One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T / T-Mobile Merger and a Proposal for Reform

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ONE MERGER, TWO AGENCIES: DUAL REVIEW IN THE BREAKDOWN OF THE AT&T/T-MOBILE MERGER AND A PROPOSAL FOR REFORM

Abstract: Mergers in the telecommunications industry are unique because they are reviewed by not one, but two federal agencies. Mergers in most industries are subject only to antitrust review by the U.S. Department of Justice (DOJ). Telecommunications mergers, however, are also reviewed by the Federal Communications Commission (FCC) under its flexible public interest standard. This system of dual review causes delay, redundancy, and a perversion of antitrust and telecommunications law. This Note examines the system of dual review through the lens of the AT&T/T-Mobile merger, which was proposed and eventually abandoned in 2011. After outlining the historical development and statutory authority for dual review, the Note demonstrates how dual review altered the DOJ’s typical burden structure in its attempt to block the AT&T/T-Mobile merger. Finally, the Note presents a proposal for reform to the FCC’s review, arguing for a significant limitation in scope and the imposition of a strict time limit.

Introduction

On March 20, 2011, two of the four largest U.S. wireless telephone companies, AT&T Inc. (“AT&T”) and T-Mobile USA (“T-Mobile”), announced their intention to merge.¹ The merger proposal instigated a heated debate among the public and within the government, ultimately leading to the implosion of the deal.² Putting aside the merits of the proposed merger, AT&T and T-Mobile’s experience has broad implications for governmental review of mergers in the telecommunications industry.³ AT&T and T-Mobile needed approval from both the U.S. Department of Justice (DOJ) and the Federal Communications Com-

² See infra notes 242–246 and accompanying text.
³ See infra notes 237–253 and accompanying text.
mission (FCC) before they could move forward with the deal. All telecommunications mergers are subject to review by the DOJ and the FCC—each agency analyzes the impact of the merger under different legal standards, different burdens of proof, and different policy guidelines. The result is a system of delay, redundancy, and inefficiency. This Note examines the system of dual review through the lens of the AT&T/T-Mobile merger, highlighting the relative ease with which the DOJ can challenge mergers in the telecommunications industry, compared to mergers in other industries. Although in most industries the DOJ must make an evidentiary showing at a preliminary injunction hearing, the dual review by the FCC eliminates this requirement in the telecommunications context. This Note does not pass judgment on whether the AT&T/T-Mobile merger should have been approved, nor does it comment on the appropriate methodology for governmental merger scrutiny. It merely seeks to highlight the inconsistencies caused by dual review and the way that these inconsistencies undermine and pervert the application of current antitrust policy.

7 See infra notes 11–14 and accompanying text.
8 15 U.S.C. § 25 (2006); Einer Elhauge, UNITED STATES ANTITRUST LAW AND ECONOMICS 587 (2d ed. 2011). A preliminary injunction can become relevant in any type of legal case, and is defined as “a temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” See BLACK’S LAW DICTIONARY 855 (9th ed. 2009).
9 See SECTION OF ANTITRUST LAW, AM. BAR ASS’N., Mergers and Acquisitions: UNDERSTANDING THE ANTITRUST ISSUES 358 (Robert S. Schlossberg & Clifford H. Aronson eds., 2000) [hereinafter MERGERS AND ACQUISITIONS] (outlining the preliminary injunction standard); Barkow & Huber, supra note 5, at 38 (explaining that the Clayton Act favors the free market and places the burden on the government); Donald J. Russell & Sherri Lynn Watson, Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission, 11 GEO. MASON L. REV. 143, 151 (2002) (speaking to the costs of dual review); infra notes 159–374 and accompanying text (arguing that the dual review of telecommunications mergers perverts the application of antitrust law and, accordingly, that FCC authority in this arena must be curtailed).
Part I of this Note outlines the development and current operation of the dual review system, focusing first on the DOJ and then on the FCC. Part II begins by using the AT&T/T-Mobile merger to demonstrate the DOJ’s ability to stall telecommunications mergers without seeking a preliminary injunction. It then discusses the inefficiencies created by this preliminary injunction problem. Finally, Part III outlines four approaches to addressing this problem, and concludes that severely limiting the substance of FCC merger review and imposing a strict time limit on this review offers the best solution.

I. DOJ & FCC Dual Review of Telecommunications Mergers

Before the merger between AT&T and T-Mobile could move forward, the parties needed the blessing of two federal agencies. Mergers between companies in the telecommunications industry are subject to review by the DOJ and the FCC. The Antitrust Division of the DOJ is the primary enforcer of the U.S. antitrust laws. The Telecommunications Act of 1996 ("1996 Act"), granted the DOJ authority to review telecommunications mergers in the same way it reviews mergers in most other industries. Congress created the FCC in 1934 as an expert agency tasked with regulating a broad swath of telecommunications issues and technologies. It has the narrow authority to review mergers that implicate the transfer of licenses for the use of electromagnetic spectrum or common carriage wires. The two agencies conduct their merger review independently and without formal cooperation.

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11 See infra notes 15–158 and accompanying text.
12 See infra notes 159–236 and accompanying text.
13 See infra notes 237–253 and accompanying text.
14 See infra notes 254–374 and accompanying text.
15 Sorkin et al., supra note 4.
16 Barkow & Huber, supra note 5, at 29.
17 Id. at 35–36.
result, a merger in the telecommunications industry is subject to review by both the DOJ and the FCC under differing standards.\textsuperscript{22}

This Part outlines the history of and statutory basis for this concurrent review process.\textsuperscript{23} Section A focuses on the development of the DOJ’s authority to review mergers in general, and telecommunications mergers in particular.\textsuperscript{24} Section B discusses the procedure and relevant legal standard used by the DOJ to review mergers.\textsuperscript{25} Section C considers the history of the FCC and its authority to review mergers.\textsuperscript{26} Finally, Section D details the FCC’s procedural and legal standards for merger review.\textsuperscript{27}

A. History of Antitrust Regulation and the DOJ’s Statutory Merger Review Authority

From its origin in the late nineteenth century, antitrust law has aimed to police the free market, intervening only when necessary to prevent or remedy anticompetitive conduct.\textsuperscript{28} Federal antitrust policy began in 1890 when Congress passed the Sherman Antitrust Act.\textsuperscript{29} Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy” that unreasonably restrains trade, and it gives the government civil and criminal recourse.\textsuperscript{30} Section 2 of the Sherman Act prohibits monopolization and any attempts to monopolize.\textsuperscript{31} Congress intended for the government, acting through the Antitrust Division of the DOJ, to protect competitive markets by bringing actions to chal-

