PROPOSALS TO STREAMLINE FEDERAL AND STATE REGULATORY REVIEW OF TRANSACTIONS IN THE COMMUNICATIONS INDUSTRY

Samuel L. Feder

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By Samuel L. Feder*

INTRODUCTION: THE STATE OF COMMUNICATIONS TRANSACTION REVIEW AT THE FCC AND STATE PUCS TODAY

Companies operating in the communications industry must pass through a series of regulatory requirements before they can engage in most transactions commonplace in other industries. In addition to being subject to the same antitrust laws as other companies, they face additional oversight by the Federal Communications Commission ("FCC" or "Commission") and state public utilities commissions ("PUCs"). Whether engaging in significant transactions (such as acquisitions or mergers) or even small ones (such as intra-family corporate reorganizations or taking on secured debt), companies holding communications licenses frequently must obtain signoffs from both state and multiple federal regulators before their transactions can move forward.

As a general rule—absent a conclusion by the antitrust authorities that a transaction would harm competition in relevant markets—the public interest is best served by allowing willing market participants freely to allocate resources and assets. The processes by which the FCC and state PUCs review applications for proposed transactions, however, is marked by significant obstacles to the ability of transacting companies ("applicants") to complete transactions on a reasonably prompt and predictable schedule. These obstacles also substantially increase the costs of such transactions, ultimately harming consumers. Applicants frequently face extended delays in the process, as well as unpredictable and excessive demands from some regulators who treat their authority to withhold approval for transactions as opportunities to extract concessions and advance preferred policy objectives. Such delays and excessive approval conditions increase the

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* Sam Feder is co-chair of the Communications, Internet & Technology practice at Jenner & Block LLP. He previously served as General Counsel of the Federal Communications Commission, from 2005 to 2008. Mr. Feder is grateful to his Jenner & Block LLP colleagues Luke Platzer and Rebekah Goodheart, who contributed substantially to this paper, and to Verizon for its sponsorship.

costs and burdens of transactions and deprive market participants of the certainty needed to engage in business planning.

These problems are compounded by the fact that both the FCC and state PUCs act with near-impunity with respect to transaction reviews. National and multistate transactions in today's economy typically require applicants to close within reasonably prompt timeframes, as applicants often must obtain financing (frequently on terms that are time-sensitive), retain personnel and talent (who seek out other opportunities during times of extended uncertainty), and engage in both short- and medium-term planning for the operations of their businesses, which require certainty as to whether regulators will allow a pending transaction to proceed. These scheduling necessities make a timely approval by the FCC and PUCs a must in most transactions—which, in turn, often requires capitulating to even some unreasonable agency conditions lest review be further delayed. Additionally, judicial review of agency decisions to deny approval of a particular transaction (or to grant such approval only in exchange for conditions) is in many cases effectively unavailable in practice because of the ability of the agencies to delay court proceedings (for a year or longer) past when a transaction is scheduled to close. This functional immunity from judicial supervision has predictably empowered the FCC and some state PUCs to place undue demands on applicants, including demands in excess of the respective agencies' jurisdiction and legal authority.

At the federal level, this frequently has manifested itself in the form of the FCC's conditioning transaction approvals upon "voluntary" commitments by applicants that the FCC would have lacked statutory authority to compel directly (such as investing money in the FCC's preferred projects or abiding by rules the FCC could not impose generally). Such an approach effectively amounts to back-door rule- and policy-making that circumvents the Administrative Procedure Act and, too often, the FCC's statutory authority. Additionally, while there is a self-imposed 180 day shot clock governing the FCC's review of transactions, in practice the FCC regularly extends its review by stopping the clock with little or no reason, thus rendering it difficult to predict when a review might be complete.

At the state level, many states have avoided these problems with more rational and streamlined review processes that forgo inquiry into simpler transactions and complete review of more significant ones within reasonable timeframes. Certain state PUCs, however, have become notorious tollbooths that exploit their *de facto* ability to block national transactions as opportunities to impose conditions favoring their own citizens or advancing parochial interests at the expense of others. These include commitments to retain or create jobs in the state or to steer investments towards specific state projects.

And at both the FCC and state PUCs, these problems escalate over time: each transaction approval establishes baseline requirements against which agencies and advocates evaluate future applications, resulting in a spiral of ever-more-burdensome conditions to obtain regulatory signoff. The process at both the FCC and state PUCs also creates incentives for third parties to intervene to gain leverage over the timeframe and results of the review, even when they do not have substantive issues related to the transaction. By doing so, they insert themselves into the process that often leads to voluntary or mandated conditions, or can seek unrelated side-deals in exchange for not further delaying review.

The result is to make transactions in the communications space unduly costly, burdensome, and unpredictable, preventing some transactions altogether and making others less efficient and less beneficial. These costs are ultimately borne by the public, as procedures that frustrate timely consummation of market-driven transactions protect inefficiencies in the status quo.

The process should be reformed. Where the expert agencies tasked with evaluating the effects of proposed transactions on competition (*i.e.*, the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")) have made a decision to permit a transaction to move forward, there should be a strong presumption that the transaction is in the public interest unless it is unlawful (for reasons specific to the communications industry) or calls into question the qualifications of applicants to abide by the rules and obligations of their regulatory authorizations.[1] When regulators attempt to go beyond those parameters in considering transactions or delay transactions well after these agencies have rendered their conclusion, consumers ultimately suffer from the inefficiencies that result from that lack of restraint. I propose below several concrete reforms to help the FCC and state PUCs focus their regulatory review more clearly on matters within their core expertise, and to limit the extent to which these agencies unnecessarily obstruct transactions in the public interest.

[1] I use the terms "licenses," "authorizations," and "certificates" interchangeably in this paper.

I. PROPOSED REFORMS TO FCC REVIEW PROCESS.

The new leadership of the FCC, in particular Chairman Pai, has in the past been a critic of the unbounded nature of the FCC's approval process, as well as its inefficiencies and potentials for abuse. Below, I discuss a number of potential reforms the Commission should consider to address those criticisms, including: limiting the type of transactions requiring FCC approval; requiring the Commission to complete such review within a fixed timeframe; specifying narrower and better-defined criteria for the approval of applications; limiting the abuses and inefficiencies in the Commission's practice of granting conditional approvals; and requiring the FCC to coordinate more closely with the antitrust agencies.

A. Reforms to Review Process and Approval Criteria.

While the FCC plays an important role in evaluating the qualifications of applicants to hold relevant FCC licenses, its approval processes have frequently been used to require applicants to undergo costly and time-consuming reviews for transactions that do not implicate such concerns. A significant driver of this practice has been the FCC's insistence on evaluating a transaction's competitive effects. But this evaluation repeats work already performed by the DOJ and the FTC in their review of proposed transactions under the antitrust laws.[2] Having the FCC broadly duplicate this work makes little sense.

To the extent markets regulated by the FCC may involve unique or specialized features that Commission expertise could help evaluate, FCC staff could lend their experience and assistance to DOJ and FTC staff in connection with their respective review processes on competitive issues, rather than undertaking a mostly-duplicative inquiry by the FCC. This would be similar to the role that the Department of Defense plays in helping DOJ evaluate the competitive implications of defense industry mergers. The costs and delay of having the FCC conduct a similar

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[2] *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; 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 (2002); James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 Commlaw Conspectus 195, 206 (1998); William J. Rinner, *Optimizing Dual Agency Review of Telecommunications Mergers*, 118 Yale L.J. 1571, 1582-83 (2009).

competitive inquiry are disproportionate to any marginal value such duplicative inquiry may have, and the Commission's skills would be far more efficiently deployed in assisting the DOJ and/or FTC reviews.[3]

Allowing the DOJ and FTC to take the lead in assessing the competitive effects of a proposed transaction would enable the FCC more efficiently to focus on areas closer to its core mission: ensuring that the entities holding FCC licenses are qualified to do so, and that transactions are lawful under its Congressional directives. Eliminating the FCC's separate competitive review would allow the FCC to review a smaller set of transactions, as well as complete its reviews more quickly, providing more certainty and allowing beneficial transactions to close more timely.

