Hunt to Assistant IG for Investigations and Counsel to the IG, Memorandum (Aug. 22, 2016), Page 5-6, https://www.documentcloud.org/documents/4332075-OIG-B-15-0022.html#document/p1 [https://perma.cc/L5VC-BABG].

144. *See id.*

145. U.S. Const. art. II, § 2.

146. *See* Myers v. United States, 272 U.S. 52 (1926).

Commissioners are not obligated to take their policy direction from the White House.

Some may argue that the practices of the White House and the DOJ generate some level of independence from the President. For example, the President's counsel routinely sets limits on the manner in which White House staff may communicate with the DOJ.[147] "However, these limits are carefully crafted to protect the President from the appearance of impropriety, not to limit the influence of White House staff."[148] The White House is also limited by the presence of an independent Inspector General at the DOJ,[149] but these practices pale in comparison to the President's removal power over the Attorney General.

B. Reforming the Dual Review System through Elevation of the FCC's Role and Reform of its Processes

As noted above, the current dual review system for telecommunications mergers is inefficient and unpredictable. The FCC is better suited than the DOJ to carry out the review process, because it has a more comprehensive scope of review, greater expertise in telecommunications, and is better insulated from political pressure. Therefore, Congress should reform the Clayton Act to grant the FCC sole review authority and to remove the DOJ from the process. Additionally, to respond to scholars' concerns, the FCC should effectuate two categories of internal reforms. First, voluntary commitments should be limited to concerns about the specific merger at hand. The FCC should lead an initiative to memorialize this policy. Second, the FCC should reduce review times. Congress should pass a bill holding the FCC to a 180-day shot clock, absent a judicial extension. This section examines the legislative changes and the internal changes to the FCC needed to actualize this proposal.

1. Congress Should Revise the Clayton Act to Exempt Mergers Involving Telecommunications Licenses from DOJ Review

In order to remove the DOJ's role in telecommunications mergers, Congress must modify the Clayton Act. Congress should add a clause to the Clayton Act, clarifying that mergers involving FCC licensees are exempt from traditional antitrust review by the DOJ/FTC. At present, several

147. Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16PM), https://www.lawfareblog.com/independence-and-accountability-department-justice [https://perma.cc/AM78-5PNV].

148. Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff, POLITICO (Jan. 27, 2017), https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000 [https://perma.cc/LWW5-9AKJ].

149. *See* Goldsmith, *supra* note 150.

categories of commercial activity are exempt from the Clayton Act.[150] This includes professional baseball, union activity, farm cooperatives, and insurance.[151] To adopt this model, Congress should amend the Clayton Act by adding a Section to Chapter 1. After Section 17, which addresses the labor exemption,[152] a new Section 18 should state that telecommunications mergers are reviewed by the FCC instead of the DOJ/FTC. This would establish a clear division of labor and place the onus on the FCC to carry out its role.

2. The FCC Should Issue Guidelines Limiting the Nature of Voluntary Commitments

While Congress is preparing legislative changes, the FCC should take action to assuage scholars' concerns about its own merger review process. First, the FCC should reduce the scope of voluntary commitments. At the time of this Note's publication, the FCC Commissioners demonstrated support for such an initiative. In 2012, then Commissioner Ajit Pai testified that the FCC "could and should stop imposing conditions and insisting upon so-called 'voluntary commitments' by parties that are extraneous to the transaction and not designed to remedy a transaction-specific harm."[153] And in the CenturyLink/Level 3 Order in 2017, as Chairman, Pai called for "narrowly tailored, transaction specific conditions that address the potential harms of a transaction."[154] Under Chairman Pai's leadership, the FCC should issue guidelines explaining the FCC's substantive and procedural goals with respect to voluntary commitments.

3. Congress Should Pass Legislation Holding the FCC to the 180-Day Timeline Absent a Judicial Extension

Second, the FCC should take action to reduce merger review times. In the status quo, the FCC may stop and start the "shot clock" at any time, and mergers often take longer than 180 days.[155] Congress should consider passing

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150. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 364 n.11 (1953) ("Congress has expressly exempted certain specific activities from the Sherman Act, as in § 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 (labor organizations), in the Capper-Volstead Act, 42 Stat. 388-389, 7 U.S.C. §§ 291, 292 (farm cooperatives), and in the McCarran-Ferguson Act, 59 Stat. 34, 61 Stat. 448, 15 U.S.C. (Supp. V) § 1013 (insurance).").

