

COMMENT

Optimizing Dual Agency Review of Telecommunications Mergers

The 2008 merger between XM Radio and Sirius Radio showcased the Federal Communication Commission's (FCC) authority to review proposed mergers and acquisitions.¹ The FCC's merger review authority overlaps with that of the Department of Justice (DOJ), as the Commission conducts its own inquiry into the antitrust justification for the proposed merger—but with a thumb on the scale against approval, requiring merging parties to prove affirmatively that the merger is in the public interest.² Justified by the FCC's special expertise in the complex and evolving telecommunications sector,³ this concurrent authority to conduct antitrust review has provoked critics to charge that any economic benefits and public interest concessions that the FCC obtains are outweighed by the costs of duplicative regulation.⁴ The absence of a statutory time limit for the Commission's review threatens to drain telecommunications mergers of their economic benefits.

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1. 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 (Aug. 5, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf [hereinafter XM-Sirius Order]; *Satellite Radio Firms' Merger Wins Approval From FCC*, WALL ST. J., July 26, 2008, at B5.
 2. The public interest inquiry includes, among other factors, the impact of any merger on competition under a markedly different standard than the Horizontal Merger Guidelines. The inquiry involves a holistic consideration of whether any benefits outweigh the (presumed) anticompetitive harm of consolidation. See *infra* text accompanying note 19.
 3. See, e.g., James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMM'LAW CONSP'CTUS 195, 206 (1998) ("The unique characteristics of the telecommunications industry require a specialized agency to regulate competition.").
 4. *Id.* at 205-06 (discussing the most common criticisms of dual agency review of telecommunications mergers).

This Comment suggests a judicial solution to the pitfalls of overlapping antitrust review authority. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) provides a waiting period for the DOJ to complete its review before firms above a certain size may consummate their merger. In almost every industry context except FCC review, this deadline's expiration permits firms to merge. The Communications Act of 1934 contains no such provision, so merger review under its substantive authority impairs the procedural impact of the HSR Act. If and when parties appeal FCC merger approval orders to a federal court of appeals, conditions that the FCC adopts after the DOJ statutory review deadline should be held unenforceable. By applying the canon of construction that more recent and specific statutes should govern over generally applicable statutes, holding post-deadline merger conditions unenforceable would serve two central aims. First, it would relieve the statutory tension inherent in having two procedural standards of overlapping review authority, which undermines the HSR Act's goal of expediting complex merger review.⁵ Second, it would compel each agency to conduct its analysis pursuant to its comparative advantage rather than to duplicate efforts, while still allowing the FCC to weigh the unique factors that impact the public interest.

I. TWO STANDARDS OF ANTITRUST REVIEW OF TELECOMMUNICATIONS MERGERS

While the FCC's authority to review telecommunications mergers overlaps with the DOJ's review authority,⁶ the standards that each agency employs differ both substantively and procedurally. Under section 7 of the Clayton Act, the DOJ may prohibit any acquisition that may "substantially . . . lessen competition, or . . . tend to create a monopoly."⁷ The HSR Act of 1976 established a formal preclearance mechanism for reviewing mergers that might violate the Clayton Act.⁸ Its blanket coverage requires merger preclearance if

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5. 122 CONG. REC. 30,877 (1976) (statement of Rep. Rodino) (noting that "the prospect of protracted delays of many months" prompted Congress to remove an "automatic stay" provision from the bill).
 6. Though the Federal Trade Commission (FTC) and DOJ possess concurrent authority to review mergers under the Horizontal Guidelines generally, the FTC's authority does not extend to telecommunications—it cannot review mergers of common carriers under the Clayton Act. 15 U.S.C. § 21(a) (2000).
 7. *Id.* § 18.
 8. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 18a).

the newly merged commercial entity “would hold an aggregate total amount of the voting securities and assets” greater than \$200 million.⁹ One primary goal of the Act was to overcome difficulties in “unscrambling” mergers that occurred before the DOJ or FTC could undertake enforcement action—once transactions were consummated and two companies combined, no effective remedy would be available to undo the merger.¹⁰