Separate from the class of transactions subject to FCC review, the process and scope of the FCC's review is problematic. To assess whether a transaction is in the "public interest," the FCC has used a broad and free-wheeling inquiry into virtually any effects a proposed transaction may have, ranging from competitive impacts on any markets in which the applicants do business or may do business in the future to any "voluntary" commitments the applicants commit to offer in connection with approval, as well as how the post-transaction market structure will affect whatever policy objectives the FCC is pursuing under the current Administration. This expansive, untethered reading of the public interest goes well beyond whether the applicants are qualified to hold the requisite licenses,[4] and it frequently leads to long, unpredictable review processes. Below I propose a number of reforms to address these issues.

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[3] *See, e.g.*, *In re 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 and Order, 31 FCC Rcd 6327, 6670 (2016) ("*Charter/TWC Order*") (Dissenting Statement of Commissioner Ajit Pai) ("no serious, knowledgeable observer will maintain that the professional staff at the Justice Department or Federal Trade Commission do not or cannot adequately protect the public interest.").

[4] *See, e.g.*, *Charter/TWC Order*, 31 FCC Rcd at 6336 ¶ 26 (assessing whether transaction "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes" and "employ[ing] a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.").

1. Firm Shot Clock to Complete Review.

The FCC's aspirational 180-day shot clock should be mandatory and should start at the time of filing an application. Currently, the shot clock does not even start until the FCC issues its public notice of an application. That public notice may not issue for weeks, even months, after an application is filed, and there is often no rhyme or reason for the delay. And even once the clock is officially started, the current process frequently includes extensions, stopping or resetting the clock, and pauses predicated upon the Commission's supposed need to gather additional information.[5] Such delays and extensions deprive the applicants as well as the market of needed certainty as to when the Commission will ultimately act on a pending application. Additionally, the financing arrangements behind many transactions can be sensitive to variations in schedule, with delays inflicting significant unanticipated costs, and applicants can face difficulties retaining and attracting talent during extended periods of uncertainty. Requiring the Commission to act upon an application within a time certain would mitigate these risks.[6] Further, by limiting the scope of its review as discussed below—and by better aligning any necessary discovery with that requested by the FTC and DOJ—the Commission will likely find that its review is not hampered by committing to stick to a shot clock.

2. Eliminate Administrative Hearing Referrals That Kill Transactions.

The Commission's process would also benefit from voting transactions up or down outright rather than referring transactions deemed too problematic to approve to hearings before an administrative law judge ("ALJ"). Given the time it takes to conduct such hearings, sending a transaction to an ALJ effectively kills it—indeed, no transaction has emerged from such hearings in decades. Yet an order referring a transaction to an ALJ is not immediately appealable, generally

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[5] *See, e.g.*, Comcast Corporation and NBC Universal, MB Docket 10-56 (234 days); Charter - Time Warner Cable - Bright House Networks, MB Docket 15-149 (221 days); Nexstar and Media General, MB Docket No.16-57 (329 days); Sinclair and Allbritton Communications, MB Docket 13-203 (327 days); XM and Sirius Satellite Radio, MB Docket 07-57 (412 days).

[6] Several of the reforms discussed herein—including eliminating the Commission's practice of negotiating "voluntary" commitments with providers and streamlining the FCC's information request procedures—should facilitate the FCC's ability to complete the transaction review process within the 180-day window.

eliminating the ability of disappointed applicants to obtain judicial redress. As Commissioner O'Rielly has argued, the FCC should discontinue "use of the ALJ and hearing designation order process as a threat or means to kill a proposed merger application" and instead "end the charade and have Commissioners vote one way or another on applications."[7] Applicants could then immediately appeal adverse decisions to the Court of Appeals.

3. Limit Review to Applicant Qualifications and Compliance with Statutes and Regulations.

As discussed above, the FCC should not reproduce the competitive reviews of the antitrust agencies. Instead, its review should be strictly limited to the qualifications of the applicants and compliance with governing statutes and FCC regulations. That approach is fully consistent with the Commission's public interest standard. A transaction in which the applicants are qualified, has been deemed beneficial by the market, and that does not run afoul of relevant statutes or regulations is necessarily in the public interest.

4. Limit Behavioral Conditions.

Where possible, the FCC's approval process would benefit from disfavoring conditions requiring providers to engage in behavioral modifications. Monitoring compliance with outstanding merger conditions can drain the Commission's resources, while also requiring applicants to undertake cumbersome procedures for adhering to such requirements.

To the extent that behavioral conditions are unavoidable in some transactions, they should be time-limited to a reasonable period (generally two years or less) to avoid continued cost and disruption long after any harm has dissipated. For example, in approving the merger between AOL and Time Warner Cable ("TWC") in 2001, the Commission required TWC to ensure that customers could use the ISPs of their choice over TWC's network, including, among other things,

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[7] *In re Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant*, Memorandum Opinion and Order, 32 FCC Rcd 6160, 6191 (2017) (Statement of Commissioner Michael O'Rielly).

allowing the third-party ISP to determine the contents of its subscribers' Internet start-up screen.[8] Regardless of whether that condition made any sense in 2001, the use of third-party ISPs disappeared years before this condition was ultimately lifted in 2012.[9] Particularly given how fast technology advances and changes in the market occur, conditions that last longer than two years are almost certainly going to be obsolete long before they expire.

5. End Extra-Jurisdictional "Voluntary" Merger Conditions.

Another critical reform should be to put an end to the FCC's practice of using merger conditions to enact policies outside the regular rulemaking process (as well as beyond the Commission's statutory authority) via "voluntary" commitments offered by the applicants as conditions of approval. The FCC has on numerous occasions utilized its gatekeeper role to extract concessions from providers, including conditions the Commission could not impose without the applicants' consent or outside the merger review context.[10]

This practice is harmful in multiple respects. First, negotiations are time-consuming, lengthening the approval process and creating additional uncertainty. Second, such conditions circumvent congressional limitations on the FCC's statutory authority, as well as the notice-and-comment procedures the Commission would normally have to follow to set rules and requirements for the industry—thereby reducing the voice that the public, and other stakeholders, would otherwise have. Third, empowering the FCC to extract concessions it could not have ordered

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[8] *In re Applications of 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, 6600-01 ¶ 126 (2001).

[9] *In re Applications of 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, 27 FCC Rcd 11,508 (2012).

[10] For instance, the FCC's approval of the Comcast-NBC Universal merger required the company to abide by "open Internet" rules notwithstanding the absence of such a requirement for industry providers generally. Similarly, its approval of the AT&T-Leap Wireless transaction required the merged company to "build out" LTE services in additional territories, as well as to offer discounted plan rates to value-conscious and Lifeline customers. The Commission almost certainly lacked statutory authority to impose any of these conditions directly if not extracted as "voluntary" commitments.

directly makes it more likely that the resulting conditions will operate as a tollbooth, raising the cost and complexity of the merger review process.

Chairman Pai has been sharply critical of this practice on numerous occasions, going so far as to call it "extortion" whereby the Commission has applicants "over a barrel" and they must "accede to the Commission's demands" or risk denial of their applications.[11] The Commission would be well-served to heed the Chairman's advice. For one, it can and should discontinue the practice of requiring providers to submit (or accepting the submission of) merger conditions if the conditions would have been beyond the authority of the Commission to order directly outside of the merger context or if the conditions are not narrowly tailored to a specific potential transaction-related harm. More importantly, it should consider creating safeguards (such as interpretive and/or procedural rules) to make it more difficult for this problematic practice to resurface in the future.