151. *Id.*

152. 15 U.S.C. § 17.

153. Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before The Subcommittee On Communications And Technology Of The United States House Of Representatives Committee On Energy And Commerce, *Oversight Of The Federal Communications Commission*, https://docs.fcc.gov/public/attachments/DOC-315058A1.pdf [https://perma.cc/J9DB-UELR].

154. Hogan Lovells, *FCC Commissioners Debate Adjustments to Merger Review Standard*, BLOG: FOCUS ON REGULATION (Nov. 7, 2017), https://www.hoganlovells.com/en/blogs/focus-on-regulation/fcc-commissioners-debate-adjustments-to-merger-review-standard [https://perma.cc/ZB29-47RT].

155. *See Frequently Asked Questions About Transactions*, *supra* note 5.

legislation similar to S.2847, which would have required that the FCC abide by the 180-day limit absent a judicial extension.[156] If 180 days is too short, then the FCC may impose a longer limit. The goal of such a reform should be to evaluate a practical limit, and then abide by it except in extenuating circumstances.[157]

C. Rebutting Potential Counter-Arguments

Critics of this proposal might raise one of several counter-arguments. First, they might argue that the FCC's merger review authority, which is conditioned upon the transfer of a telecommunications license, encompasses either too many or too few companies. Second, they might argue that the FCC does not have the requisite economic expertise to be the sole reviewer of telecommunications mergers. Third, they might argue that this proposal will have undesirable effects such as the approval of an anticompetitive merger or the denial of neutral and procompetitive mergers. Finally, some argue that this proposal would open a Pandora's Box by calling other dual review systems into question. These concerns are surmountable, either because they rest on invalid assumptions or because, while valid, the FCC can easily address them.

1. This Proposal is Neither Underinclusive nor Overinclusive

One potential concern regarding this proposal is that the FCC could have authority over a merger that involved only one minor license transfer. In this scenario, the FCC's expertise in telecommunications would be of little benefit, and the DOJ would be deprived of an opportunity to participate. To avoid this problem, the DOJ should retain review authority over mergers where FCC-regulated activity is below a specific threshold.[158] When a proposed merger fell beneath the threshold, both the FCC and the DOJ would conduct reviews. Congress should be responsible for creating an initial threshold, and should seek testimony from the FCC and the DOJ as part of the legislative process. Congress should permit the DOJ and FCC to revise this threshold, if they desire, through the issuance of a joint Memorandum of Understanding.

Critics may also fear that a telecommunications company will avoid FCC review by divesting itself of any assets that would require license transfers. For example, Time Warner sold its television station prior to its

156. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, S. 2847, 115th Cong. (2018).

157. These internal reforms could be effectuated in the form of an amendment to the Telecommunications Act or an internal policy change. If Congress is unsatisfied with the FCC's commitment to this issue, it should pursue an amendment.

158. The threshold should be a specific percentage of market activity, rather than a percentage of the party's business. A large company may have a large impact on the telecommunications market as a whole, but telecommunications may constitute only a small share of that company's business.

merger with AT&T, successfully avoiding FCC review.[159] In these limited cases, the DOJ should retain review authority. Additionally, the FCC's expertise in telecommunications would not be needed in such a scenario.

2. The FCC Has the Economic Expertise Needed to Lead this Review Process

Critics have questioned whether the FCC has the economic expertise required to lead merger reviews.[160] As Chairman Pai acknowledged in 2017, "the state of the FCC's economic analysis and data collection is not where it needs to be."[161] In response to this, Chairman Pai announced the creation of a new Office of Economics and Analytics (OEA), whose role is to better integrate economic analysis into FCC decision-making.[162] The office will consist of four divisions: the Economic Analysis Division, Industry Analysis Division, Auctions Division, and Data Division.[163] If enacted according to plan, the Economic Analysis Division (EAD) will play a key role in merger reviews.[164]

Even under the status quo, the FCC hires economic experts for merger reviews. When the FCC reviews a major transaction, it announces a team of experts—several of whom have economic backgrounds.[165] For example, the review teams for the Comcast/Time Warner Cable and AT&T/DirecTV mergers included William Rogerson, the former chief economist of the FCC, and Shane Greenstein, a Northwestern University professor with a focus on "the business economics of computing, communications and Internet

159. David Shepardson, *FCC approves Time Warner sale of Atlanta TV station*, REUTERS (Apr. 17, 2017, 8:43 PM), https://www.reuters.com/article/us-timewarner-fcc-meredith-idUSKBN17J1N8 [https://perma.cc/KGN8-M434].