\textsuperscript{22} Barkow & Huber, supra note 5, at 30–31.
\textsuperscript{23} See infra notes 28–158 and accompanying text.
\textsuperscript{24} See infra notes 28–50 and accompanying text.
\textsuperscript{25} See infra notes 51–82 and accompanying text.
\textsuperscript{26} See infra notes 83–133 and accompanying text.
\textsuperscript{27} See infra notes 134–158 and accompanying text.
\textsuperscript{28} See Mergers and Acquisitions, supra note 9, at 1; Barkow & Huber, supra note 5, at 38, 57; Raymond Z. Ling, Note, Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After Whole Foods, 75 Brook. L. Rev. 935, 939 (2010).
\textsuperscript{30} 15 U.S.C. § 1. Congress’s rationale for passing the Sherman Act is not completely clear. Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 57–58 (4th ed. 2011). Scholars have cited the promotion of allocative efficiency, just business practices, and viability of small farmers as possible impetuses for its passage. Id. at 58. What is clear, however, is that Congress intended antitrust standards to develop and change over time through adjudication in the courts. Id. at 65.
The antitrust laws intervene only when necessary to eradicate anticompetitive behavior, restoring the market to its competitive status quo; antitrust laws do not seek to substantively improve the market or prices.\textsuperscript{33}

Merger policy, a subset of antitrust policy, changed over time in response to the Sherman Act’s inability to address the growing volume of mergers.\textsuperscript{34} The number of mergers exploded during the period between 1895 and 1904, creating a need to strengthen the Sherman Act’s jurisdiction over mergers.\textsuperscript{35} Under the Sherman Act, the government could challenge a merger only by bringing an action alleging an unreasonable restraint of trade or monopolization after the merger had been consummated.\textsuperscript{36} It was therefore very difficult for the government to challenge mergers under the Sherman Act.\textsuperscript{37}

Congress responded to calls for reform by passing the Clayton Act, which declared the illegality of anticompetitive mergers to be a problem separate from the general anticompetitive behavior covered by the Sherman Act.\textsuperscript{38} The Clayton Act, passed in 1914, enumerated specific activities, such as mergers, over which the federal government has jurisdiction.\textsuperscript{39} Section 7 of the Clayton Act, which prohibits mergers that


\textsuperscript{34} See Hovenkamp, \textit{supra} note 30, at 542; Bailey, \textit{supra} note 29, at 444; Ling, \textit{supra} note 28, at 939–40. “A merger occurs when two firms that had been separate come under common ownership. . . . The antitrust laws also use the word ‘merger’ to describe a consolidation: two original corporations cease to exist and a new corporation is formed that owns the assets of the two former corporations.” Hovenkamp, \textit{supra} note 30, at 541. Some scholars have posited that the Sherman Act, by prohibiting informal relationships and combinations among firms, actually encouraged mergers. \textit{Id.} at 542.

\textsuperscript{35} Hovenkamp, \textit{supra} note 30, at 542.


\textsuperscript{37} Elhauge, \textit{supra} note 8, at 585–86; Ling, \textit{supra} note 28, at 940.


\textsuperscript{39} Clayton Act, ch. 323, § 7.
substantially lessen competition, has become the primary vehicle for federal government oversight of mergers.\textsuperscript{40}

The Clayton Act, however, did not give the government the power it needed to prevent anticompetitive mergers before they occurred, and therefore the Act required further amendment.\textsuperscript{41} Under the Clayton Act as it stood in 1914, the government had specific authority to challenge unlawful mergers but had no way of knowing about or reviewing mergers before they went into effect; therefore, the DOJ typically had to wait until a merger was consummated to bring an action.\textsuperscript{42} Congress addressed this problem in 1976 by passing the Hart-Scott-Rodino Antitrust Improvement Act (“HSR Act”).\textsuperscript{43} The HSR Act enabled effective government enforcement of Section 7 of the Clayton Act by providing for oversight and blockage of mergers before they were completed.\textsuperscript{44}

This structure allows the DOJ to play a central role in the review, approval, and challenge of telecommunications mergers.\textsuperscript{45} The Antitrust Division of the DOJ and the Federal Trade Commission (FTC) are the primary enforcers of the Clayton and HSR Acts, and, pursuant to this authority, review and challenge mergers across a wide range of industries.\textsuperscript{46} Ever since the enactment of the 1996 Act, the DOJ has reviewed telecommunications mergers as it does mergers in any other industry.\textsuperscript{47} When the parties to a proposed merger exceed enumerated size thresholds, which practically all parties to telecommunications mergers do, both are required to file for approval with the DOJ and the FTC before the merger may be consummated.\textsuperscript{48} After the initial notifi-

\textsuperscript{40} Id.; Ling, \textit{supra} note 28, at 940. Section 7 prohibits mergers in which “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

\textsuperscript{41} See infra notes 42–44 and accompanying text.

\textsuperscript{42} Ling, \textit{supra} note 28, at 940.


\textsuperscript{44} Id.; Bailey, \textit{supra} note 29, at 439–40.

\textsuperscript{45} See infra notes 46–50 and accompanying text.

\textsuperscript{46} 15 U.S.C. §§ 18–18a; 28 U.S.C. § 52 (2006). The DOJ and the FTC work together to allocate review for each merger between themselves. MERGERS AND ACQUISITIONS, \textit{supra} note 9, at 13–16. The DOJ is regarded as having more experience in telecommunications and therefore almost always reviews proposed mergers in the telecommunications industry. \textit{Id. at} 14.


\textsuperscript{48} 15 U.S.C. § 18a; Barkow & Huber, \textit{supra} note 5, at 37–38; Ling, \textit{supra} note 28, at 942. As summarized by one writer:
cation and report form is submitted to both agencies, the merger is cleared to one of the two agencies for further review.\textsuperscript{49} Mergers in the telecommunications industry are almost always assigned to the DOJ for investigation rather than the FTC; therefore, this Note focuses exclusively on DOJ review.\textsuperscript{50}

\textbf{B. DOJ Legal Standard and Procedure}

The HSR Act outlines a complex procedure for merger review.\textsuperscript{51} Once the proposed merger is assigned to the DOJ, the agency has thirty days to conduct an initial investigation, during which time consummation of the transaction is prohibited.\textsuperscript{52} If the DOJ is satisfied that the proposed merger does not violate the Clayton Act, the DOJ can note approval by either granting an early termination of the waiting period or allowing the thirty-day waiting period to expire.\textsuperscript{53} If, on the other hand, the DOJ believes that the merger may raise Clayton Act concerns, it can issue a request for additional information (“second request”).\textsuperscript{54} After the parties have “substantially complied” with the second request, an additional thirty-day waiting period attaches for the DOJ to complete

[The HSR Act] requires premerger filing when: (1) at least one party to the transaction is engaged in commerce or an activity affecting commerce, and (2) when the size of the transaction exceeds $200 million (commonly known as the “size-of-transaction test”). When the size of the transaction does not exceed $200 million, but is in excess of $50 million, premerger filing is generally required if one party has at least $10 million in sales or assets, and the other party has at least $100 million in sales or assets—commonly referred to as the “size-of-person test.”

\textsuperscript{49} Mergers and Acquisitions, supra note 9, at 14. The FTC and the DOJ share authority to enforce the antitrust laws. Russell & Wolson, supra note 9, at 143 n.1; Ling, supra note 28, at 943–44. In practice, however, each proposed merger will be cleared to a single agency for review, depending on the relative expertise and experience of each agency in that industry. Russell & Wolson, supra, at 143 n.1; Ling, supra note 28, at 943–44.

\textsuperscript{50} Mergers and Acquisitions, supra note 9, at 14; Russell & Wolson, supra note 9, at 143 n.1; Ling, supra note 28, at 943–44.