6. Streamline Team Telecom Review.

Another opportunity for reform—although one that would benefit only a subset of transactions—would be to make more efficient the process by which the FCC refers certain transactions involving foreign investment to Team Telecom, an informal, inter-agency executive branch review process. Although ostensibly concerned with evaluating the potential national security implications of foreign investment in United States communications markets, the Team Telecom review process has frequently been criticized for lacking either formal structure or transparency, prolonging unnecessarily transactions involving benign foreign investors and (due to its absence of firm deadlines) generating significant uncertainty about when such transactions can move forward.

Commissioner O'Rielly, in particular, has been an advocate for reforms to this review process.[12] Although the Commission has considered revising it in the past—most recently in a 2016 proposal that would have shortened Team Telecom review while significantly increasing up-

[11] *Charter/TWC Order*, 31 FCC Rcd at 6668-69 (Dissenting Statement of Commissioner Ajit Pai).

[12] *See, e.g.*, Commissioner Michael O'Rielly, *Team Telecom Reviews Need More Structure*, FCC Blog (Sept. 18, 2015, 2:19PM) https://www.fcc.gov/news-events/blog/2015/09/18/team-telecom-reviews-need-more-structure.

front requirements on all applicants, irrespective of whether such additional application information would actually be needed[13]—those efforts have not been implemented.[14]

The Commission—as well as the Executive Branch—would be well-served to take up such reforms again. Although some set of foreign investments in American communications companies might involve national security considerations (and may require more extended review), it ought to be possible for the vast majority of reviews to be completed within more clearly-defined timeframes, with more transparency for applicants.

7. At the Very Least, Strictly Limit Review and Streamline the Review Process.

I recognize that the approaches I propose above would mark a significant change from the Commission's current practice. To the extent the Commission and/or Congress are not prepared to change the Commission's public-interest review to this extent in the near term, I recommend a number of more incremental changes that would at least substantially mitigate the harms of the current process.

a) Applicants Should Not Be Required to Show Additional Affirmative Benefits.

If the FCC continues to adhere to its broad conception of the public interest standard as encompassing policy objectives beyond the qualifications of the applicants, the Commission should at the least narrow that standard.

The Commission should start with a strong presumption that it is in the public interest to allow willing parties to engage in transactions that the market has deemed beneficial. Such transactions effectuate the will of the parties, create value by assigning economic resources to higher-value uses, and promote efficiencies.

In the past several years, however, the FCC has placed on applicants the burden of demonstrating affirmative benefits from a proposed transaction above and beyond the fact that the

[13] *In re Process Form for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, 31 FCC Rcd 7456 (2016).

[14] *See* Ex Parte Supplemental Comments of the National Telecommunications and Information Administration, IB Docket No. 16-155 (FCC Nov. 10, 2016) (objecting to shortened review timeframes as "rigid").

transaction is desired by the market itself. There is no basis either in law or in policy for such an approach: a merger that does not violate any of the Commission's rules and has willing participants is presumptively in the public interest, unless a significant market failure has taken place or the transaction would cause affirmative harm that can be shown to outweigh the benefits of allowing assets and resources to be allocated by the market. So even under the FCC's traditional and expansive public interest standard, the Commission should not *require* any showing of additional affirmative benefits. Applicants should, of course, retain the option of presenting evidence of any unique, transaction-specific benefits to a transaction if there are any potential adverse effects to the transaction to counterbalance.

b) Use Conditions Only to Mitigate Identified, Transaction-Specific Harms.

The Commission's current conception of its public interest standard also involves a "balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits,"[15] in effect allowing the Commission to weigh benefits in some areas against perceived detriments in others. But this view of the public interest can also result in the Commission imposing conditions in some area it perceives as beneficial, on the logic that such benefit will balance out a perceived merger-related harm in another area.

This practice is of dubious legality,[16] and is easily abused as a means to attach conditions to merger approvals that advance the Commission's policy preferences without requiring any nexus to remedying any identified harm a transaction might cause. Use of this mechanism also significantly limits the ability of the public and other stakeholders to participate in the policymaking process through regular APA procedures, while creating unpredictable outcomes, as (absent a close nexus between a merger condition and any identified harms from a transaction) the FCC's conditions could take any number of forms varying with the policy preferences of its current members or the then-current administration.

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[15] *Charter/TWC Order*, 31 FCC Rcd at 6336 ¶ 26.

[16] *Compare* 47 U.S.C. § 214(c); 47 U.S.C. § 303(r) *and NBC*, 319 U.S. at 216.

This practice may also raise constitutional concerns. While the Supreme Court has upheld the delegation to the FCC to apply a public interest standard in licensing decisions,[17] it has also cautioned that such delegation is not boundless, and "is not to be interpreted as setting up a standard so indefinite so as to confer an unlimited power."[18] But the Constitution requires construing statutory delegations to agencies sufficiently narrowly to ensure that Congress has not improperly delegated legislative authority.[19] In recent years, some members of the Court have grown skeptical of agency rulemaking that relies upon generic delegations to act in the public interest without more clear instructions from Congress on the specific policy objectives to be pursued.[20] Reliance by the FCC on ever-changing policy metrics for discerning whether the public interest is served by a particular set of merger conditions implicates many of the same considerations.

Whether on legal, constitutional, or policy grounds, however, eliminating or at least substantially reducing the practice of imposing unrelated, non-transaction-specific conditions—and instead requiring merger conditions to relate specifically to mitigating or preventing identified harms arising out of a proposed transaction—would add much-needed transparency and predictability to the process, while forcing the FCC to evaluate each proposed transaction on its own merits.

c) Utilize the DOJ/FTC Second Request.

Even if the Commission does not leave consideration of the competitive effects of a proposed transaction to the antitrust agencies as I propose, it should at the least reduce the burden

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[17] *See Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); *NBC v. United States*, 319 U.S. 190, 215 (1943).

[18] *NBC*, 319 U.S. at 216 (holding that standard must be read in "context" and focused specifically on the "scope, character, and quality of services," after considering the "nature of radio transmission and reception." (quotation marks omitted)).

[19] *See, e.g.*, *Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

[20] *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1251-52 (2015) (Thomas, J., concurring) (noting that cases upholding delegations to regulate in the "public interest" are in tension with the "original meaning of the Constitution"); *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting).

of its review on applicants. In particular, the Commission's information request procedures regularly impose tremendous data-gathering and document production obligations on applicants, many of which are substantially duplicative of requests issued by the DOJ and/or FTC (the "Second Request"). Applicants routinely undertake an intensive and time-consuming effort to respond to the Second Request, only to receive information requests from the FCC that cover the same topics, yet contain sufficient differences—such as the date range or format of data—as to require applicants to re-start the information-gathering and data-collection process. This adds significant cost and delay, and places a huge burden on applicants' business units to generate multiple responses.

Better coordination among agency staff could avoid those costs. DOJ/FTC could be the repository for relevant documents filed as responses to the Second Request, and the FCC staff could be provided with access to documents on file with DOJ/FTC. Documents filed at the FCC could be limited to those necessary to assess qualifications of the applicant to hold licenses (or other limited review). This would save significant time and effort by eliminating the current redundancy in the system.

