Remarks of Commissioner Meredith Attwell Baker

Towards a More Targeted and Predictable Merger Review Process

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I want to start a conversation about the proper FCC role in reviewing mergers, and to outline how I intend to review future transactions. I fear that the delay and uncertainty surrounding our current merger review process can have the unintended consequence of chilling consumer-enhancing investment.

While the NBC/Comcast deal approved in January certainly informs my views, I want to avoid as best I can a Monday Morning Quarterback analysis of that deal. The challenges faced in that review are symptoms of long-term structural issues in how the Commission approaches merger reviews. In fact, since the late 1990s, then-Commissioners Michael Powell[1] and Harold Furchtgott-Roth,[2] as well as a host of academics,[3] have raised serious reservations with our merger review process. Many of those reservations apply with equal—if not greater—force today, and several of their reform proposals merit renewed consideration.

Let's assume you are the CEO of a company and you have $10 billion to invest. You are considering acquiring a company with broadcast and wireless assets. Looking at that deal, you need to know if it serves your shareholders' best interests, and whether it is the right long-term vision for the company. If the deal can be structured correctly, you are willing to infuse the new company with billions in capital and to create new jobs. Your decision to invest is complicated today by the uncertainty surrounding the necessary regulatory approvals.

What does that mean in practice? You have to factor in approximately a year of regulatory scrutiny. Some deals take longer, 18 months or more. More than likely, merger conditions will also be imposed, but you will have little sense of the cost, complexity, length, or even topic of those conditions when you make the deal. In recent years, the FCC has imposed conditions mandating jobs to be created in a

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[1] Remarks of Commissioner Michael Powell, *Letting Go of the Bike,* Practising Law Institute (Dec. 10, 1998); Opening Statement of Michael Powell before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce on the Telecommunications Merger Act of 2000 (Mar. 14, 2000); Statement of Commissioner Michael Powell Concurring in Part, Dissenting in Part, *Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech").*

[2] Harold Furchtogott-Roth, *Failure of FCC Merger Reviews Communications Law Does Not Necessarily Perform Better than Antitrust Law,* Manhattan Institute Conference (Dec. 9, 2002); Separate Statement of Commissioner Harold Furchtgott-Roth Concurring in Part, Dissenting in Part, *SBC/Ameritech.*

[3] Randolph J. May, *Any Volunteers,* Legal Times (Mar. 6, 2000); Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC,* Federal Communications Law Journal, Vol. 61, No. 1 (2008); Rachel E. Barkow and Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers,* University of Chicago Legal Forum (2000); Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium,* 43 HOUSTON L. Rev. 1311 (2007); Thomas M. Koutsky and Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the 'Public Interest' Standard,* Phoenix Center Policy Bulletin No. 18 (May 2007).

particular region, a billion dollars to be invested in a geographic market, and broadband services to be offered on specific terms and conditions.

So, ask yourself, would you subject yourself to the FCC merger review process? Or in our global market would you look elsewhere to invest in telecom companies overseas or more certain investments in other industries altogether? My concern is that you might walk away, and how many other consumer-enhancing and job-creating deals are not getting done today.

To his credit, Chairman Genachowski has dedicated significant internal resources to institutional reform to update our procedures. To date, our merger review rules have been missing from that broader review. We have a clear statutory obligation to closely scrutinize transactions and reject those that violate the Communications Act, our rules, or fail to serve the public interest. We have the matching obligation to do so in a predictable, timely, and equitable manner. We need a better means to achieve these twin obligations, and I urge the Chairman to take a fresh look at our merger review process.

There are three specific questions that I want to focus on. Should telecom mergers be subject to dual government reviews, one by the FCC and one by either the DOJ or FTC? Do FCC merger reviews take longer than necessary? Does the FCC's practice of adopting wide-ranging merger conditions serve the public interest?

The Dual Review of Telecom Mergers

The first issue is a statutory challenge. Congress explicitly set up a dual federal review of telecommunications and media transactions. Antitrust agencies—either the FTC or DOJ—have authority to evaluate the competitive implications of the transaction just as they do for any industry.