\textsuperscript{51} See infra notes 52–56 and accompanying text.

\textsuperscript{52} 15 U.S.C. § 18a(a)–(b) (2006); Bailey, supra note 29, at 442. The DOJ uses information submitted in the initial notification and report form to conduct this initial investigation. Bailey, supra note 29, at 442. This form contains basic information on the structure of the proposed merger as well as financial information. \textit{Id}.

\textsuperscript{53} Ling, supra note 28, at 946.

its review. At the end of this second thirty-day period, the DOJ must decide whether to approve the merger, pursue a voluntary agreement between the parties to alleviate its concerns, or file suit to block the merger.

The DOJ’s analysis follows a predictable structure. The DOJ, in conjunction with the FTC, issues nonbinding internal guidelines that outline the analytical framework used by the agencies when determining whether a proposed merger may violate the Clayton Act. The 2010 Horizontal Merger Guidelines provide that a merger will be considered anticompetitive if it results in an increase in the merged firm’s market power. Market power is a measure of a firm’s ability to profit from raising prices above cost and is estimated by a firm’s market share. Typically, the DOJ will begin its analysis of market power by defining the relevant product and geographic markets. The definition of a relevant product market depends on whether a firm manufactures products that the consumer views as substitutable. The relevant geographic market is defined as the geographic area where the firms compete directly over these substitutable products.

55 Bailey, supra note 29, at 443; Ling, supra note 28, at 946. If the proposed transaction is a cash tender offer, however, the additional review period is only ten days. 15 U.S.C. § 18a(e)(2).
56 Ling, supra note 28, at 946.
57 See infra notes 58–63 and accompanying text.
59 Id. at 2. The Guidelines state:

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. . . . A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.

60 Hovenkamp, supra note 30, at 89–91 (“Market power is a firm’s ability to deviate profitably from marginal cost pricing.”).
62 Hovenkamp, supra note 30, at 101; Merger Guidelines, supra note 58, at 7 (“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”). Coca-Cola, for example, would likely be seen as a valid substitute for Pepsi, but Diet Pepsi likely would not. See id.
63 Hovenkamp, supra note 30, at 123–24.
The DOJ then weighs the anticompetitive effects against any mitigating factors to come to a decision.\textsuperscript{64} To measure the anticompetitive effects, the DOJ analyzes the market concentration within the identified relevant market before and after the proposed merger using the Herfindahl-Hirschman Index ("HHI").\textsuperscript{65} A high market concentration suggests a high likelihood of collusion and anticompetitive concerns.\textsuperscript{66} The DOJ then balances the estimated anticompetitive effects against any procompetitive effects of the merger and any mitigating factors such as created efficiencies or increased ease of entry.\textsuperscript{67} The DOJ’s analysis focuses on the immediate effect of the merger on the market at issue; it does not take into account long-term predictions of future competition.\textsuperscript{68} This analysis informs the DOJ’s decision to approve the merger or challenge it as a violation of the Clayton Act.\textsuperscript{69}

If the DOJ believes the proposed merger would have a net anticompetitive result and the parties cannot come to an agreement with the DOJ to remedy the anticompetitive elements, the DOJ will file suit in federal court to permanently enjoin the merger.\textsuperscript{70} The Clayton Act favors the free market; the burden therefore rests on the DOJ to prove by a preponderance of the evidence that the proposed merger is likely to substantially lessen competition.\textsuperscript{71} The DOJ’s determination that the proposed merger will be anticompetitive receives no deference from

\textsuperscript{64} See infra notes 65–69 and accompanying text.
\textsuperscript{65} Curran, supra note 61, at 752. Market concentration is a measure of the number of firms and their respective market shares. See Merger Guidelines, supra note 58, at 18. “The HHI as used in the Horizontal Merger Guidelines is the sum of the squares of every firm in the relevant market.” Hovenkamp, supra note 30, at 566. The DOJ will also extrapolate anticompetitive effects based on observed effects of recent similar mergers. Merger Guidelines, supra note 58, at 3.
\textsuperscript{66} Mergers and Acquisitions, supra note 9, at 35. The 2010 Horizontal Merger Guidelines set a score of 2500 on the HHI as the threshold for "high" market concentration, indicating anticompetitive effects. See Hovenkamp, supra note 30, at 566.
\textsuperscript{67} Curran, supra note 61, at 752. As one scholar explains,

\textit{[a] barrier to entry is something that permits incumbents to price monopolistically for an unacceptable period of time before effective entry restores price and output to the competitive level. If barriers to entry are completely absent, any instance of monopoly pricing will result in immediate entry of sufficient magnitude to restore prices to the competitive level.}

Hovenkamp, supra note 30, at 579.
\textsuperscript{68} See Barkow & Huber, supra note 5, at 45–46.
\textsuperscript{69} Merger Guidelines, supra note 58, at 1, 18–19; Ling, supra note 28, at 946.
\textsuperscript{71} Barkow & Huber, supra note 5, at 38, 49.
the court. The burden placed on the DOJ comports with the overarching policy behind the antitrust laws: to presume that unhindered participation in the economy will result in a competitive and efficient atmosphere and that the government should intervene only if there is a clear showing of harm to consumers.

While its case is pending, the DOJ will typically seek a preliminary injunction to prevent the merger from being consummated before trial. In fact, cases are often won or lost at the preliminary injunction stage due to the high costs of trial. Because the DOJ must show a likelihood of success on the merits, the grant or denial of a preliminary injunction is often predictive, if not conclusive, of the final result of the case. Therefore, the DOJ will often consolidate its claim for preliminary injunction and its claim for permanent injunction into the same action.

Merger remedies, whether reached through negotiation or litigation, commonly take one of two forms: structural or behavioral. The most typical DOJ remedy is the structural divestiture of the portion of one merging company that competes directly with the other merging company. If the parties reach agreement through negotiation, the DOJ will issue a consent decree which commands substantial judicial deference. Alternatively, if the remedy is judicially mandated, the opinion is subject to full judicial review.

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72 Id. at 49; Russell & Wolson, supra note 9, at 147.
73 See Barkow & Huber, supra note 5, at 38, 49.
75 Mergers and Acquisitions, supra note 9, at 358.
76 Id. at 371. A court will grant a preliminary injunction if the DOJ can demonstrate that: (1) consumers would suffer irreparable harm without the issuance of an injunction; (2) harm to the plaintiff would outweigh harm to the defendant if the injunction were granted; (3) the DOJ has a substantial likelihood of success on the merits at trial; and (4) issuing injunctive relief would comport with the public interest. Id.
77 See Mergers and Acquisitions, supra note 9, at 358–60, 371; Ling, supra note 28, at 947–48.
78 Frankel, supra note 70, at 169 n.37.
79 Ling, supra note 28, at 950. Structural remedies alter the makeup of the merging companies such that the premerger state of competition will be maintained. Id. Behavioral remedies, conversely, regulate the conduct of the newly merged company. Id. The DOJ prefers structural remedies because they do not require subsequent regulatory oversight. Id.
80 Id.
81 Russell & Wolson, supra note 9, at 147–48.
82 Frankel, supra note 70, at 169. It is important to note, however, that appeals are fairly rare, so these decisions are often final. Id.
C. History of Telecommunications Regulation and Statutory Authority for FCC Merger Review

