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RESEARCH SUMMARY

HOW FCC TRANSACTION REVIEWS THREATEN RULE OF LAW AND THE FIRST AMENDMENT

The Federal Communications Commission (FCC) has the power to approve or deny any transfer of licenses issued under its jurisdiction. In recent years, the FCC has increasingly been using this power to review mergers and extract regulatory concessions from merging companies as a way to enforce rules that it is otherwise unable or unwilling to promulgate through the normal rulemaking process. Merging companies have little choice but to agree to the nominally voluntary concessions if they want their merger to go through. Furthermore, because these regulatory concessions are considered voluntary, many of them are practically unappealable, shielding the FCC's actions from judicial review. The FCC has used its ability to extract these merger conditions to skirt statutory, and in some cases constitutional, limits on its power, posing a threat to good governance, free speech, and the rule of law.

A new study for the Mercatus Center at George Mason University examines how and why the FCC uses its power over license transfers to extract regulatory concessions from businesses, and identifies the legal implications of the expanding use of this power. The FCC has used transaction reviews both to maximize the scope of its jurisdiction and to avoid oversight. This power, which is supposed to benefit the "public interest," has instead served the political interests of FCC administrators, stifled free speech, and created a climate of legal uncertainty in the communications industry.

To read the study in its entirety and learn more about the authors, Mercatus research fellows Brent Skorup and Christopher Koopman, see "How FCC Transaction Reviews Threaten Rule of Law and the First Amendment."

BACKGROUND

No Explicit Authority for Merger Review

- While the Communications Act of 1934 doesn't provide the FCC with any explicit authority to review mergers, the FCC does have a statutory duty to find that license transfers serve

For more information, contact
Kate De Lanoy, 703-993-9677, kdelanoy@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

"the public interest, convenience, and necessity" before approving them. The agency interprets this as de facto power to review and approve mergers.

- The vague "public interest" standard by which the FCC is supposed to evaluate license transfers has rarely been constrained by Congress or the courts. This gives the agency broad discretion in exercising its power.

- Communications-industry mergers are also subject to review by the Department of Justice and the Federal Trade Commission, and they must meet the same standards as mergers in many other industries. Both of these agencies have clearly defined merger review authority and use review processes that rely on welfare-based standards and rigorous economic analysis rather than an amorphous public interest standard.

"Empire Building" through Regulation

Scholars have long recognized that regulators, far from seeking to maximize the public interest, often strive to achieve their own goals and objectives. The "empire building" model of agency behavior provides a framework for understanding how regulators maximize their jurisdictions, reputations, and output, among other variables. Increased use of transaction reviews helps the FCC achieve two such goals:

- *Expand jurisdiction*. Agencies' regulatory agendas are constrained by the statutory authority granted to them by Congress. Courts may strike down regulations enacted outside the scope of an agency's statutory authority. To avoid this constraint and expand its jurisdiction, the FCC has used concessions gained through merger review to enforce regulations previously struck down by courts.

- *Avoid oversight*. Formal rulemaking procedures require public notice and comment periods, and the resulting rules are subject to judicial review. Even when particular regulatory policies are explicitly authorized by statute, the FCC has sometimes chosen to enforce those policies through merger conditions to avoid scrutiny from both the public and the courts.

KEY FINDINGS

FCC Merger Reviews Threaten Free Speech

Many recent concessions achieved by the FCC have dealt with issues related to speech and the distribution of speech. Given that courts have steadily weakened the FCC's ability to regulate speech since the 1970s, the growth in speech-related merger concessions is consistent with an empire-building model of FCC behavior. Two examples illustrate the FCC's use of merger reviews to impose regulations of speech:

- *Net neutrality*. Rules forcing Internet service providers to carry content they do not wish to carry were struck down in 2010 and 2014, but merger conditions enforcing "net neutrality" on some of the largest providers allowed the FCC to enforce this rule without judicial review or congressional authorization.

- *Programming mandates*. While Congress has authorized the FCC to enact certain rules regarding television programming, implementing such policy through the formal rule-making process could attract negative attention from Congress, media companies, and the public. The FCC extracted many commitments related to programming from Comcast and NBCU during their 2011 merger, including quotas for Spanish-language and children's programs, thereby avoiding significant public and court scrutiny of TV content regulations.

The Supreme Court has held that licensing laws that regulate distributors of speech are presumptively unconstitutional when those laws lack explicit limits on authority. The FCC's solicitation and encouragement of "public interest" programming and net neutrality commitments from merging firms therefore may expose the agency to First Amendment challenges.

FCC Merger Reviews Undermine Rule of Law and Create Uncertainty

- *There are no practical avenues for appeal*. While merger conditions are nominally voluntary, the consequences of not offering or accepting them—a rejected merger—are very costly, giving companies no choice but to accept. Appealing the "voluntary" conditions is practically impossible, allowing the FCC to impose conditions with almost no legal consequences or constraints.

- *The review proceedings are slow and opaque*. Unlike other federal agencies that regulate mergers, the FCC has no statutory time limit for its transaction reviews. Reviews typically take a year, during which merging companies may not know what conditions will be attached to their merger. Firms may spend tens or hundreds of millions of dollars on an FCC merger review alone, only to be rejected or saddled with impractical merger conditions.

POLICY RECOMMENDATIONS

- *Define clear limits and expand judicial review of merger conditions*. Constraining the FCC's ability to extract concessions during merger reviews will require clear statutory limits on transaction reviews, such as limiting acceptable merger conditions to those that remedy specific merger-related harms. Allowing companies to appeal conditions in court could ensure that the FCC is not imposing arbitrary conditions that do not meet the new, strict criteria.

- *Remove the FCC's transaction review power*. Congress should consider removing the FCC's transaction review authority and relying instead on the Department of Justice and the Federal Trade Commission to oversee mergers, because both already have the authority and tools to do so. Furthermore, both agencies focus almost exclusively on competition policy across many industries, reducing the incentive to use merger review as a tool for enacting unrelated policy agendas.