The HSR Act’s preclearance process also ensures timely DOJ review of the proposed merger. Notification of a proposed merger triggers a thirty-day waiting period that allows the DOJ to determine whether the transaction may be consummated.¹¹ If the DOJ takes no action by the end of the waiting period, the parties may complete their transaction.¹² On the other hand, if the DOJ decides to investigate further the competitive effects of the merger, it may request additional information from the parties before the initial waiting period expires. Upon receiving the requested information, which yields a large volume of documents and testimony from the parties, the DOJ evaluates whether the companies have “substantially complied” with its requests for full documentary information.¹³ A finding of substantial compliance triggers a new thirty-day waiting period, in which the DOJ must complete its review.¹⁴

Any DOJ challenge to a proposed merger requires the DOJ to bear the burden of proving a violation of the antitrust laws.¹⁵ This procedural posture is crucial—mergers are presumed not to substantially lessen competition absent a

9. 15 U.S.C. § 18a(a)(1).

10. See Kathryn J. Sedo, *Cooperative Mergers and Consolidations: A Consideration of the Legal and Tax Issues*, 63 N.D. L. REV. 377, 390 n.68 (1987).

11. 15 U.S.C. § 18a(b)(1)(B).

12. *Id.* § 18a(a), (b)(2).

13. *Id.* § 18a(e)(1)(B)(i)(II).

14. *Id.* § 18a(e); see Matthew S. Bailey, Note, *The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests*, 67 OHIO ST. L.J. 433, 443 (2006). In practice, DOJ or FTC review often extends beyond the initial thirty-day period, but the effect of agency failure to seek further extensions remains: once the waiting period expires, the parties may consummate the proposed merger. 15 U.S.C. § 18a(a). If, during the review period, the DOJ concludes that the merger will tend to “substantially lessen competition,” it may file suit to enjoin the merger. *Id.* §§ 18, 18a(f). Merging parties typically will reach settlement through a consent decree with the Department rather than risk their transaction being permanently enjoined. See Bailey, *supra*, at 443.

15. 15 U.S.C. § 18; *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975). Importantly, the DOJ or FTC may still challenge a merger after the termination of this waiting period, though the HSR Act’s preclearance mechanism largely obviated the need for post-merger review. See Scott A. Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41 (2004).

contrary showing. Against this backdrop, the DOJ's analysis of proposed mergers results in a predictable standard that allows companies to forecast the benefits of the merger, discounted by the probability of enforcement. Rather than standing as an impediment, the traditional DOJ review process serves as a loose filter for transactions that might substantially undercut competition.¹⁶

The FCC reviews potential mergers pursuant to its broad license transfer authority under the Communications Act¹⁷ to determine if the transactions promote "the public interest, convenience and necessity."¹⁸ The public interest standard is construed broadly—the Commission inquires into whether the proposed license transfer might violate any provisions of the Communications Act or "promise[] to yield *affirmative* public benefits."¹⁹

The Commission's review roughly follows the informal adjudication model used for new license applications,²⁰ though it retains aspects of rulemaking—parties seeking license transfer through merger often must submit supporting materials, interested parties may offer their input through a notice-and-comment process, and FCC staff may request additional documentation.²¹ Unlike the DOJ review process, the FCC faces no statutory deadline for completing its review and may request further public comment.²² A self-imposed 180-day deadline for review²³ is rarely followed,²⁴ "lead[ing] to long delays that risk undermining the very reasons for a merger."²⁵