In contrast to the DOJ’s antitrust review, the FCC’s review stems from a long history of heavy regulation of telecommunications to protect the public interest.83 The Communications Act of 1934 (“1934 Act”) marked the beginning of a cohesive federal telecommunications policy in the United States.84 Prior to its passage, different agencies regulated each separate technology, leading to a disparate system of regulation.85 The 1934 Act revolutionized telecommunications regulation by creating the FCC, an expert agency tasked with regulation of all telecommunications technologies, from radio to telephone to television.86 This Act gave the FCC broad discretionary power to regulate the use of telecommunications through adjudication and rulemaking.87 The Act is separated into seven titles, four of which concern general provisions and three of which correspond to the regulation of specific technology.88 This structure creates a “silo” model of regulation in which each technology falls under separate statutory provisions.89 Title II regulates common carriers, such as telephony; Title III regulates services that transmit via the electromagnetic spectrum, such as radio and broadcast television; and Title VI regulates cable services, such as cable television.90

Before the creation of the FCC in 1934, the telephone market existed as a government-sanctioned monopoly.91 Bell Telephone Company (“Bell”), the dominant telephone company, argued for a government-mandated monopoly as the best option for the industry, citing a number of reasons that the industry tended toward a natural monop-

83 See Barkow & Huber, supra note 5, at 50–51; Boliek, supra note 33, at 1642–43.
85 Stuart Benjamin et al., Telecommunications Law and Policy 52–54 (2d ed. 2006).
86 Id.
87 Id. at 60.
89 Boliek, supra note 33, at 1642–43.
First, the market approached a natural monopoly because the initial costs of investment in telephone networks were so high, and the marginal cost of adding each additional customer were so low, that inefficiencies would be created by having more than one provider. Second, network effects existed in that the value of the service to each customer increased exponentially as the network grew larger because each customer could communicate with a broader network of subscribers. Bell’s argument prevailed and Congress passed the Willis-Graham Act, which exempted consolidations in the telephone industry from antitrust oversight and allowed Bell to create a monopoly. The government granted Bell a monopoly in exchange for submitting to common carrier regulation.

Since 1934, FCC governance has been marked by a slow movement towards deregulation and free competition. The FCC inherited a system of monopoly and regulatory oversight, and it initially tolerated Bell’s dominance. As the Bell monopoly grew larger and expanded into long-distance and other derivative markets, however, the government became concerned about the monopolistic state of the industry. This concern ultimately led to a DOJ suit and the eventual breakup of the Bell monopoly in 1984. The 1984 Modification of Final Judgment (“MFJ”) between the DOJ and Bell vested Bell’s long-distance service in one company, AT&T, and opened the long-distance market to competition. The MFJ broke up Bell’s local telephone service into regional Bell operating companies that were subject to monopoly rate regulation and prohibited from expanding their service offerings be-

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92 Benjamin et al., supra note 85, at 695–98; id. at 1178 (“A natural monopoly is said to exist in any market where the costs of production are such that it is less expensive for demand to be met by one firm than it would be for that same demand to be met by more than one firm.”).
93 Id. at 696; Lyons, supra note 91, at 387.
94 Benjamin et al., supra note 85, at 698. Early telephone networks were not interconnected, and thus a customer could only call other people who subscribed to his or her network. Id.
95 Id. at 702.
96 Id.
97 See infra notes 98–102 and accompanying text.
98 Benjamin et al., supra note 85, at 53–56; see Lyons, supra note 91, at 387–88.
99 Benjamin et al., supra note 85, at 713.
100 Id. at 723; see United States v. AT&T Co., 552 F. Supp. 131, 139 (D.D.C. 1982), aff’d, 460 U.S. 1001 (1983).
yond local telephone service. The divestiture of the Bell monopoly began to open telephony up to competition, but the 1996 Act completed this revolution. The 1996 Act, which amended the 1934 Act, aimed to inject competition into local telephone markets and enhance competition in other markets already open to competition.

Before the 1996 Act opened telecommunications up to antitrust law, the FCC had the exclusive right to review telecommunications mergers as part of its Title II authority to regulate common carriers. Title II of the 1934 Act reflects the natural monopoly argument and regulates the rates, terms of entry, and service offerings of common carriers. Landline telephone service qualifies as a common carrier and is therefore regulated under this title. Section 221(a) of the 1994 Act gave the FCC the authority to exempt mergers from antitrust scrutiny. Section 601(b) of the 1996 Act repealed Section 221(a) and clarified that the antitrust laws apply independently to telecommunications activity. The 1996 Act thus marks the beginning of dual jurisdiction because from this point forward, both the DOJ and the FCC have had explicit statutory authority to review mergers.

FCC regulation of the electromagnetic spectrum has also moved away from heavy-handed regulation, although not as drastically as with common carrier regulation. Title III of the 1934 Act concerns the regulation of the electromagnetic spectrum. This Title gives the FCC broad authority to allocate different uses for the spectrum among different frequency bands, issue licenses to private entities for use consis-

104 Benjamin et al., supra note 85, at 772; see supra note 18 (discussing the interplay between the 1934 Act and the 1996 Act).
105 See infra notes 106–110 and accompanying text.
107 47 U.S.C. §§ 201–276; Benjamin et al., supra note 85, at 55; Boliek, supra note 33, at 1643.
109 47 U.S.C. § 152 note (2006); Benjamin et al., supra note 85, at 1057. Despite the independent antitrust review, the FCC still reviews mergers under the 1934 Act. Benjamin et al., supra note 85, at 1057–58.
110 See McFadden, supra note 84, at 459–60; supra notes 15–22 and accompanying text.
112 Benjamin et al., supra note 85, at 55.
tent with this plan, and regulate the renewal and transfer of such licenses. The potential for interference if spectrum usage were unregulated, and the inherent scarcity of the spectrum due to its fixed nature, are common policy justifications for government regulation of the spectrum. Professor Ronald Coase argues that the government should take a more hands-off approach to spectrum regulation and allow the market to determine which frequencies should be used for which purposes. Although this argument has not come to dominate the FCC’s approach to spectrum regulation, the FCC does advocate a more limited use of its “command-and-control” system of licensing specific frequencies for specific defined uses.