160. Interview with Dan Kirkpatrick, Attorney, Fletcher, Heald & Hildreth (Nov. 15, 2018).

161. Ajit Pai, Chairman, FCC, *The Importance Of Economic Analysis At The FCC* (Apr. 5, 2017), https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy [https://perma.cc/N7C9-ZWP7].

162. *Id.*

163. *See* Memorandum from Wayne Leighten to Ajit Pai, FCC Chairman, 6 (Jan. 9, 2018), https://docs.fcc.gov/public/attachments/DOC-348640A1.pdf [https://perma.cc/4JG5-MCSQ].

164. According to the FCC's planning document, EAD will "work with the transaction team to develop data requests, review the merger application, meet with outside economics consultants representing stakeholders, review and summarize economic comments and relevant economic analysis, analyze submitted data and other relevant material for empirical support for claimed economic harms or benefits, and draft sections of orders addressing claims of economic harms and benefits." *Id.* at 9.

165. *See, e.g.*, Brian Fung, *These are the FCC merger hawks who'll decide your cable future*, WASH. POST: THE SWITCH (July 7, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/07/07/these-are-the-fcc-merger-hawks-wholl-decide-your-cable-future/?utm_term=.e2d6bfaac521 [https://perma.cc/DK9Q-AWBW].

infrastructure."[166] The FCC has also hired individuals with experience in the traditional antitrust agencies.[167]

3. This Proposal Would Not Lead to the Approval of Anticompetitive Mergers, Nor Would it Lead to the Denial of Procompetitive Mergers

Scholar Laura Kaplan has expressed concerns that, if the FCC obtains sole review authority, the FCC could approve an anticompetitive merger on the basis that it serves the public interest.[168] However, this hypothetical assumes the existence of a merger that passes the FCC's competition test, while failing the DOJ test. This scenario has never occurred and, given the similarity of the agencies' competition analyses, it seems highly unlikely.[169]

Kaplan also fears that the FCC would deny a neutral or pro-competitive merger on the basis that it doesn't satisfy the public interest.[170] However, this is only a concern if—like Kaplan—one dismisses the legitimacy of the public interest standard.[171] Kaplan notes that the public interest standard is "speculative" and "unbounded."[172] All merger review is necessarily speculative.[173] The "unbounded" nature of FCC review is, concededly, problematic. As discussed above in Part B(II), the FCC should only be able to impose voluntary commitments that are specific to competition concerns.[174]

4. This Proposal Would Not Open a Pandora's Box

Additionally, critics argue that granting the FCC review authority over telecommunications mergers could open a Pandora's box.[175] If the government accepts the premise that expert agencies should control merger review, does this mean that other dual review systems should be eliminated? For example, the banking industry utilizes dual review and could be analogized to telecommunications. [176] This Note does not rule out the possibility that other dual review systems should be reevaluated. However,

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166. *Id.*

167. Press Release, *Review Teams Announced for Proposed Comcast-Time Warner Cable-Charter And AT&T-DirecTV Transactions* (July 7, 2014), https://www.fcc.gov/document/comcast-time-warner-cable-charter-and-att-directv-transactions [https://perma.cc/TW6K-SXXY] (For example, the FCC hired Jamillia Ferris, a former Chief of Staff and Counsel to the Assistant Attorney General of the DOJ's Antitrust Division.)

168. *See* Kaplan, *supra* note 31, at 1602.

169. *See supra* note 169.

170. Kaplan, *supra* note 31, at 1602-03.

171. *Id.* at 1603.

172. *Id.*

173. *See supra* p. 14.

174. *See supra* p. 26.

175. *Id.*

176. J. Robert Kramer II, *Antitrust Review in Banking and Defense,* 11 GEO. MASON L. REV. 111, 115-17 (2002).

Congressional action is required in order to alter merger review processes, and it is unlikely that Congress would eliminate all dual reviews without a careful consideration of industry nuances.

IV. CONCLUSION

In the telecommunications industry, an overhaul of the merger review process is long overdue. In weighing whether the DOJ or FCC should lead the process, the FCC has four distinct advantages: its comprehensive public interest standard, subject matter expertise in telecommunications, a transparent review process, and independence from political pressure. Congress should follow the successful examples of the railroad and airline alliance agreements[177] and grant the FCC sole review authority of telecommunications mergers.

177. *See* Kaplan, *supra* note 31, at 1602 n. 281.