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16. Announcement, Deborah Platt Majoras, Reforms to the Merger Review Process 1 (Feb. 16, 2006), <http://www.fcc.gov/os/2006/02/mergerreviewprocess.pdf> ("Each year, more than 95% of all HSR-reported transactions are 'cleared' during the initial 30-day waiting period, as the [DOJ or FTC] determines that the transaction is unlikely to lessen competition substantially.")
 17. See 47 U.S.C. §§ 214, 310. The FCC also has authority, under sections 7 and 11 of the Clayton Act, to reject mergers of "common carriers engaged in wire or radio communication" under the same standard as the DOJ. 15 U.S.C. §§ 18, 21(a). Due to the more restrictive scope of inquiry, the FCC chooses not to exercise its merger review authority under the Clayton Act. See *infra* text accompanying note 46.
 18. 47 U.S.C. § 310(d).
 19. Applications of Ameritech Corp., Transferor, and SBC Communications, Transferee, 14 F.C.C.R. 14,712, 14,737-38 (1999) (emphasis added) [hereinafter Ameritech-SBC Order].
 20. See Weiss & Stern, *supra* note 3, at 197 n.23 ("Section 308 of the Communications Act . . . requires the Commission to consider the same factors in reviewing a license transfer as in granting a license in the first place.")
 21. See, e.g., Ameritech-SBC Order, *supra* note 19, at 14,733.
 22. *Id.*
 23. See Federal Communications Commission, Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers, <http://www.fcc.gov/transaction/timeline.html> (last visited Apr. 24, 2009).

The FCC may reach a binary decision on whether to approve a proposed merger outright, or it may request concessions, which are conditions the merging parties must meet to obtain approval.²⁶ In these cases, merging parties must either negotiate the conditions requested by the Commission staff or risk being subjected to a rare formal adjudicatory hearing whose prospective costs are sufficiently high to deter any proposed merger. By agreeing to the conditions, merging parties sacrifice most avenues for judicial review of the final approval order.²⁷

In determining the range and scope of conditions to seek from the merging parties, the FCC conducts its own antitrust analysis that mimics steps “taken directly from the Horizontal Merger Guidelines issued by the Department of Justice and the [Federal Trade Commission],” probing further into “potential participants in each relevant market” than the DOJ’s prospective competition review.²⁸ This broad antitrust analysis, which focuses on potential, rather than existing, competition, is justified by the agency’s industry expertise and forecast of competitive conditions yet to ensue.²⁹ Courts have upheld the agency’s antitrust authority as necessary to be “weigh[ed] . . . along with other important public interest considerations.”³⁰

In contrast with the DOJ’s antitrust review standard, parties seeking FCC merger approval carry a considerably higher burden of proof, under an “amorphous” public interest analysis.³¹ The parties must prove affirmatively that the transaction would serve the public interest, or that “any likely

24. See Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 31-32 (“The average merger takes two to four months to conclude. Telecommunications mergers, however, take between nine and twelve months to conclude.”).

25. *Id.* at 33.

26. *Id.* at 64.

27. *Id.* at 78 (noting that the Commission’s merger conditions are often “broad[] statements of agency policy that evade judicial review”).

28. *Id.* at 44-45 (internal quotation marks omitted).

29. See XM-Sirius Order, *supra* note 1, at 32.

30. *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980) (internal quotation marks omitted) (quoting *N. Natural Gas Co. v. Fed. Power Comm’n*, 399 F.2d 953, 961 (D.C. Cir. 1968)).

31. Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 201 n.142 (“[T]he ‘public interest’ evaluation tends to be more amorphous and wide-ranging than Section 7 [of the Clayton Act].”).

anticompetitive effect is more than offset by other benefits.”³² Through negotiating for the procurement of these conditions, guided by the commissioners’ sense of whether procompetitive factors and other public interest benefits outweigh any perceived costs of the merger, the FCC shapes the transaction until the final form meets its approval.

Both the HSR Act and the 1996 Telecommunications Act sought to reduce agency hindrances to private market transactions.³³ The HSR Act specifically allows for any merger to be consummated at the expiration of the statutory waiting period.³⁴ In adopting the Act, Congress sought to ensure effective review in accordance with the antitrust laws, conducted in a timely manner.³⁵ The 1996 Telecommunications Act amended section 7 of the Clayton Act to reaffirm that telecommunications mergers fall within the scope of the DOJ’s enforcement authority.³⁶ These statutes clarify that telecommunications mergers are subject to dual jurisdiction, but they provide minimal guidance for the FCC’s procedural framework for merger review.