B. Rationalized Triggers for FCC Review.

To comport with the more circumscribed role I envision for the Commission and to minimize unnecessary burdens on applicants, I also propose that the following types of transactions be subject to no prior FCC approval and instead be subject only to post-closing notifications and relevant ownership form updates (unless they trigger foreign-ownership limits or other statutory/regulatory issues):

- *Changes in ownership or control of applicants at the holding company level while leaving applicants themselves unchanged*. These transactions currently require FCC review. But where the applicants themselves retain their management, assets, and capabilities, and it is merely their upstream parent or holding companies who change ownership or control, such transactions do not normally raise concerns with respect to the qualifications of the applicants.
- *Changes of control where both the acquiring entity and the acquired entity already hold FCC licenses of the same type*. Such transactions should not require prior review,

as there should be no concern as to the qualifications of the post-transaction entity to continue carrying out its licensed functions.

- *Corporate restructuring transactions that change only a certificated entity's control or ownership structure*. Although the Commission has reformed parts of its process for some of these transactions—*i.e.*, those that qualify as *pro forma* transactions between common carriers—there still remain many unnecessary filing obligations and the need for pre-closing authorization in many circumstances. The Commission should revise and expand its *pro forma* process to ensure that any transaction where the ultimate parent is unchanged need not obtain prior review.
- *Changes in ownership or control of license holders where the license is incidental to the business*. Many entities may hold a business pool or other license used for corporate security or internal communications, but no other FCC licenses. Requiring review of the transfer of such a license and the potential for additional FCC inquiry into the underlying transaction makes no sense when the license is incidental to the business' general purposes.

For the kinds of transactions identified above, absent a statutory or regulatory gating issue, such as foreign ownership or media ownership limits, applicants should be able to file a post-closing notice, rather than seeking pre-closing approval. That notice, moreover, should be modified from the current practice. Today, under the system that the Commission uses for many *pro forma* transactions, applicants may have to file paperwork associated with each individual license, even if the only change is in an intermediate holding company and not in the ultimate license owner. The FCC is often significantly delayed in processing these notices, or fails to input them into their records at all. The FCC should instead allow license-holders to file a single update on multiple licenses at one time, perhaps by updating their ownership disclosure form (*i.e.*, Form 602) or filing a similar form rather than file license by license revisions. A license-holder could file this update any time there are intermediate changes or changes to the corporate form of a license holder or its parent, so long as the ultimate owner of the license remained the same. Such an approach would reduce burdens on FCC staff and allow the FCC to maintain accurate records without unduly burdening the ability of market participants to order their affairs.[21]

II. PROPOSED REFORMS TO STATE REVIEW PROCEDURES.

In addition to the review exercised over telecommunications transactions by multiple agencies at the federal level, some states also regulate such transactions through their PUCs, which license carriers to operate within their respective territories and exercise jurisdiction over intrastate communications services. As a consequence of the overlapping regulatory jurisdiction between the FCC and state PUCs, applicants undergoing transactions generally must secure approval not only from the FCC and DOJ, but also from the PUCs in many states in which they hold authorizations.

Although the patchwork of state requirements warrants reform, many states have already modernized their review processes, and are able to complete reviews promptly. A number of states forego the approval process altogether for certain transactions, requiring applicants to provide official notice of transactions—to ensure that state regulators can maintain updated records and identify appropriate points of contact when regulatory issues arise—but not requiring all applications to undergo a formal review and approval process.

But problems still frequently arise in the state approval process. Because there is often no practical way to carve out specific states from national transactions, or to stagger the closing of significant transactions around different territories, each PUC that requires formal approval has the practical ability to hold up an entire national transaction merely by denying approval over whatever small portion of that transaction may require its signoff—such as transferring control over one applicant's local state affiliate. This confers outsized power and leverage upon PUCs—if they choose to use it—to operate as tollbooths, extracting disproportionate concessions from providers who have no choice but to comply, lest denial of authorization by a single PUC undo the entire proposed transaction. And the conditions that state PUCs use this leverage to extract can be highly problematic: in addition to often being burdensome for the affected providers, they can create competitive distortions in the marketplace, harm other states by requiring providers to

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[21] This change to the *pro forma* procedures should be enacted even if the existing review processes are not changed, as discussed in Part I.A.7 above.

devote finite resources (such as jobs) to a specific jurisdiction, and do not advance the traditional, recognized interests of state PUCs in preserving and advancing universal service, protecting the public safety and welfare, ensuring the quality of telecommunications service, and safeguarding the rights of consumers.[22] Applicants facing such demands also lack recourse: state judicial review procedures to rein such conduct by PUCs are generally unavailable within the time they would be needed to close a transaction.

Requirements that providers navigate this complex state approval process—including satisfying state PUCs who make excessive demands as conditions of their approval and attempt to duplicate the competitive analysis conducted by the DOJ/FTC—increase the cost and detract from the efficiencies and public benefits that can be realized from transactions in the communications space, sometimes significantly. Below I propose reforms to alleviate these difficulties.

A. Standardize Review Criteria Across States.

Creating consistent review frameworks across states with respect to the types of transactions that trigger approval review, the criteria governing such review, and the timeline in which such review is to be completed would eliminate administrative burdens and reduce inefficiencies in the current framework.

1. Complete Review Within Defined Timelines and in Advance of Federal Review.

The multistate nature of major communications transactions, paired with the impossibility of severing the effects of transactions in individual states from the national transactions they comprise, mean that even a single PUC can hold up an entire national transaction if its approval timeline for any element of the transaction lags behind other regulators. A state PUC that delays approval thus delays the benefits of a transaction not only to its own citizens, but also to all stakeholders nationwide. In multistate transactions, for instance, regulators in California can effectively delay or block altogether benefits from accruing in New York or Texas even after regulators in those latter two states have identified such benefits and granted their approval,

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[22] *See* 47 U.S.C. § 253(b) (prohibiting states from imposing legal requirements that prohibit the ability of any entity to provide telecommunications services unless such requirement advances the objectives listed and does so on a competitively neutral basis).

because *all* states' approvals are usually needed before the transaction can proceed in *any* state. Such delays are also burdensome for the applicants themselves, as they must bear the costs of financing, uncertainty, retaining and attracting employees, and inability to engage in business planning.

Many state PUCs are cognizant of this dynamic and aspire to complete their review and approval in advance of the conclusion of the federal review process. But there is not a uniform practice of completing state PUC review and approval in advance of FCC and DOJ/FTC review, even though the issues before state PUCs are usually significantly less complex. At times these delays can be substantial. For instance, in the Verizon/Frontier transaction, FCC review was complete at the beginning of September 2015, but the applicants did not receive approval from the California PUC until three months later. Similarly, in the Charter-Time Warner Cable-Bright House Networks transaction, the California PUC's schedule did not contemplate an approval decision until several months after the FCC review was scheduled to be completed, and denied the applicants' motion to advance the schedule to align it with the FCC's. This situation created significant uncertainty in the markets and ultimately required the applicants to forgo important procedural rights in the California PUC's approval process (*i.e.*, their right to a hearing to challenge transaction opponents' evidence) to accelerate the PUC's review, with the PUC's order ultimately still postdating the FCC's approval. And, most recently, Verizon and XO Communications Services received approval from the FCC for their transaction in mid-November 2016, but were not able to close until February of the following year, as they were not able to obtain approval from the New York PSC or Pennsylvania PUC until the end of the following January.

Delays in state PUC approvals are exacerbated by some state PUCs' use of their gatekeeper role as a tollbooth. Insofar as some PUCs approach national transaction approvals as opportunities to extract concessions from providers, they have an incentive to delay their own reviews so that they can assess which concessions the applicants are willing to offer to regulators in other jurisdictions, and then utilize that information in their own negotiations. Reform of the state PUC conditional approval process to limit PUCs to requiring only transaction-specific mitigation measures (as discussed below) should thus remove some of the current incentives for delay. Reforms should also set firm and predictable timelines for state PUCs to complete their review, with schedules more aggressive than the FCC's shot clock to avoid the costs of one lagging state delaying a national transaction. To the extent states do not already have more prompt shot clocks in place, a presumptive 120-day timeframe should be sufficient given the more limited scope of state PUC review.