At the same time, the Commission has independent authority to review transfers of FCC licenses, primarily under sections 214 and 310 of the Act. The FCC has the obligation to ensure that the transfer would not violate the Act or our rules, and that the acquiring entity is qualified to hold the license. Those transactions must also be in the public interest. In the *Bell Atlantic/NYNEX* merger, the Commission held that "the public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws."[4]

Indeed, over time, our review of the license transfer has morphed into a full-fledged merger review: similar to, but not identical to, the antitrust review. Our role should be to transfer a license, not bless the entire transaction. While the Commission had a strong working relationship with the Department of Justice during the NBC/Comcast transaction, that relationship does not alter the inherently duplicative nature of these reviews. Why are mergers of telecom companies subject to a more searching review than transactions in many other industries?

We should work with Congress to help evaluate whether this dual review structure as currently configured remains the best use of limited government resources in this era of tightening budgets.

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[4] *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 2 (1997).

A More Predictable and Defined Timeline

The second issue goes directly to the FCC process and the length of Commission reviews. The NBC/Comcast merger took too long in my view (355 days), yet it took about as long as similar transactions have taken in the recent past.

The length of FCC merger reviews has been an issue for over a decade. In the wake of the 1996 Act, a series of delayed mergers brought congressional scrutiny to the Commission's review process. SBC/Ameritech took 439 days; Bell Atlantic/GTE took 623.[5] Multiple legislative proposals were introduced to either eliminate FCC merger review authority altogether or to establish a fixed review timetable, as short as 60 days.[6]

In response to this congressional pressure, the FCC in early 2000 established a 180-day merger shot clock. To call it a shot clock is a bit deceiving. While the Commission "endeavor[s] to meet its 180-day goal," it is under no obligation to do so.[7] The Commission retains the authority to stop the clock at its own discretion, and, in some cases, the clock has stopped multiple times for over a hundred days. Further, the clock does not even begin until a Public Notice is released, which itself can take a couple of weeks.

As a result, the 180-day goal is rarely, if ever, met for major deals. Since 2001, major transactions that received heavy scrutiny and media coverage took on average 321 days, almost double the goal. The shortest Sprint/Nextel just missed the goal at 181 days.[8] The longest were 505 days for XM/Sirius and 429 days for Adelphia/Comcast/Time Warner.[9] Amazingly, transactions unwinding assets took almost as long, if not longer. Splitting Time Warner and Time Warner Cable took 243 days.[10]

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5 *See SBC/Ameritech; GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000).

6 S.1125, the Telecommunications Merger Review Act (May 26, 1999); HR.2533, the Fairness in Telecommunications License Transfers Act (July 15, 1999).

7 Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers (available at http://www.fcc.gov/transaction/timeline.html) (last visited Mar. 1, 2011).

8 *Applications of Nextel Communications, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations,* Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005)

9 *See 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 and Report and Order, 23 FCC Rcd 12348 (2008); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006)

10 *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Time Warner Inc., and its subsidiaries, Assignor/Transferor To Time Warner Cable Inc., and its subsidiaries, Assignee/Transferee,* Memorandum Opinion and Order, MB Docket No. 08-120, DA 09-73 (2009)

Moving forward, we should either retire the shot clock or actually enforce it. The only choice—in my view—is to enforce it. A fixed timetable is critical to providing applicants and interested parties the certainty needed to invest, and the current structure simply takes too long.

The practical concern with such open-ended reviews is uncomplicated. At least two companies' ability to conduct business is up in the air for almost a year's time. The old owners are wary to make decisions that would prejudice the new company's direction, and the new owners are unable to effectuate the synergies and business plans that made the deal attractive in the first place. In industries as dynamic and fast moving as the ones we regulate, a year is an eternity. This extended period of limbo places great strain on both the companies and their employees, and provides an artificial competitive advantage for other industry players.

The lack of a fixed timetable also increases the Commission's leverage to extract conditions. Today, the merging parties have the false choice to accept potentially unpalatable conditions or face months of additional review.

The recommendation: we should approve, deny, or designate for hearing a license transfer within 180 days of the application being filed. The clock should never stop running, and we should provide expanded updates and deal status on our website. To protect against the potential risk of applicant gamesmanship through delay or refusal to provide necessary information, the Commission should retain the ability to extend the shot clock one time for up to 60 days upon a finding that the parties have failed to respond in a timely and comprehensive manner. Any such extension must be structured so that it is the exception, not the rule. Too often, time frames left to the Commission's discretion get extended in the normal course of business. Similarly, to protect against gamesmanship from commenters, the record should close with respect to any new conditions or complaints no later than day 150 in order to provide staff time to finalize the decision and any necessary conditions.