II. THE COSTS OF OVERLAPPING ANTITRUST REVIEW AUTHORITY

Many commentators hail the prospective public interest benefits that might accrue from the merger review process, which allows the FCC to consider a broader range of issues than DOJ or FTC review alone.³⁷ Despite the benefits of specialized antitrust review by the FCC,³⁸ its unbounded review procedure

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32. *Id.* at 201; see XM-Sirius Order, *supra* note 1, at 19 (“[O]ur public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.”).
 33. The 1996 Act sought to “promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.” Telecommunications Act of 1996, Pub. L. No. 104-104, pmbll., 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
 34. See 15 U.S.C. § 18a(a), (b)(2) (2000); 16 C.F.R. § 803.10 (2009).
 35. 15 U.S.C. § 18a(e)(B)(1)(iii) (requiring internal review by the FTC and the Assistant Attorney General “to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process”).
 36. Telecommunications Act § 601(b)(3), 110 Stat. at 143.
 37. See, e.g., Lili Levi, *Reflections on the FCC’s Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581 (2000). This Comment only briefly addresses these extensive public interest benefits. I suggest that the FCC can *better* protect these interests if it structures its merger review to avoid duplication of existing DOJ review.
 38. The HSR Act inquires into whether the merged entity would be able to sustain a “small but significant and nontransitory” increase in price over a short timespan. U.S. DEP’T OF JUSTICE

entails considerable costs to merging parties and the public. The costs of overlapping antitrust review authority are readily apparent. Parties seeking to merge must clear regulatory hurdles set at different heights—transactions that clear the DOJ’s well-advertised test³⁹ might compel the FCC to attach broad-ranging conditions.⁴⁰ Merging companies have difficulty forecasting ex ante the scope of the conditions that may be attached to the final merger approval. The FCC furthers its regulatory agenda through the quasi-adjudicatory proceeding involved in merger review, and its public interest standard offers “virtually limitless discretion to approve, disapprove, or condition a merger based on whatever factors it deems important at the time.”⁴¹

The delay in approving the transaction itself stands as another unpredictable barrier to approval and consummation. Inconsistent review deadlines—one agency with statutory deadlines for completion of review, one without—render the agency with an unconstrained timeline dominant and the statutory deadline meaningless in the context of dual review.⁴² Uncertainty accompanying such delays raises the cost of financing transactions, which tacks greater debts onto the ultimate merged entity and raises the opportunity costs that each company faces.⁴³ As the next Part argues, resolving this statutory tension might reduce these costs while preserving the benefits of specialized FCC review.

& FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1.11, at 6 (1997 rev. ed.) [hereinafter GUIDELINES]. This one-size-fits-all analysis is arguably insufficient for the FCC’s task of taking a “more expansive view of potential and future competition and its impact on the relevant market.” XM-Sirius Order, *supra* note 1, at 19.

39. Under the Horizontal Merger Guidelines, agencies first utilize the Herfindahl-Hirschman Index to calculate the impact of merger on the relevant product and geographic markets to determine market concentration before and after the proposed merger. GUIDELINES, *supra* note 38, at 15.
40. Barkow & Huber, *supra* note 24, at 54 (“Although DOJ gave the Bell Atlantic/NYNEX and SBC/Ameritech mergers the green light with few or no strings attached, the Commission required the companies to commit to a multitude of conditions.”).
41. *Id.* at 41.
42. See Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 151 (2002) (“[T]he FCC’s practice of deferring final action until the antitrust review has been completed has the practical effect of insulating DOJ from the constraints imposed by the HSR Act.”).
43. Investing excess cash flows in a merger or acquisition, by definition, limits other opportunities either company might pursue in order to build share value. These opportunity costs are likely to be sizable as companies seeking to merge must “defer investments or important strategic decisions,” Russell & Wolson, *supra* note 42, at 151, which might place them at a competitive disadvantage in an “industr[y] undergoing rapid economic and technological change,” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997).