2. Consistent Triggers for Transactions Requiring Review.

There are stark differences across states today in the triggers for state PUC review and approval. Some states evaluate the qualifications of the acquiring entity to hold an authorization if a transaction results in the authorization's transfer, but require only notice of transactions in which the entity holding the authorization remains intact and the change of control is at the parent level.[23] Others require approval authority over any transaction resulting in a change of control to a regulated entity, even if the acquired entity is in a competitive market that would otherwise be expected to protect consumer interests.[24] Among the latter set of states, there is further variety as to what constitutes a "transfer of control" triggering such review, with some jurisdictions requiring review only where there is an actual change in the identity of the majority shareholder,[25] whereas others require approval even for changes involving a plurality shareholder.[26] Some states even require providers to go through an approval process before they can take on secured debt, on the reasoning that the creditor's security interest encumbers the provider's state-issued authorization.[27]

Navigating this patchwork of disparate processes creates administrative burdens, as it is often no small task for providers initiating a transaction to even determine which state approvals are required for a given transaction structure, particularly for smaller providers not experienced in

[23] *See, e.g.*, *In re Nebraska Public Service Commission, on its own motion, to conduct an investigation to determine when the Commission has jurisdiction to authorize acquisitions, mergers, or other transfers of control.* No. C-1746/PI-19, Clarification Order, 1998 Neb. PUC LEXIS 15 (Neb. Pub. Servs. Comm'n Mar. 10, 1998) (approval for indirect transfers of control among certificated carriers not required if change of control takes place at level of out-of-state parent corporation); N.C. Utils. Comm'n Rule 17-8(a) (notice-only filings required for transfers of control of competitive providers).

[24] *See, e.g.*, Cal. Pub. Util. Code §854 (approval required for all transfers of control of certificated entities).

[25] *See, e.g.*, *In re Commission Investigation into Possible Modification of its Procedure for Reviewing Non-Dominant Carrier Acquisitions and Transfer of Control Transactions*, Docket No. P-999/CI-07-192, Order, 2007 Minn. PUC LEXIS 69 (Minn. Pub. Utils. Comm'n May 22, 2007).

[26] *See, e.g.*, 52 Pa. Code § 69.901 (approval requirement for changes of "control" includes "de facto" control and is implicated by transfer of the largest voting interest exceeding 20%).

[27] *See, e.g.*, N.Y. Pub. Servs. Law § 101.

large, multi-state transactions. Accordingly, below I recommend certain uniform criteria states should adopt to make their approval requirements consistent with federal law while retaining the ability of PUCs to exercise their jurisdiction in key areas of state concern.

a) Post-Closing Notice Requirements for Intra-Corporate Reorganizations.

As with the FCC approval process, there is little justification for requirements that carriers obtain state PUC approval before engaging in transactions that do not affect the qualifications of the state-licensed telecommunications entities to hold their state authorizations. In particular, restructuring of a regulated entity that results in nominal changes of control, but effects no real change to the entity at the operational level (or even to the identity of the owners exercising ultimate decision-making authority) has no effect on the entity's qualifications to hold state-issued authorizations. As with the FCC reform recommendation discussed in Part I.B above, states that have not already shifted to post-closing notices for such transactions should do so. This is not merely a theoretical point. Internal restructurings that companies do to streamline corporate structures, such as merging multiple carriers under a single corporate umbrella, routinely require numerous state approval filings and multiple months of waiting.

b) Post-Closing Notice Requirements for Most Changes of Control Not Implicating Transfers of Authorizations.

The same rationale supports a move to notice requirements, in lieu of applications for review and approval, in most (if not all) transactions where ultimate control of the entity holding state authorizations changes due to a parent-level transaction. Insofar as that entity remains intact, such transactions generally do not affect its qualifications.

Several states have dispensed with formal approval requirements in a number of situations meeting these criteria. The states that have not yet done so should replace formal approval procedures with requirements that providers submit post-closing notices of transactions, so that state regulators can be aware of pertinent developments and maintain updated point-of-contact information for regulated entities.

First, in transfers involving a change of control where the acquiring entity already holds certificates of the same type as the acquiring entity, post-closing notice should be sufficient.[28] As set forth in Part I.B above, the principal concern (if any) of such transactions is how they will affect competition in markets in which the providers operate—an issue that is already addressed by federal regulators, obviating the need for further state review.

Second, where the acquired entity is a competitive provider but remains intact and unaltered by a change of control (whether at the parent or the operational level), there is little policy justification for state PUCs to require approval authority or attach conditions to the change of control. Market competition can be expected to protect consumers irrespective of who owns or controls a competitive provider, as long as the entity remains qualified to hold any state-issued certificates and abide by its terms and conditions. Indeed, the majority of states forgo review and approval for changes of control where the acquired entity is competitive, requiring only post-closing notices so that PUC staff can update their records and maintain contact information.

Third, changes of control at the parent level implicate few or no state interests where both the acquiring and acquired parent entities are located in other states (*i.e.*, where there is an indirect change of control over a state authorization holder, but this change of control is merely incidental to a transaction centered in other jurisdictions). Where transactions occur in other states, PUCs in states incidentally affected by those transactions have no special institutional capabilities or experience different from the federal agencies assessing the effects of a proposed transaction at

[28] Even California—whose approval process can often be lengthy and convoluted in other areas—has recognized that transactions in this category can often be simplified, and allows many of them to proceed via pre-closing notice under certain conditions. *See In re Application of California Association of Long Distance Telephone Companies Under Section 853 of the Public Utilities Code for Modification of the Procedures by which Non-Dominant Interexchange Carriers Seeks and Obtain Commission Authority Under Sections 851-854 of the Public Utilities Code*, A.93-09-029, Opinion, D.94-05-051, 1994 Cal. PUC LEXIS 356 (Cal. Pub. Utils. Comm'n Sept. 9, 1993); *In re Application of the Safety and Enforcement Division for an Emergency Order to Declare Void the Authority "granted" through the Advice Letter Process to MIDCOM Communications, Inc. (U-S261-C) and Cherry Communications, Inc. (U-5306-C) for MIDCOM Communications to Purchase a Portion of the California Customer Base of Cherry Communications, Inc.*, A.96-02-004, Opinion, D.97-06-096, 1997 Cal. PUC LEXIS 526 (Cal. Pub. Utils. Comm'n June 25, 1997); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-043, Opinion, D.98-07-094, 1998 Cal. PUC LEXIS 891 (Cal. Pub. Utils. Comm'n July 23, 1998).

the national level. While state PUCs have an interest in being notified of such proposed transactions, these interests can be satisfied via post-closing notice requirements.

c) Eliminate Approval Requirement for Financing Arrangements.

To the extent a handful of states (such as New York and Pennsylvania) still retain mandates requiring PUC approval before a regulated provider can issue secured debt, those requirements should be eliminated entirely. At minimum, they should be replaced with pre-closing notice requirements allowing PUCs to assess whether the indebtedness provides any basis to doubt the continued qualifications of the licensee, although even this situation is unlikely and such requirements unnecessary.