The advent of wireless telephony has disturbed the FCC’s organized system of regulation according to the underlying technology because it falls under both Title II and Title III of the 1934 Act. Wireless telephony involves the sale to the public of voice communication directly from one party to another and therefore wireless companies qualify as common carriers under Title II of the 1934 Act. But wireless telephony uses the electromagnetic spectrum, rather than physical wires, to transmit its signals. Thus, wireless providers also qualify as spectrum licensees under Title III of the 1934 Act. To limit the confusion caused by this dual classification, the FCC exempted wireless providers from the majority of the common carriage duties of Title II. Most importantly, the FCC chose not to regulate the rates of the wireless companies because the market for wireless service did not exhibit the same natural monopoly concerns as traditional wired service,

113 Id. at 62–63.
114 Id. at 31–34.
115 See Ronald H. Coase, Why Not Use the Pricing System in the Broadcast Industry?, Free-
Freeman-1961jul-00052 (publishing a condensed version of Professor Ronald Coase’s December 11, 1959 testimony to the FCC).
119 Daniel Sineway, Note, What’s Wrong with Wireless?: An Argument for a Liability Ap-
120 47 C.F.R. § 20.15(a); Lyons, supra note 117, at 2.
121 Orloff, 352 F.3d at 418; 47 C.F.R. § 20.15.
and instead developed, from its creation, as a competitive market.\(^\text{122}\) Although wireless companies do maintain some obligations under Title II, they are primarily treated as spectrum licensees under Title III.\(^\text{123}\)

The FCC’s authority to review telecommunications mergers stems from Title II and Title III of the 1934 Act.\(^\text{124}\) Section 214(a) of Title II requires FCC approval for the acquisition or construction of any new line by a common carrier.\(^\text{125}\) Section 310(d) of Title III requires FCC approval for the transfer of any spectrum license.\(^\text{126}\) As a result, the FCC has the authority, and legal duty, to review all mergers in the telecommunications industry that involve the acquisition of licenses.\(^\text{127}\) Practically every major telecommunications merger requires the transfer of licenses, and therefore, the FCC’s authority to review mergers extends quite far.\(^\text{128}\)

This authority gives the FCC power to review mergers in the landline and wireless telephone industries under a broad public interest standard.\(^\text{129}\) The FCC’s authority to review mergers in landline telephony is vested in its section 214(a) power to review common carrier acquisitions of communications lines (e.g., landline telephone wires).\(^\text{130}\) The FCC’s authority to review wireless providers, conversely, stems from its section 310(d) power to review the transfer of spectrum licenses.\(^\text{131}\) FCC approval under either provision requires an affirmative determination that such transfer is in the public interest.\(^\text{132}\) Although the FCC technically has power to review mergers under the Clayton Act, it typi-

\(^{122}\) Orloff, 352 F.3d at 418–19; 47 C.F.R. § 20.15.

\(^{123}\) See 47 C.F.R. § 20.15; Lyons, supra note 117, at 1–3.

\(^{124}\) Benjamin et al., supra note 85, at 55, 1057; see 47 U.S.C. §§ 201–276 (Title II); id. §§ 301–399 (Title III).

\(^{125}\) 47 U.S.C. § 214(a) (2006). Section 214 requires that a company seeking to acquire new lines obtain “from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.” Id.

\(^{126}\) Id. § 310(d). A spectrum license is a license, granted by the FCC, for use of a designated portion of the electromagnetic spectrum for transmission of signals over the air. Benjamin et al., supra note 85, at 5–8. Section 310(d) requires, as a prerequisite to license transfer, that the FCC find “that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d).

\(^{127}\) See Benjamin et al., supra note 85, at 1058; Russell & Wolson, supra note 9, at 148.

\(^{128}\) See Russell & Wolson, supra note 9, at 148.

\(^{129}\) See infra notes 130–133 and accompanying text.


\(^{131}\) Id. § 310(d).

cally declines to act under this authority, choosing instead to use its more flexible power to approve license transfers under the 1934 Act.\(^{133}\)

D. FCC Legal Standard and Procedure

The FCC’s merger review authority is broader in scope than the DOJ’s authority.\(^{134}\) In addition to performing a competition analysis comparable to that of the DOJ, FCC review takes into account public interest factors extrinsic to the competitive effect of the merger.\(^{135}\) Unlike the DOJ, the FCC’s statutory authority is focused on the discrete issue of whether the transfer or acquisition of licenses, not the merger as a whole, is in the public interest.\(^{136}\) In practice, however, the FCC does not confine its review to the license transfer issue, but instead considers whether the merger as a whole would serve the public interest.\(^{137}\)

If a telecommunications merger requires the consent of the FCC to transfer licenses or acquire wire lines, the parties must file an application with the FCC.\(^{138}\) This application typically includes documentation and information outlining the bounds of the transaction and the predicted public interest benefits.\(^{139}\) Any interested parties, including members of the general public, may then file comments and replies in response to the merger.\(^{140}\) The FCC may also request additional materials from the parties to facilitate the review.\(^{141}\) The entire application record is available to the public.\(^{142}\) The FCC has set a 180-day time limit

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\(^{133}\) Barkow & Huber, supra note 5, at 41. The FCC has jurisdiction to review mergers under sections 7 and 11 of the Clayton Act, but in practice rarely chooses to exercise this authority, relying instead on its authority under the 1934 Act. Id.; see supra note 46 (outlining the FCC’s Clayton Act authority to review mergers).

\(^{134}\) See Benjamin et al., supra note 85, at 1056–59; Telecom Antitrust Handbook, supra note 101, at 70–75.

\(^{135}\) Benjamin et al., supra note 85, at 1058–59.


\(^{137}\) See Benjamin et al., supra note 85, at 1058–59.

\(^{138}\) Russell & Wolson, supra note 9, at 148.

\(^{139}\) See Telecom Antitrust Handbook, supra note 101, at 83; Russell & Wolson, supra note 9, at 148–49.

\(^{140}\) Russell & Wolson, supra note 9, at 148. Upon application to the FCC, the FCC delineates a time limit for the submission of comments and replies. See infra note 201 and accompanying text (discussing an example of the FCC scheduling process).

\(^{141}\) Russell & Wolson, supra note 9, at 148.

\(^{142}\) Id.
for completion of its review.\textsuperscript{143} This time limit, however, is self-imposed, not statutory, and the FCC rarely adheres to it.\textsuperscript{144}

After reviewing all the comments, replies, and party documentation, the FCC conducts an analysis to determine whether the transfer would be in the public interest.\textsuperscript{145} The merging parties bear the burden of affirmatively demonstrating that the proposed transfer is in the public interest.\textsuperscript{146} This standard sharply contrasts with the burden placed on the DOJ to demonstrate the anticompetitive effects of a merger when seeking to block it.\textsuperscript{147} After conducting its analysis, the FCC may act in one of three ways: it may approve the transfer, it may reject the transfer outright, or it may attach conditions to the transfer.\textsuperscript{148} In practice, the FCC rarely rejects a merger outright; typically, the FCC attaches conditions to its approval, and the merging parties either accept the conditions or abandon the transaction.\textsuperscript{149} Once the FCC has approved the transfer, its decision on the public interest question is entitled to “substantial judicial deference.”\textsuperscript{150}

The FCC’s public interest analysis includes an evaluation of the competitive effects of the proposed merger.\textsuperscript{151} Although the public interest analysis historically considered the implications for competition, the 1996 Act explicitly enumerated this factor as part of the public interest calculation.\textsuperscript{152} This part of the FCC’s analysis mirrors the antitrust analysis conducted by the DOJ.\textsuperscript{153} The FCC begins by defining the relevant product and geographic markets, evaluating the merger’s effect on competition in those markets, and considering mitigating factors to determine whether the merger’s procompetitive effects out-