III. RELIEVING STATUTORY TENSION AND THE COSTS OF OVERLAPPING AUTHORITY

Both the FCC and traditional antitrust enforcement agencies are tasked with fulfilling similar goals—ensuring a competitive market and promoting the public interest—but their overlapping authority threatens to undermine these objectives. Many critics contend that the FCC should jettison its duplicative antitrust analysis from the public interest inquiry entirely, but courts have upheld this mode of review.⁴⁴ This Comment argues, by comparison, that courts can respond to this antitrust review overlap by encouraging more timely consideration of telecommunications mergers.

On previous occasions, Congress has attempted unsuccessfully to impose statutory limits on the FCC's merger review process,⁴⁵ but delayed merger review already stands on a questionable legal basis. Instead of proceeding under the Clayton Act, the FCC maintains that its "jurisdiction under the Communications Act is sufficient to address all questions regarding the competitive effects of the proposed transfer."⁴⁶ As a substantive matter, this assertion is valid—sections 214(a) and 310(d) of the 1934 Communications Act provide the public interest standard applicable to license transfers.⁴⁷ As a procedural matter, the Act provides little guidance,⁴⁸ so the FCC follows its own self-prescribed process, which includes a nonbinding guideline of 180 days for review. The HSR Act provides the default procedure for reviewing large mergers, and its text is clear—telecommunications mergers do not fall within one of its exceptions, and its conditions otherwise apply to mergers over \$200 million.⁴⁹ Reading the Communications Act in conjunction with the HSR Act, dual agency review proceeding under separate procedural frameworks renders the statutory time limit substantively ineffective. The statutory overlap thus permits an inefficient result—one underlying aspect of a waiting period is that its expiration permits a transaction to ensue, but a

44. See *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980).

45. See, e.g., Telecommunications Merger Review Act of 2000, H.R. 4019, 106th Cong. (2000).

46. Applications of AirTouch Communications, Inc. Transferor, and Vodafone Group, PLC. Transferee, for Consent to Transfer of Control of Licenses and Authorizations, Memorandum Opinion and Order, 14 F.C.C.R. 9430, 9434 n.21 (1999).

47. 47 U.S.C. §§ 214(a), 310(d) (2000).

48. Section 310(d) of the Communications Act provides that license transfers are governed by the standard applicable to granting new licenses. 47 U.S.C. § 310(d). The relevant section provides no time limit on the FCC's review period. *Id.* § 308.

49. See 15 U.S.C. § 18a.

concurrent review proceeding faces no time restriction and can delay a transaction indefinitely.

Scholars have pointed out the limits on judicial review as a central drawback to the FCC's process of exacting "voluntary" conditions.⁵⁰ When telecommunications firms can merge only after final Commission approval, which often requires adopting negotiated conditions, the newly merged company cannot challenge the very provisions to which it consented. Some scholars have gone so far as to argue that this drawback "will persist unless the Communications Act is amended to provide a mechanism for timely judicial review."⁵¹ To the extent that parties wish to challenge the substance of the FCC's orders under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard,⁵² this concern is valid. Judicial deference to agency decisions leaves little room for parties to object when they granted their consent. The FCC's underlying *procedure* stands on weaker authority.⁵³ Congress has not spoken explicitly on the duration of the FCC's public interest review under the Communications Act, nor have parties applying for merger approval consented to any timeline (or lack thereof). Judicial review of final FCC orders may be available to challenge the basis for its unimpeded duration if the agency's action is final, with binding legal consequences.⁵⁴

If the FCC's procedural flexibility accompanies its substantive review authority, then it directly undercuts the HSR Act's deadline. Courts can remedy this conflict by applying the canon of construction that when two statutes conflict, the specific statute governs over the general—that is, "a specific policy embodied in a later federal statute should control [the courts'] construction of the [earlier] statute, even though it ha[s] not been expressly

50. See, e.g., Barkow & Huber, *supra* note 24, at 69 ("The option of 'voluntary conditions' is especially likely to shield the agencies [sic] policies from judicial review. That is, the imposition of policies via conditions on a particular merger is unlikely to get to the judicial review stage because the parties themselves are frequently in no position to challenge the Commission's order.").