Requirements to obtain state PUC approval to issue secured debt can pose an unnecessary obstacle for providers seeking capital refinancing or restructuring their leverage ratio. Approval requirements related to financing may have once served a purpose in the era of rate-of-return regulation (where the debt assumed by a regulated entity was of interest to regulators insofar as a provider's finances affected its weighted average cost of capital), but any remaining policy rationale behind such requirements is questionable today. To the extent such requirements retain any continued rationale, it is that PUCs have an interest in assuring themselves of the qualifications of creditor(s) in the event a default results in the creditor's assumption of control over the provider's assets. But PUCs are capable of protecting that interest by assessing such qualifications if and when such a default arises without engaging in *ex ante* micromanagement of providers' financial affairs. That most states have done away with such requirements, without any adverse consequences, demonstrates that they no longer are needed.

3. Ensure that Review and Approval Conditions Remain Limited to Matters within State PUC Jurisdiction.

The jurisdiction of state PUCs is significantly more limited than the FCC. While state PUCs have authority to regulate intrastate telecommunications services, protect consumers, administer public safety programs such as E911 systems, and to license carriers operating in their jurisdictions, they do not exercise authority over the rates, terms, and conditions of broadband services, nor over the rates or entry of wireless services. In addition, insofar as state PUCs' licensing authority includes the power to authorize whether carriers may offer telecommunications services in their states, that authority is constrained by federal law, and must be applied in a competitively neutral fashion to advance specific, itemized objectives.[29] Beyond these federal-law limitations, many states further divest their PUCs of statutory authority, under state law, to regulate wireless, VoIP, and other Internet Protocol services.

The statutory and jurisdictional limits on state PUCs thus require that their approval review process should be focused specifically on (1) the qualifications and operations of state license holders, and not the operations of other affiliates under the same corporate parent, (2) the regulated operations of such providers, *i.e.*, intrastate telecommunications services and E911 and ETC obligations, and not on services or products the same companies may offer outside of areas of PUC regulation, and (3) the operations of such providers in the forum state, and not on the overall national consequences of a proposed transaction. So while a PUC's review process may reasonably include ensuring that a new licensee or owner is qualified to continue the licensed operations of an acquired entity, and will be prepared to assume responsibilities such as maintaining a reliable E911 service, it is improper for PUCs to include within that evaluation a judgment as to whether the public interest is served (or not served) by elements of the transaction beyond its purview. Those elements can include how customers in the state will be affected with respect to video services offered by a separate affiliate of the applicants not holding a state license, the terms and conditions of (FCC-regulated) broadband services offered by the applicants or their separate affiliates, or the effect of a transaction on national markets for information services, such as edge provider services offered by third parties.[30]

Most PUCs are mindful of these statutory and jurisdictional limitations in their transaction review process. But respect for these limits is not uniform. Applicants in some states have faced

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[29] *See* 47 U.S.C. § 253.

[30] There are also issues as to which review by state PUCs may not be legally improper, but make for bad policy. For instance, it makes little sense for state PUCs to include in their evaluation the competitive effect of a transaction on local telecommunications markets, as the DOJ and FTC have specialized expertise in market analysis, can generally assemble a significantly more comprehensive record on the subject, and already include such considerations in their review. Review of such considerations by state PUCs risks not only duplicating unnecessarily the work of federal regulators, it also introduces risks of inconsistent conclusions. State PUCs should defer to federal regulators and incorporate federal findings into their evaluations to the greatest extent possible.

extensive and burdensome discovery and approval conditions regarding services offered by unregulated affiliates, such as broadband Internet and VoIP services offered by affiliates not parties to the pertinent PUC proceedings. To use one particularly extreme example, the California PUC recently ordered (as part of the Charter-Time Warner Cable-Bright House Networks transaction) the merged entity to meet various service quality metrics for VoIP services, commit to broadband Internet speed increases within the state, abide by certain requirements related to customer-provided broadband Internet modems, abide by certain open-Internet requirements, and abide by new requirements related to the parent company's Internet interconnection and peering arrangements, among others.[31] The New York PSC and the New Jersey Board of Public Utilities both similarly conditioned the approval of the Altice-Cablevision deal on a commitment to increase broadband speeds within their respective states.[32]

Such overreaching by state PUCs is problematic for numerous reasons. First, expansive review by state PUCs of services, affiliates, and topics outside of their jurisdiction risks dramatically expanding the scope of state PUC proceedings, increasing costs and creating opportunities for delay. Second, it creates opportunities for mischief, with disappointed opponents of a transaction at the federal level using state PUC proceedings as a second bite at the apple to litigate yet again arguments they brought before the FCC or other federal agencies without success

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[31] *See In re Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC* (U6878C), A.15-07-009, Decision Granting Application To Transfer Control Subject To Conditions at 71-73, D.16-05-007, 2016 Cal. PUC LEXIS 255, at *104-08 (Cal. Pub. Utils. Comm'n May 12, 2016).

[32] *See Joint Petition of Altice N.V. and Cablevision Systems Corporation and subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements*, No. 15-M-0647, Order Granting Joint Petition Subject to Conditions, Appendix A at 1, 2016 N.Y. PUC LEXIS 311, at *141-42 (N.Y. Pub. Serv. Comm'n June 15, 2016); *In re Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Entities for Approval to Transfer Control of Cablevision Cable Entities*, No. CM15111255, Order Approving Stipulation of Settlement at 7-8, 2016 N.J. PUC LEXIS 133, at *20-23 (N.J. Bd. Pub. Utils. May 25, 2016).

(and forcing applicants to expend time and resources to wage duplicative battles on identical topics across numerous forums). Third, proliferating state conditions on subjects beyond state PUCs' authority create real risks of inconsistencies across states as well as between state and federal regulators. Fourth, such expansive review can result in unduly burdensome requirements that unlawfully increase the cost and difficulty of communications transactions.

As set forth below, these problems are exacerbated by inadequate judicial review procedures, which remove effective means of policing PUC orders that depart from PUCs' statutory powers and jurisdiction. Reforms of the judicial review process, which I address below, thus may help alleviate them. But states should also take action to address these problems directly, ensuring that their PUCs conduct transaction reviews, and impose approval conditions, only in regard to matters within their powers. And the FCC should consider preempting state PUCs that exceed those limitations and unduly trench on areas of federal authority.

4. Limit Approval Conditions to Mitigation of Transaction-Specific Harms.

Part I.A.7.b above describes difficulties with the FCC's use of approval conditions to implement unrelated policy goals through the merger review and approval process, including requiring applicants to negotiate the submission of "voluntary" commitments that allow the FCC to impose conditions it would have lacked the jurisdiction to order directly. While most states do not display the same problems in their approval processes, the flaws in the FCC process are replicated at some state commissions: approval conditions that lack a nexus to transaction-specific harms, as well as an expectation that providers offer up "voluntary" commitments that the PUC could not have itself ordered.

The problematic requirement of non-transaction-specific approval conditions is particularly harmful at the state level when PUCs use them as a mechanism for protecting parochial interests in national transactions, at the expense of other states and their citizens, as well as at the expense of national synergies underlying the transactions. In recent years, this has specifically taken the form of state PUCs requiring providers to commit to steering particular investments or maintaining/creating facilities and jobs within a particular state's borders. The New York PSC has been particularly active with such conditions. For instance, in Verizon's recent acquisition of XO Communications Services, it mandated that the merged entity retain all customer-facing XO positions in the state for four years,[33] and in connection with the Charter-Time Warner Cable merger, it went even further, prohibiting any net loss in such positions whatsoever, for four years,[34] as well as mandating extensive investment in the state.[35] The West Virginia PSC also has imposed such conditions, including in its approval of the sale of Verizon West Virginia to Frontier Communications, which required that Frontier locate its Southeast regional headquarters in Charleston, West Virginia.[36] The PSC based this condition on its expectation that this hub for engineering, technical, operational, and executive personnel for Frontier's operations in eight states would be a major employment center in the area.[37]

The parochial dynamic of these types of state reviews also creates an incentive for each state to delay its own proceeding to ensure that another state does not impose "better" conditions. In the Charter-Time Warner Cable transaction, for instance, the New Jersey Board of Public Utilities—despite presiding over a transaction that had only minimal effect in the state due to Time Warner's extremely small footprint there—did not move forward with its approval of the transaction until after New York had done so. Similarly, the Pennsylvania and New York commissions took substantially longer than other states to approve the Verizon-XO transaction, with each almost certainly delaying its own process to ascertain what sort of conditions the other

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[33] *See Petition of XO Holdings, XO Communications Services, LLC, and Verizon Communications Inc. for Approval of a Proposed Transaction Pursuant to Section 100 of the Public Service Law*, No. 16-C-0288, Order Granting Joint Petition Subject to Conditions at 22, 2017 N.Y. PUC LEXIS 12, at *33 (N.Y. Pub. Serv. Comm'n Jan. 24, 2017).

