Federal Communications Commission

End Redundant Review of Telecom Mergers by the Federal Communications Commission

RECOMMENDATION

Eliminate the Federal Communications Commission's (FCC's) merger review authority.

RATIONALE

Mergers and acquisitions among communications firms today typically undergo a double review process. First, they must be approved by the relevant antitrust authority (either the Antitrust Division of the Department of Justice or the Federal Trade Commission). Then, they undergo scrutiny by the FCC.

The Communications Act does not mandate that the FCC review mergers. The merger review is an outgrowth of the FCC's authority to approve license transfers that the merging firms may hold. These licenses, however, may represent a minimal part of the merger and present no issues in themselves. Instead, they are a hook for the FCC to embark on its own lengthy review of such transactions.

For the most part, the FCC review is redundant, covering much of the same ground as the antitrust agencies, but the "public interest" standard used by the FCC is broader than the competition-based standard used under antitrust law. This has provided the FCC with virtually unlimited discretion to examine any issue or demand any concession from the merging firms, even if it has little or nothing to do with the economic effect of the merger on the marketplace.

The FCC's merger review process is unnecessary and harmful, and should be eliminated, leaving merge review with the antitrust authorities.

ADDITIONAL READING

- Harold Furchtgott-Roth, "The FCC and Kafkaesque Merger Reviews," *Forbes*, April 19, 2016.
- Harold Furchtgott-Roth, "The FCC Racket," *The Wall Street Journal*, November 5, 1999.
- James Gattuso, "AT&T and T-Mobile: Good Deal, Bad Process," Heritage Foundation *WebMemo* No. 3252, May 13, 2011.
- James L. Gattuso, "AT&T-Bell South Merger: Regulation Through the Backdoor," American.com, January 6, 2007.

Transfer Broadband Competition Authority to the Federal Trade Commission

RECOMMENDATION

Return broadband competition policy enforcement from the FCC to the Federal Trade Commission (FTC).

RATIONALE

In 2015, the FCC imposed new "open-Internet" (or "net-neutrality") rules on broadband Internet service providers (ISPs). These rules prohibit these ISPs from engaging in any conduct that would favor one type of Internet content over another. Among these rules are a ban on blocking content; "throttling" or slowing down the delivery of content; and "paid prioritization," under which content providers pay a fee to have their content delivered on an expedited basis.

These rules are misguided. The banned activities present little danger to consumers, and in fact are a feature of most well-functioning markets. Premium pricing (and discounting) adds to consumer choice and provides a way for challengers in an industry to differentiate themselves and compete with bigger, more established firms. Because of this, the FCC has already proposed repealing the rules.

This is not to say that ISPs could never successfully abuse their market power. However, eliminating FCC network-neutrality rules need not leave consumers without recourse. Broadband consumers could still be protected from harm by the competition laws, which have applied to most other areas of the economy for over a century. (The competition laws also applied to the ISPs until the 2015 net-neutrality rules were adopted.)

Competition laws generally require evidence that a company is abusing its dominant role in the marketplace rather than imposing arbitrary bans on categories of activity. While not without flaws, these laws are ultimately based on economic analysis applied on a case-by-case basis, rather than sweeping prohibitions of the FCC's rules.

The agency best suited to administer competition law is the FTC, which has focused on such policy issues for over a hundred years—and in fact had responsibility for broadband-competition policy before 2015.

Institutionally, the FCC is less suited to this job. Not only does it have a history of politicized decision making, but—because its purview is limited to communications—it focuses disproportionately on that sector, rather than on other marketplace problems. The FTC, while not immune from politics, has by contrast, relied more on economic analyses. And, because of the broad scope of jurisdiction, it is better able to assess the relative need for intervention.

The FCC should return broadband oversight responsibilities to the FTC.

ADDITIONAL READING

- Alden F. Abbott, "Time to Repeal the FTC's Common Carrier Jurisdictional Exemption (Among Other Things)?" Heritage Foundation *Commentary*, October 18, 2016.
- Alden F. Abbott, "You Don't Need the FCC: How the FTC Can Successfully Police Broadband-Related Internet Abuses," Heritage Foundation *Legal Backgrounder* No. 154, May 20, 2013.
- James L. Gattuso and Michael Sargent, "Eight Myths About FCC Regulation of the Internet," Heritage Foundation *Backgrounder* No. 2982, December 17, 2014.
- Maureen K. Ohlhausen, "Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously," *Colorado Technology Law Journal*, Vol. 15 (2016), p. 119.