\textsuperscript{143} Id. at 149; Rinner, \textit{supra} note 21, at 1574.
\textsuperscript{144} Barkow & Huber, \textit{supra} note 5, at 30–31 (“The average merger takes two to four months to conclude [review at the FCC]. Telecommunications mergers, however, take between nine and twelve months to conclude.”); Russell & Wolson, \textit{supra} note 9, at 149–150.
\textsuperscript{145} Curran, \textit{supra} note 61, at 757–58.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} Barkow & Huber, \textit{supra} note 5, at 38.
\textsuperscript{148} \textit{See} Rinner, \textit{supra} note 21, at 1575.
\textsuperscript{149} \textit{See} Russell & Wolson, \textit{supra} note 9, at 149.
\textsuperscript{150} \textit{See} Barkow & Huber, \textit{supra} note 5, at 43; \textit{see} SBC Commc’ns, Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995) (“So long as ‘the FCC’s action resulted from consideration of the relevant factors’ and the agency has not ‘succumbed to a clear error of judgment,’ its decision must be upheld.” (quoting GTE Serv. Corp. v. FCC, 782 F.3d 263, 268 (D.C. Cir. 1986))).
\textsuperscript{151} Curran, \textit{supra} note 61, at 758.
\textsuperscript{153} Weiss & Stern, \textit{supra} note 6, at 199.
weigh its anticompetitive effects.\textsuperscript{154} The FCC’s competitive analysis differs in one respect from that of the DOJ: the FCC’s approach is more forward-looking and considers the effect on future competition, not just the effect on competition immediately following the merger.\textsuperscript{155}

The FCC’s broad power to review for the public interest allows the agency to move beyond pure antitrust analysis to consider other relevant factors.\textsuperscript{156} The FCC considers the general aims of the 1934 Act, such as promoting access to high quality and diverse telecommunications services and ensuring the FCC’s ability to regulate.\textsuperscript{157} The ability to consider these additional factors differentiates the FCC’s review from that of the DOJ and provides for a broader and more discretionary analysis.\textsuperscript{158}

\section{II. The Preliminary Injunction Problem}

Subjecting telecommunications mergers to review by two federal agencies under different standards that support different policy objectives creates inefficiencies, encourages collusion between the agencies, and ultimately frustrates the objectives of antitrust law.\textsuperscript{159} Section A of this Part explains how ongoing FCC review allows the DOJ to move forward with cases without seeking a preliminary injunction to prevent the parties from completing the merger transaction.\textsuperscript{160} Section B then shows how the recent experience of AT&T and T-Mobile demonstrates this entrenched problem.\textsuperscript{161} Finally, Section C outlines the impact of this preliminary injunction problem on the dissemination of antitrust and telecommunications policy.\textsuperscript{162}

\subsection{A. The Preliminary Injunction Requirement and Merger Delay}

The preliminary injunction requirement, which compels the DOJ to seek a preliminary injunction before halting progress on a merger, typically prevents the DOJ from holding up mergers in the court system when it does not have a strong case.\textsuperscript{163} When bringing suit to block a merger, the DOJ is usually required to seek a preliminary injunction to

\begin{footnotesize}
\textsuperscript{154} See Barkow & Huber, supra note 5, at 44–45.
\textsuperscript{155} See Rinner, supra note 21, at 1575.
\textsuperscript{156} See Curran, supra note 61, at 759–60.
\textsuperscript{157} See id.
\textsuperscript{158} See Barkow & Huber, supra note 5, at 42–43, 45.
\textsuperscript{159} See infra notes 163–253 and accompanying text.
\textsuperscript{160} See infra notes 163–187 and accompanying text.
\textsuperscript{161} See infra notes 188–219 and accompanying text.
\textsuperscript{162} See infra notes 220–253 and accompanying text.
\textsuperscript{163} See infra notes 164–166 and accompanying text.
\end{footnotesize}
prevent the merger from being consummated while court proceedings are ongoing. The preliminary injunction requirement is vested in Section 15 of the Clayton Act, which gives the court power to “make such temporary restraining order or prohibition as shall be deemed just in the premises.” Obtaining a preliminary injunction forces the DOJ to quickly and succinctly assemble its case and make an affirmative evidentiary showing of the anticompetitive effects of the merger.

The preliminary injunction requirement and accompanying evidentiary standard, under which the DOJ bears the burden of proof, comport with broader antitrust policy. The HSR Act makes possible the prophylactic rejection of anticompetitive mergers not permitted by the Clayton Act alone. Under the HSR Act, merging parties must submit to agency review before consummation of the merger. Reviewing mergers before consummation is more efficient and allows a more effective application of antitrust law than would the alternative of analyzing the effects of the mergers after completion. These efficiencies can be realized only if the parties halt progress on the merger during review. A preliminary injunction provides a mechanism for the government to extend the pause initiated by the HSR review process.

The preliminary injunction standard reflects the seriousness of antitrust intervention. Antitrust law envisions a default system in which competitors are allowed to compete and prosper without government intervention. According to antitrust policy, a perfect free-market system is an efficient system because the price of each product naturally follows from the value that consumers place on that product; resources, therefore, are put to their highest and best use.

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164 Elhauge, supra note 8, at 587.
165 15 U.S.C. § 25 (2006); Motion of United States for Preliminary Injunction, supra note 10, at 1; Mergers and Acquisitions, supra note 9, at 358–59.
166 Mergers and Acquisitions, supra note 9, at 371–72, 380–87.
167 See infra notes 168–172 and accompanying text.
168 Ling, supra note 28, at 940–41.
170 Bailey, supra note 29, at 448–50; Ling, supra note 28, at 940–43.
171 Telecom Antitrust Handbook, supra note 101, at 122; Rinner, supra note 21, at 1572–73.
173 See infra notes 174–180 and accompanying text.
174 See Mergers and Acquisitions, supra note 9, at 1; Hovenkamp, supra note 30, at 2–8.
law interrupts this balance only when absolutely necessary to prevent anticompetitive behavior. When challenging a merger, therefore, the DOJ bears the burden of demonstrating the anticompetitive effects before interruption of the free market will occur. Likewise, the DOJ bears the burden when seeking a preliminary injunction. The government is not permitted to suspend the merger process beyond the thirty- to sixty-day HSR review period without making an evidentiary showing beyond its initial complaint. This requirement prevents the abuse of power and ensures that the free market remains the status quo.

Mergers in the telecommunications industry, however, are not subject to the preliminary injunction requirement because concurrent review by the FCC obviates this need. Because telecommunications mergers require approval by both the FCC and the DOJ, parties to a proposed merger cannot move forward with the transaction until the FCC determines that the requested license transfer comports with the public interest. Unlike DOJ review, however, FCC review is not subject to any enforceable time limit. When the DOJ files suit to block a telecommunications merger, FCC review typically persists in the background. As long as this FCC review continues, the merging parties may not consummate their transaction irrespective of whether the DOJ seeks a preliminary injunction at court. The simultaneous FCC review essentially guarantees that once the DOJ files suit, the case will move toward trial and the parties’ transaction will be placed on hold without the DOJ making any sort of evidentiary showing beyond that contained

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176 See Mergers and Acquisitions, supra note 9, at 1; Hovenkamp, supra note 30, at 2–8; Barkow & Huber, supra note 5, at 38, 57.