[34] *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Case 15-M-0388, Order Granting Joint Petition Subject to Conditions, Appendix A at 5, 2016 N.Y. PUC LEXIS 2, at *117 (N.Y. Pub. Serv. Comm'n Jan. 8, 2016).

[35] *Id.* at Appendix A at 1-2, 2016 N.Y. PUC LEXIS 2, at *112-14.

[36] *Joint Petition for Consent and Approval of the Transfer of Verizon's Local Exchange and Long Distance Business in West Virginia to Companies to be Owned and Controlled by Frontier Communications*, Case No. 09-0871-T-PC, Commission Order On Request For Consent for the Acquisition of Verizon West Virginia By Frontier Communications and for Approval of the Transfer of Long Distance Customer Accounts of Verizon Long Distance, LLC, and Verizon Enterprise Solutions, LLC, To a Company To Be Owned and Controlled By Frontier Communications And Approval Of Related Matters, at 28, 2010 W. Va. PUC LEXIS 1158, *79-80 (W. Va. Pub. Serv. Comm'n May 13, 2010).

[37] *Id.*

would be able to extract from the applicants. And this delay precluded residents of all other states from the benefits of the transaction, well after the FCC and other state commissions had found the transaction would be in the public interest.

Above and beyond the questionable legality of a state PUC's exercising compulsory authority over a provider's employment practices and investment decisions, such requirements make for bad policy by privileging the narrow interests of the forum state over the public interest more generally, while specifically imposing disadvantages on other states—as investments made and jobs created in one jurisdiction may mean jobs not created and investments not made in other states. And insofar as the compulsory investments and hiring decisions differ from more efficient ones a provider would have made under market conditions, the net investment and job gains compelled by such conditions may often be negative. So conditions that specifically disadvantage other states—by compelling jobs and investments to be steered into a specific state—are contrary to the public interest, should be discontinued by states, and (where possible) be preempted by the FCC.

B. Ensure Judicial Review Is Meaningfully Available in PUC Transaction Review Context.

A major factor driving difficulties with the merger review process at the state level today is that judicial intervention is often not readily available. Although states generally permit parties to appeal from final agency decisions, such judicial review, after a PUC's merger review has been completed, is ineffective as a practical matter in transactions of national significance that must be closed on specific timelines to be most efficient (and in many cases must be closed within such timeframes due to contractual or economic constraints).

As discussed above, applicants frequently must close national transactions within prompt timeframes in order to maintain necessary financing, provide investors and business partners with the requisite certainty, engage in business planning, retain and attract personnel, and manage costs. Judicial review of an adverse state PUC decision, therefore—whether a denial of an application or a conditional approval subject to burdensome or unlawful conditions—cannot provide a meaningful remedy unless it can be completed fast enough to avoid materially disrupting the schedule of a national transaction.

That judicial review is ineffective unless it is prompt, in the merger context, renders state PUC decisions unreviewable as a practical matter: judicial review of a final agency decision can take months, and even a victory on appeal may result only in a remand back to a PUC rather than an approval. Where a state PUC acts arbitrarily or capriciously—or oversteps its jurisdictional limitations—there is often no recourse, as a transaction would need to be canceled entirely before the judicial review process can be completed. Thus, an adverse decision by a single state PUC can effectively cancel a proposed multistate transaction, and applicants facing conditional approvals with burdensome and unlawful conditions have no choice but to accept the conditions or abandon the entire transaction.

The *de facto* immunity from judicial supervision that state PUCs enjoy in the transaction context in turn incentivizes abusive behavior, with some PUCs regularly exceeding their statutory authority and jurisdiction with impunity. A particularly egregious example, although hardly isolated, has been the California PUC, which under state law has been explicitly divested of jurisdiction over both broadband Internet access services and VoIP services.[38] Notwithstanding this unambiguous divestment of statutory authority, it has continued (based on highly implausible jurisdictional pretexts) to freely impose, on occasions such as the Verizon-Frontier transaction and Charter-Time Warner Cable-Bright House Networks transaction, significant and burdensome requirements on the applicants directly related to their broadband and VoIP services—knowing full well that the applicants would have no practical ability to challenge such action in court.[39]

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[38] *See* Cal. Pub. Util. Code § 710.

[39] State PUCs sometimes also rely on such unchallenged conditions as precedent in later matters. For example, in a recent dispute involving the California PUC's right to demand that providers hand over highly competitively sensitive and granular customer information regarding broadband services, the PUC and other third parties to the proceeding cited, as precedent, the fact that such information had been successfully demanded of applicants in the California PUC's merger approval process—ignoring that such applicants lacked any effective choice in the matter and no court had approved the commission's demands in those merger proceedings either. *See Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042*, I.15-11-007, 2015 Cal. PUC LEXIS 691 (Cal. Pub. Utils. Comm'n Nov. 5, 2015), Ruling on Pending Motions and Issues Discussed at January 20, 2016 Prehearing Conference (Feb. 4, 2016), at 13 n.30 (citing as precedent the requirement to produce such information in connection with the California PUC's review of the Comcast/Time Warner Cable application).

Remedying these difficulties requires placing PUCs on notice that their actions are subject to judicial review. Indeed, even the mere knowledge that they may be called to justify their decisions in court should have a constraining effect on the worst abuses. I propose two reforms to advance this objective.

First, states should ensure that they have available procedures, in extreme cases, to invoke judicial review in parallel with the PUC process to correct egregious errors or excesses of jurisdiction, whether by extraordinary writ (such as a writ of mandamus) or through rules providing for an interlocutory review procedure.[40] Intervention during the PUC proceeding itself could actually arrive in time to be helpful to applicants.

Second, states should adopt rules allowing applicants to accept conditional approvals without waiving their right to seek judicial review of conditions exceeding the PUC's subject matter jurisdiction. In the ordinary course, courts typically find that closing a transaction with a PUC's approval operates as a waiver of the right to appeal any conditions. Applicants are thus deprived of any avenue for relief from conditions that were never within the power of the PUC to impose in the first place. Accordingly, waiver rules resulting from acceptance of an approval decision, even where the conditions are described as "voluntary," should not prohibit applicants from appealing *jurisdictional* defects in the conditions. Again, the mere possibility that a PUC might have to defend its actions in court may deter the most egregious abuses.