This streamlined structure would provide more than sufficient time for a thorough and searching review of any major transaction. More modest transactions should never take this long. One approach would be for the Commission to adopt a faster track for smaller transactions or a Hart Scott Rodino-like waiting period to conserve resources and expedite reviews for noncontroversial transactions.

The key to me is a known time frame for investors to build into their decision-making. It is critical to highlight that tightening the time frame need not—nor should it—reduce the rigor of our review.

Establishing Common Sense Limits on Merger Conditions

The last issue goes to how the FCC imposes merger conditions. The Commission's long-standing practice is to adopt merger conditions as part of our public interest analysis. These conditions have become a cost of doing business with the agency. We publicly state that merger conditions should be transaction-specific. Too often while they may be applicant-specific, they fail to be transaction-specific.

The process is always at risk of devolving into how to get more "benefits" from a given transaction: playing down the offered benefits and overstating predicted harms to compel more conditions. Concerns with our regulation-by-condition approach are not new, and we clearly need a more predictable and judicious process with respect to imposing conditions.

This is not a question of whether the policies promoted by merger conditions are a positive development or the correct policy. For example, I fully support Comcast's commitment made in connection with its acquisition of NBC to deploy additional broadband facilities and to design a low-income program to address our nation's broadband adoption challenges. This is good corporate citizenship and I commend

it. I fail to see, however, any nexus of those conditions to the combination of NBC programming and Comcast distribution assets.

My concerns go to whether merger conditions are an appropriate vehicle to implement new industry-wide policies better addressed through a formal rulemaking. Our goal of competitive and technological neutrality is undermined by imposing different rules and policies on those that seek merger approval. Two of the four major wireless carriers are barred by merger conditions from receiving universal service support; the other two are free to receive support. Whatever your view on the proper universal service policy, that policy should apply equally to all similarly situated providers and the consumers they serve.

Professor Christopher Yoo has similarly noted that "the current [merger review] policy result[s] in piecemeal regulatory policy that does not gain the usual benefits of the full administrative process."[11] Acting outside our traditional rulemaking authority is problematic because, by using so-called "voluntary" conditions, the agency is able to effectively shield its policy from judicial review. By shaping our merger analysis through extensive interaction with the applicants, we also run the risk that our policy decisions are short-sighted or incomplete if we look only at the applicants' circumstances. Our process would benefit from the more inclusive rulemaking approach that provides opportunity for all to participate in shaping policy. Lastly, acting by condition gives the Commission unbridled discretion to further any policy objective it seeks, even those well beyond our normal statutory limits.

Our practice of imposing broad conditions on transactions also invites competitors and special interest groups to seek conditions for their own advantage—the FCC's form of earmarks. We have seen parties demand that applicants increase their philanthropic giving. Others ask for public access to all the applicants' future commercially sensitive deals. Companies seek to decrease their costs, increase their leverage, and harm a competitor's business. This practice delays and muddles our review, and reduces significantly the ability of merging parties to predict the shape and form of conditions.

The recommendation: As an easy first step, we should retire the notion that these conditions or commitments are voluntary. Commissioner Kathleen Abernathy was correct that conditions "are the quid pro quo that merger applicants must accept in order to get timely approval."[12] Using the leverage of a merger denial or merger delay to extract concessions from the applicants cannot fairly be characterized as a voluntary process. They should simply be called conditions.

To provide a common sense check on the breadth and scope of merger conditions, we should also craft a general framework with built-in rebuttable presumptions as to the types of enforceable conditions that will be sought going forward and the factual showing necessary to justify those conditions.

I believe a more defined framework focused on merger-harm-specific conditions would provide a more predictable review process, and help put an end to regulation-by-condition. It would also limit the debate to those issues that are truly merger-specific, and weed out parties seeking regulatory delay for their own competitive advantage.

Specifically, the core of this framework should be a clear understanding that conditions will only be imposed to check against actual violations of the statute, the FCC rules, or to remedy documented public

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[11] Christopher S. Yoo, *Network Neutrality and the Problems with Policymaking Through Merger Conditions,* Perspectives from Free State Foundation Scholars, Vol. 2, No. 1 (Jan. 8, 2007).

[12] Statement of Commissioner Kathleen Q. Abernathy, *Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18437 (2005)

interest harms. Violations of the Act or rules are self-explanatory and non-controversial. With respect to documented public interest harms, any corresponding condition must have a clear nexus to the actual public interest harm, which must be supported by the evidentiary record. The resulting condition needs to be more than merger-specific, it must be merger harm-specific, narrowly tailored and targeted to mitigate against the documented harm. The condition must also be directly proportional to the identified harm that the merger poses.