177 See id. at 25, 358, 371–72; supra notes 167–172 and accompanying text.

178 Mergers and Acquisitions, supra note 9, at 358, 371–72.


180 See Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 4; Weiss & Stern, supra note 6, at 197.


182 See 47 U.S.C. §§214(a), 310(d); Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 4–5.
in the initial complaint. In this way, it is easier for the DOJ to challenge mergers in the telecommunications industry because concurrent FCC review independently prevents the merging parties from consummating the transaction, thereby relieving the DOJ of its typical preliminary injunction requirement; thus, antitrust law applies inconsistently.

B. The Preliminary Injunction Problem in Action: The Proposed Merger of AT\&T and T-Mobile

Government opposition to the proposed merger between AT&T and T-Mobile demonstrates how systemic inefficiencies of dual review overwhelm antitrust policy by delaying mergers without the safeguards provided by a preliminary injunction. In the case of AT&T and T-Mobile, the DOJ pursued its case without obtaining the preliminary injunction normally necessary to prevent consummation of a merger. On March 20, 2011, AT&T and Deutsche Telekom AG (“DT”) announced the merger between AT&T and T-Mobile. The parties entered into a binding agreement whereby AT&T would acquire T-Mobile from DT for cash and stock valued at thirty-nine billion dollars. The transaction, if consummated, would have left only three major wireless telephone companies in the United States. The combined company would have been the largest of the three, claiming forty-two percent of all U.S. wireless subscribers.

186 See Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 4–5.
187 See supra notes 181–186 and accompanying text. Compare Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 1 (declining to seek a preliminary injunction), with Motion of United States for Preliminary Injunction, supra note 10, at 1 (seeking a preliminary injunction).
188 See infra notes 189–219 and accompanying text.
189 See Second Amended Complaint at 1–4, United States v. AT&T Inc., No. 11–01560 (Sept. 30, 2011); Amended Complaint at 1–4, AT&T, No. 11–01560 (Sept. 16, 2011); Complaint at 1–3, AT&T, No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011).
190 AT&T News Release, supra note 1.
191 Id. DT would receive twenty-five billion dollars in cash and fourteen billion dollars in AT&T stock for the sale; this would give DT approximately an eight percent stake in AT&T. Press Release, T-Mobile USA, Deutsche Telekom to Receive 39 Billion USD for T-Mobile USA (Mar. 20, 2011), http://newsroom.t-mobile.com/articles/att-acquires-t-mobile-usa. The agreement between AT&T and DT was subject to a three billion dollar breakup fee, payable by AT&T to DT, if the deal was not consummated. Sorkin et al., supra note 4.
192 Sorkin et al., supra note 4. The merger would leave AT&T, Verizon, and Sprint Nextel Corp. (“Sprint”) to compete in the nationwide wireless telephone market. Id.
193 Id.
Immediately following the announcement of the merger, both AT&T and T-Mobile spoke positively of the deal. In its press release announcing the merger, AT&T praised the deal, saying it would deliver much needed additional spectrum capacity that would, in turn, increase service quality for customers and ensure a rapid deployment of 4G LTE access to ninety-five percent of the population. Similarly, T-Mobile reassured customers that the merger would bring improved quality of voice and data service and access to 4G LTE technology. The deal did not receive the same warm reception from the public. Almost immediately after the announcement, critics posited that the merger would significantly reduce competition in the wireless industry, leaving consumers with less choice, less innovation, and ultimately, higher prices.

The FCC opened a docket on April 14, 2011 to prepare for filings regarding the proposed merger. Pursuant to their obligations under the 1934 Act, AT&T and DT filed applications with the FCC on April 28, 2011 requesting consent to transfer control of all licenses and authorizations held by T-Mobile to AT&T. The FCC began its process of reviewing the merger by establishing a pleading cycle with separate deadlines for submission of petitions to deny, oppositions to those petitions, and replies to those petitions. The FCC received numerous petitions to deny this merger.

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194 See infra notes 195–196 and accompanying text.
198 See Sorkin et al., supra note 4; Wortham, supra note 197; AT&T, T-Mobile Deal Raises Questions, supra note 197.
200 AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc., 26 FCC Rcd. 6424, 6424 (Apr. 28, 2011) [hereinafter AT&T/T-Mobile Accepted for Filing].
201 Id. at 6426.
202 Petition to Deny of Free Press, at 6–7, In re AT&T Inc., WT Docket No. 11-65 (FCC May 31, 2011); Petition to Deny of Public Knowledge and Future of Music Coalition at 4, WT Docket No. 11-65 (FCC May 31, 2011); Petition to Deny, Sprint Nextel Corp. at 1, WT
While the FCC review continued, the DOJ brought suit in the U.S. District Court for the District of Columbia seeking to permanently enjoin the merger under section 7 of the Clayton Act. The complaint defined the relevant product market as the market for mobile wireless telecommunications services, including both voice and data services. Further, it defined the relevant geographic market as nationwide competition across local markets. The complaint also stated that following the merger, the wireless market would be highly concentrated according to the HHI. It then outlined the importance of T-Mobile as a competitive force in the market, and the anticompetitive effects that would be generated on the product and geographic markets as a result of the proposed merger. The defendants’ answer, filed on September 9, 2011, denied most of the allegations in the complaint and argued that the merger would be positive for consumers and would give AT&T the additional spectrum it needed to continue its high-quality service.

After the initial complaint and answer were filed, the DOJ case proceeded concurrently with the FCC review until AT&T ultimately

Docket No. 11-65 (FCC May 31, 2011). Sprint filed a petition to deny, arguing that the proposed merger would eliminate Sprint’s ability to compete in the wireless market and would effectively create a duopoly in the industry between the new AT&T and Verizon. Petition to Deny, Sprint Nextel Corp., supra, at i–iv, 36–37. Sprint argued that the merger would harm competition, which would lead to higher prices, less innovation, and lower quality service, and would not provide any benefit to the industry. Id. at i–iv. Two prominent think tanks, Public Knowledge and Free Press, made similar arguments in separately filed petitions to deny. Petition to Deny of Free Press, supra, at 1–3; Petition to Deny of Public Knowledge and Future of Music Coalition, supra, at 1–4. The think tanks argued that the merger must fail the FCC’s public interest review because it would raise serious antitrust concerns, cause public harm, and would not confer any substantial benefit. Petition to Deny of Free Press, supra, at 1–7; Petition to Deny of Public Knowledge and Future of Music Coalition, supra, at 1–12.

Complaint, supra note 189, at 5–8.
Id. at 8–11.
Id. at 11–12.
Id. at 12–20. The DOJ also highlighted the difficulty a new competitor would face in entering the market and the lack of any measurable efficiencies created by the merger. Id. at 20.