C. Discontinue Use of "Most Favored Nation" Clauses in PUC Transaction Approvals.

A particularly problematic use of state commissions' approval authority is the proliferation of so-called "most favored nation" clauses ("MFNs"), by which state commissions approve transactions contingent upon a requirement that—if the provider grants a concession to any other PUC thereafter as a condition of approval in the second jurisdiction—the same concession will be extended to the original jurisdiction as well. For example, the New York PSC recently approved the Verizon-XO Communications deal with an MFN, which requires Verizon to notify the

[40] As one might expect from the extreme conduct of the California PUC, California lacks any procedure for judicial review until the PUC has issued a final decision and denied a subsequent motion for rehearing. *See* Cal. Pub. Utils. Code § 1756.

commission within 30 days if it makes a more favorable "public benefit" commitment to another state and provide the same benefits in New York.[41] The New York PSC and the New Jersey Board of Public Utilities also approved the Altice-Cablevision deal subject to similar MFN clauses.[42]

MFNs lack principled support. As a policy matter, conditional approvals of proposed transactions should only allow such conditions that mitigate transaction-specific harms. MFNs are divorced entirely from this rationale, as their purpose is simply to maximize the concessions that can be extracted from a provider as a toll for passing through the approval process, while ensuring that PUCs in other states are not more successful in the toll-charging endeavor. As such, MFNs highlight the least-defensible elements of the state PUC approval process and should be eliminated.

Beyond their lack of policy justification or nexus to PUCs' proper role in the approval process, MFNs create a zero-sum competition among states affected by a transaction, concentrating finite benefits (such as call center jobs or buildout commitments) in the states that utilize MFNs at the expense of other states that do not. They also make it more difficult for subsequent states to reach mutually acceptable agreements with providers, as providers cannot offer benefits or commitments to subsequent jurisdictions without also offering them to the original state, thereby significantly increasing the costs and burdens of any commitments the provider might offer in the future. MFNs thus create an arms race among states that place rigorous approval requirements on providers while penalizing states with more streamlined procedures.

MFNs also can exacerbate the existing problems with investment- and job-related conditions discussed in Part II.A.4. Above and beyond the fact that conditions in those areas can

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[41] *Petition of XO Holdings, XO Communications Services, LLC, and Verizon Communications Inc. for Approval of a Proposed Transaction Pursuant to Section 100 of the Public Service Law,* No. 16-C-0288, Order Granting Joint Petition Subject to Conditions at 20-21, 2017 N.Y. PUC LEXIS 12, at *31 (N.Y. Pub. Serv. Comm'n Jan. 25, 2017).

[42] *Joint Petition of Altice N.V. and Cablevision Systems Corporation and subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath, Inc. and Cablevision Cable Entities, and for Certain Financing Arrangements*, No. 15-M-0647, Order Granting Joint Petition Subject to Conditions at 84-85, 2016 N.Y. PUC LEXIS 311, at *134-35 (N.Y. Pub. Serv. Comm'n June 15, 2016); *In re Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Entities for Approval to Transfer Control of Cablevision Cable Entities*, No. CM15111255, Order Approving Stipulation of Settlement at 9-10, 2016 N.J. PUC LEXIS 133, at *25-26 (N.J. Bd. Pub. Utils. May 25, 2016).

undercut the very synergies that provide the economic justification for transactions in the first instance, MFNs can make these problems worse by forcing providers into duplicative commitments in two or more states that maintain the status quo at the expense of a transactions' potential benefits elsewhere. For instance, a provider seeking to consolidate or reorganize legacy operations can find itself obligated to preserve existing facilities or positions in multiple locations, preventing reorganization or consolidation of industries and more efficient investments or job creation elsewhere.

D. Paid Advocates and Intervenors With No Nexus to the Transaction Should Not Prolong Proceedings.

Another structural factor frequently causing excessive delay in state merger review proceedings is the practice of compensating advocacy groups that intervene in the proceeding. For instance, the California PUC's "Intervenor Compensation" framework entitles various third-party litigants to compensation so long as they make a "substantial contribution" to the state's review process, with the costs of such compensation assessed on the applicants themselves—in effect requiring applicants to pay for the costs of opposing their applications. A bill to create a similar intervenor compensation program was also recently proposed in the Hawaii State Legislature.[43]

Unlike the staff of state PUCs, who represent and ultimately answer to the public, independent advocacy groups are not answerable to elected officials and are not subject to political constraints. Compensation structures that broadly reward participation in the regulatory approval process thus financially incent such advocates and their paid counsel and consultants to proliferate contested issues and to eschew compromises, as such advocates do not bear the full costs of prolonging or complicating the proceedings, and may even stand to gain financially from extending them as long as possible.

The policy rationales for fee-shifting the cost of advocacy in transaction approvals to the applicants themselves are questionable. States that choose to subsidize outside groups as advocates before their PUCs in lieu of relying upon PUC staff or dedicated state offices (such as ratepayer advocates) to fill that role must carefully tailor the compensation structures to reduce incentives for such groups to use those resources litigating issues of questionable importance or

[43] *See* H.B. 805, 29th Leg. 2017, Reg. Sess. (Haw. 2017).

merit. For instance, PUCs should ensure that any compensation is narrowly limited to specific work on areas on which advocates prevailed,[44] and more rigorously police both the reasonableness and the proportionality of the effort such groups expend.

A related problem is that some PUCs permit interventions by parties with an insufficient nexus to proposed transactions. State approval proceedings can thus become mechanisms for companies seeking relief vis-à-vis the applicants in business disputes to obtain leverage over applicants by slowing and complicating the approval process. For example, Core Communications, Inc. has intervened in several Pennsylvania PUC approval proceedings, seeking essentially the same relief it was seeking in litigations or rulemakings where it and applicants were adverse to one another. In one instance the PUC dismissed Core's intervention,[45] but in another, Core's intervention was disputed but not withdrawn until the applicant settled its intercarrier compensation dispute with Core.[46] And in a more recent transaction, an applicant's motion to dismiss was rejected (allowing Core to fully litigate the case including by propounding discovery), although Core's substantive arguments were also rejected based on an analysis that Core's alleged harm was illusory.[47] To avoid the risk that third parties seeking unrelated gains can intervene in

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[44] The California Intervenor Compensation Program's "substantial contribution" test, for instance, sets the threshold for eligibility lower than the "prevailing party" test applicable under federal fee-shifting statutes, incentivizing advocates to stake out more-aggressive positions without thereby assuming the risk that a lack of success on unduly aggressive positions will jeopardize their funding.

[45] *Joint Application of EarthLink, Inc. and One Communications Corp., et al.*, Docket No. A-2011-2218761, Opinion and Order, 2011 Pa. PUC LEXIS 2091 (Pa. Pub. Util. Comm'n Apr. 20, 2011).

[46] There the applicant explained, "Core has improperly attempted to interject its private intercarrier compensation dispute into this transfer of control docket." Answer and Preliminary Objection of Sprint Communications Company L.P. to the Petition to Intervene and Protest of Core Communications, Inc. at 1, *Sprint Communications Company L.P. Application for Approval of a General Rule Indirect Transfer of Control of Sprint Communications Company L.P. to Starburst II, Inc.*, Docket No. A-2012-2337337 (Pa. Pub. Util. Comm'n Jan. 17, 2013). Core subsequently withdrew its intervention after Sprint settled their intercarrier compensation dispute.

[47] The applicants pointed out that Core's proposed conditions were identical to ones it advocated at the PUC and the FCC. The PUC's approval order rejected Core's competition argument and its proposed conditions, noting that "Core has not purchased any competitive transport services from XO in Pennsylvania for more than three years." *See Joint Application of XO Holdings and Verizon Communications Inc. for approval of a transfer of control of XO Communications Services, Inc. from XO Holdings to Verizon Communications Inc.*, Docket No. A-2016-2535279, Order & Opinion at 24 (Pa. Pub. Util. Comm'n Jan. 26, 2017).

approval proceedings to prolong them and obtain leverage in unrelated disputes, PUCs should have policies in place to treat intervention requests from competitors with substantial skepticism.