51. Russell & Wolson, *supra* note 42, at 154.

52. See 5 U.S.C. § 706(2)(A).

53. Cf. SBC Commc'ns Inc. v. FCC, 56 F.3d 1484, 1496-97 (D.C. Cir. 1995) (upholding the FCC's "procedural discretion in implementing the Communications Act" and resisting the appellants' challenge to merger review procedures as requiring an "unwarranted intrusion into the agency's ability to conduct its own business").

54. Cf. Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1103 (D.C. Cir. 2001) ("As a general proposition, an FCC order is final if it (1) represents a terminal, complete resolution of the case before the agency, and (2) determines rights or obligations, or has some legal consequence." (internal quotation marks omitted)).

amended.”⁵⁵ The Supreme Court has applied this canon quite deliberately, holding that “[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”⁵⁶ Though the HSR Act is not the organic statute governing FCC merger review, an unbounded FCC review period nullifies the Act’s statutory deadline. Applying this canon of construction would separate the FCC’s substantive review authority from its unbounded procedure, allowing the HSR Act’s procedural provisions to apply across the board. Following the Supreme Court’s decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,⁵⁷ lower courts have been hesitant to impose on agencies additional procedural duties besides those contained in the APA. The scope of this deference to agency procedural choices is limited, however, to the extent that procedures may be anchored in statutory text.⁵⁸ Imposing this procedural restriction would breathe life into the HSR Act’s statutory deadline in the context of telecommunications mergers.

In applying this canon, courts should treat merger conditions attached by the FCC after the expiration of the HSR Act’s waiting period as unenforceable, construing the more recent and specific statutory provision as binding on the review of all mergers.⁵⁹ Courts can mitigate the costs of delay by enforcing the HSR Act’s deadline on the Commission itself. Imposing a strict statutory deadline on the FCC’s merger review process would resolve the inherent tension between the two statutes and would limit the FCC’s bargaining power during the course of negotiating merger conditions. Enforcing this procedural rule as binding on FCC review might disrupt the Commission’s ability to promulgate policy through license transfer orders, but it would strongly encourage Congress to clarify this statutory gray area. Absent congressional action, establishing a time limit for FCC review might reduce the agency’s incentive to engage in duplicative antitrust review. Instead, given that the DOJ

55. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (second and third alterations in original) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

56. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

57. 435 U.S. 519 (1978).

58. *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 239 (D.C. Cir. 2008).

59. The D.C. Circuit in *SBC Communications Inc. v. FCC* upheld the FCC’s procedural discretion in reviewing mergers. 56 F.3d 1484, 1496 (D.C. Cir. 1995) (citing *Vermont Yankee*, 435 U.S. at 549). The appellants’ challenge, however, focused on the FCC’s method of review, not its duration. The judicial solution this Comment advocates would leave the FCC’s discretion over mode of procedure intact, but would impose a limit that preserves the HSR Act’s statutory deadline.

conducts its own thorough antitrust analysis, the FCC would have greater incentive to focus on its institutional strengths: issuing orders and negotiating conditions based on unique public interest considerations.