To provide some additional limiting principles as to the type of merger-harm-specific conditions that will fit within that framework, the Commission should also establish a rebuttable presumption against any conditions that fall within the following four categories.

First, conditions should not adversely affect the rights of entities that are not parties to the transaction. Conditions are negotiated between the FCC and the parties. It is fundamentally unfair to take away or limit the rights of other industry players that are not part of those negotiations. To the extent a condition adversely affects third parties, it suggests the condition is too broad and addresses industry-wide issues that are properly resolved in a rulemaking proceeding.

Second, conditions should not pertain to matters subject to an active rulemaking proceeding.[13] Too often conditions seemingly serve the immediate agenda of the Commission without any clear connection to the transaction under review. When there is an open proceeding, imposing a condition on the same topic begs the question whether it is a test case for final rules, a replacement for rules that cannot be agreed to, or simply achieving a policy objective through different means. In these cases, the Commission should bear the burden of clearly demonstrating that there is a transaction-specific challenge that requires individualized rules different from general rules that could be adopted in the open docket.

Third, conditions should not be based on predictions of speculative future harms, particularly with respect to new and evolving markets and services. Regulating the instant messaging market by condition in the *AOL/Time Warner* proceeding should remain a cautionary tale. In that merger, the Commission imposed interoperability and other conditions on AOL's instant messaging service.[14] Those conditions were lifted only two years later when our predictions about an evolving market proved incorrect.[15] In these instances, we run the significant risk of market distortion in the development of new markets and services. I share Chairman William Kennard's view that at the "nascent stage" in the development of a market, "one should not presume to have a regulatory cure for every anticipated marketplace ailment.[16] We must allow the marketplace to evolve."[17] And, to paraphrase Chairman Powell, the proper inquiry for the

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[13] I would define active rulemakings to include any rulemakings initiated or refreshed in the six months prior to the transaction or during the pendency of the transaction review.

[14] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc and America Online, Inc, Transferors, to AOL Time Warner Inc. Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001)

[15] *Petition of AOL Time Warner Inc. for Relief from the Condition Restricting Streaming Video AIHS,* Memorandum Opinion and Order, CS Docket No. 00-30, FCC 03-193 (2003)

[16] Statement of William E. Kennard on ATT/TCI (Feb. 17, 1999).

[17] *Id.*

Commission should be whether the relevant market or service is mature enough for us to have confidence that the predicted "harms are sufficiently probable to warrant direct government intervention."[18]

Fourth, any conditions should be within the Commission's statutory authority. We should not do through condition what we could not do through rulemaking, whether it is the subject matter of the condition or the particular remedy chosen.

The last part of the framework should go to how long conditions remain in force. Some conditions by their very nature must be permanent. Others are temporary conditions that serve as a transition for a fixed amount of time. There should be a presumption that no temporary conditions should last more than three years given the dynamic nature of the industries we regulate. We have to keep in mind that Hulu and Android are only three years old. The iPad just celebrated its first birthday and the Xoom has just made its debut. Conditions that last longer risk forcing business relationships and services that no longer reflect consumer demands, technological realities, or marketplace conditions.

Any conditions imposed under this framework should be properly documented and separately discussed. The FCC should state clearly the specific documented harm or violation that triggers the need for the condition, and how the proposed condition remedies that harm or violation in a proportional manner. If the Commission seeks to adopt conditions inconsistent with the presumptions outlined today, the Commission should also include a showing demonstrating that the unique facts and circumstances of this merger necessitate a departure from the framework.

I am sympathetic to the view that the FCC's ability to impose conditions should be even more severely limited to cure only actual violations of the statute or Commission rules, and that my four presumptions ought to be outright prohibitions. Given the Commission's past conduct, there is a certain appeal to bright line rules, which would eliminate the unchecked discretion in today's process. My concern is that bright line rules may not provide the flexibility we need to deal with all transactions and all identified public interest harms, but I welcome that debate.

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The current FCC merger review process is ripe for an overhaul. We should work with Congress to update our rules and procedures to better serve consumers and investors. Fundamental to that reform is to establish an actual timetable for merger reviews and to establish some limiting principles around negotiated merger conditions.

Thank you.

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[18] Press Statement, FCC Commissioner Michael Powell, Approval of AOL-Time Warner Merger (Jan. 11, 2001),