One might counter, however, that Congress's repeated attempts to limit the FCC's procedural discretion⁶⁰ suggest legislative acquiescence through its failure to overturn the agency's interpretation of its enabling text.⁶¹ The Supreme Court often has held that failures to pass legislation to override agency or judicial interpretations of ambiguous statutory text amount to acquiescence.⁶² In the FCC merger review context, Congress has taken notice of the costs of dual review, but the flurry of statutory amendments that failed to gain traction may suggest that the FCC's procedural framework should remain intact, or at least should not be judicially curtailed. Yet the acquiescence counterargument stands on flimsy grounds. Unlike recent cases in which the Court found that private-party reliance on longstanding agency interpretations counseled against judicial second-guessing,⁶³ FCC review procedure itself imposes costs on regulated parties. Extending the HSR Act's time limit to FCC review would not pose new reliance costs, unless reduced flexibility prompts the Commission to reject proposed mergers with greater frequency. Acquiescence, in this context, is less than explicit: Congress has not *ratified* the FCC's procedure by reenacting the Communications Act,⁶⁴ and, arguably, the HSR Act's broad sweep suggests a more recent intent to limit agency impediments to proposed mergers.

This statutory construction may raise broader concerns, as the FCC's mandate to consider the public interest extends beyond antitrust analysis, and

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60. See Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311, 1337 n.172 (2007) (recounting multiple legislative attempts to curb the FCC's merger review authority).
61. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) (finding that Congress's failure to act on proposed bills seeking to overturn an IRS ruling "provide[d] added support for concluding that Congress acquiesced" to the agency's interpretation).
62. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998).
63. See, e.g., *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 17 n.9 (2007); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1188 (2008) ("[A] longstanding agency interpretation that regulated parties have internalized and that Congress has acquiesced in should rarely be overturned . . .").
64. The broad reach of the 1996 Telecommunications Act overhauled a number of provisions of the original 1934 Communications Act. Even defining "ratification" loosely, this subsequent statute only spoke to merger review by clarifying that the Clayton Act, and thus the DOJ's review authority, applies to telecommunications mergers. See *supra* note 36 and accompanying text. Arguing that this amendment ratified the FCC's procedure is tenuous, because this provision ensures that the DOJ's procedural framework accompanies its review.

this remedy could undercut important conditions attached to merger orders. This concern, though well founded, can be narrowed by considering the scope of the Commission's review. The FCC's public interest inquiry has focused extensively on antitrust concerns,⁶⁵ requiring few conditions unrelated to competition within the telecommunications market. Strong incentives to complete its review and decision on the same timeframe as the DOJ—lest the final conditions be rendered unenforceable—would compel the FCC to avoid duplicative analysis and focus primarily on factors *not* considered by the Department. Acting concurrently under similar deadlines, each agency would focus on its comparative advantage in protecting the public interest.

Interpreting the 1996 Telecommunications Act provides further support for a standard that undermines unlimited FCC merger review. The 1996 Act clarified that DOJ review of telecommunications mergers should complement the FCC's review.⁶⁶ If the DOJ's threshold for merger preclearance is lower than the FCC's—as is evident from the standards each agency employs—allowing DOJ review in addition to FCC review seems superfluous. Construing the HSR Act's deadline as applicable to both agencies' procedures might allow this overlap to serve the 1996 Act's two central goals: enhancing efficiency and protecting the public interest.⁶⁷

CONCLUSION

The tension between the two statutory standards for merger review procedure deserves greater notice. This Comment advocates a judicial remedy, though the optimal solution would be legislation providing greater clarity to how the FCC should conduct its review of telecommunications mergers. Where Congress did not account for the supremacy of the FCC's unlimited review power, construing the more precise statutory provision to limit the length of the FCC's review would result in one of two effects: (1) Congress would clarify that, in the context of dual antitrust review by multiple agencies, the statutory time limit should be obviated in order for the FCC to complete its more broad-ranging review, or (2) the FCC would be forced to restrict its

65. See Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order, 12 F.C.C.R. 19,985, 19,987 (1997).

66. See *supra* text accompanying notes 33-36.

67. 47 U.S.C. § 257(b) (2000) (affirming the FCC's national policy of encouraging "vigorous economic competition, technological enhancement, and promotion of the public interest, convenience, and necessity").

inquiry to nonduplicative analysis in order to maximize its efficacy in attaching merger conditions that benefit the public interest.

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