Answer at 1–25, AT&T, No. 1:11-cv-01560 (D.D.C. Sept. 9, 2011). AT&T argued that the merger would create engineering efficiencies that would increase the quality and quantity of service. Id. at 1. The wireless industry, AT&T opined, is in fact highly competitive, with the average consumer having a choice between at least five companies. Id. at 2, 6. Additionally, T-Mobile was already in a state of decline and, therefore, the merger would not harm consumers at all. Id. at 3. The answer concluded by denying that the government was entitled to the relief requested and stating that the merger was in the public interest and should therefore be permitted. Id. at 24–25.
backed out of the merger.\textsuperscript{209} In September, seven states joined the DOJ action and the plaintiffs filed an amended complaint to reflect this change.\textsuperscript{210} Discovery proceeded on schedule and trial was set for February 2012.\textsuperscript{211} Meanwhile, the FCC extended its review past the 180-day self-imposed limit in order to review new data regarding AT&T’s claim that the merger would create more jobs.\textsuperscript{212} On November 22, 2011 the FCC publicly announced it was considering referring the matter to an administrative hearing for review.\textsuperscript{213} A document entitled “Staff Analysis and Findings” accompanied the draft administrative hearing order and outlined the FCC’s opposition to the transaction.\textsuperscript{214} On November 23, AT&T and T-Mobile sought formal withdrawal of their applications from consideration by the FCC.\textsuperscript{215} The FCC granted this withdrawal on November 29 and simultaneously released its Staff Analysis and Findings to the public.\textsuperscript{216} The parties initially continued to fight the DOJ lawsuit, but ultimately withdrew that application as well on December 19.\textsuperscript{217} All parties stipulated to a dismissal on December 20, and AT&T had to pay T-Mobile a breakup fee of over four billion dollars.\textsuperscript{218} Ex-

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\textsuperscript{209} See infra notes 210–219 and accompanying text.  
\textsuperscript{210} Amended Complaint, supra note 189, at 1–2. California, Illinois, Massachusetts, New York, Ohio, Pennsylvania, and Washington joined the DOJ’s suit. Id. The Commonwealth of Puerto Rico later joined the suit, and the plaintiffs filed a second amended complaint to reflect this change. Second Amended Complaint, supra note 189, at 1–2.  
\textsuperscript{213} In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, 26 FCC Rcd. 16,184, 16,184 (Nov. 29, 2011) [hereinafter Bureau Order Dismissing Applications].  
\textsuperscript{214} Id.  
\textsuperscript{215} Id. at 16,185.  
\textsuperscript{216} Id. at 16,186.  
\textsuperscript{218} Stipulation of Dismissal, AT&T, No. 11-01560 (D.D.C. Dec. 20, 2011); Merced, supra note 217. A breakup fee, a typical feature of merger agreements, is “a fee paid if a party voluntary backs out of a deal to sell or purchase a business or a business’s assets.” BLACK’S LAW DICTIONARY 1609 (9th ed. 2009). Breakup fees serve to “protect the prospective buyer and to deter the target corporation from entertaining bids from other parties.” Id.
actly nine months after AT&T and T-Mobile announced their agreement, the parties had definitively abandoned the merger.\footnote{219}{See AT&T News Release, supra note 1; Merced, supra note 217.}

\section*{C. The Preliminary Injunction Problem Explained: How Delay Causes Failure and Thwarts Policy Goals}

At no point during this progression did the DOJ bring a motion for a preliminary injunction.\footnote{220}{See Second Amended Complaint, supra note 189, at 1–4; Amended Complaint, supra note 189, at 1–3; Complaint, supra note 189, at 1–3.} As the DOJ case moved toward trial, the FCC continued to review the merger under its public interest standard.\footnote{221}{See AT&T/T-Mobile Accepted for Filing, supra note 200, at 6424; Bureau Order Dismissing Applications, supra note 213, at 16,184; Edward Wyatt, U.S. Judge Grants Delay in Challenge to AT&T Deal, N.Y. Times, Dec. 13, 2011, at B4; Merced, supra note 217.} The FCC review, standing alone, prevented AT&T and T-Mobile from moving forward with the transaction.\footnote{222}{See 47 U.S.C. §§ 214(a), 310(d); Weiss & Stern, supra note 6, at 197; Sorkin et al., supra note 4.} The DOJ, therefore, had no practical reason to seek a preliminary injunction because as long as the FCC continued its review, the parties could not consummate the merger.\footnote{223}{See Mergers and Acquisitions, supra note 9, at 358; Barkow & Huber, supra note 5, at 38; Russell & Wolson, supra note 9, at 151. Whether the AT&T/T-Mobile merger would have been desirable is immaterial. See Mergers and Acquisitions, supra note 9, at 358; Barkow & Huber, supra note 5, at 38; Russell & Wolson, supra note 9, at 151.} This represents an inconsistent application of antitrust law, which should require the DOJ to bear the burden of proof throughout all stages of a merger challenge.\footnote{224}{See infra notes 226–236 and accompanying text.}

The proposed merger between two nationwide direct broadcast satellite ("DBS") providers in 2001 generated an identical preliminary injunction problem.\footnote{225}{See supra note 213, at 16,184; Edward Wyatt, U.S. Judge Grants Delay in Challenge to AT&T Deal, N.Y. Times, Dec. 13, 2011, at B4; Merced, supra note 217.} DBS providers transmit video signal to paying customers using the electromagnetic spectrum and often compete with local cable companies.\footnote{226}{See 47 U.S.C. §§ 214(a), 310(d); Weiss & Stern, supra note 6, at 197; Sorkin et al., supra note 4.} As a broadcast service, DBS providers are regulated as spectrum licensees under Title III of the 1934 Act.\footnote{227}{See Benjamin et al., supra note 85, at 55.} EchoStar Communications Corporation ("EchoStar"), the parent company of Dish Network, and Hughes Electronics Corporation ("Hughes"), the parent company of DIRECTV, entered into an agreement on October 28, 2001 whereby EchoStar would acquire Hughes for cash and stock.
then valued at twenty-six billion dollars. Pursuant to their obligation under the 1934 Act, in December of 2001 the parties filed a consolidated application with the FCC to transfer control of numerous licenses from Hughes to EchoStar. The FCC review revealed serious anticompetitive concerns, and on October 9, 2002, the FCC designated the merger for a hearing. Meanwhile, the DOJ had been reviewing the merger according to the HSR Act, and it decided to file suit to block the merger on October 31, 2002. The DOJ explicitly noted that it was not seeking a preliminary injunction because the ongoing FCC review served the same function. The case therefore moved slowly toward trial set for June 2003. Much like AT&T and T-Mobile’s experience, EchoStar and DIRECTV could not move forward with their transaction even though the DOJ never made a showing of its likelihood of success on the merits. Eventually, on December 10, 2002, the parties agreed to abandon the merger and requested withdrawal. The FCC formally

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228 Complaint, supra note 226, at 7–8. The agreement provided that Hughes would split off from its parent company, General Motors Corporation, and would then merge with EchoStar. Hearing Designation Order in the Application of EchoStar Commc’ns Corp., 17 FCC Rcd. 20,559, 20,561–62 (Oct. 9, 2002) [hereinafter EchoStar Hearing Designation Order].


231 Complaint, supra note 226, at 5–6. In its complaint, the DOJ defined the relevant market as “numerous local geographic markets for MVPD [multichannel video programming distribution] service, each consisting of a community whose members face the same competitive choices.” Id. at 15. The complaint expressed concern that the proposed merger would create either a monopoly or duopoly in most local MVPD markets. Id. at 17–18. Additionally, the complaint cited a high barrier to entry for a new MVPD provider. Id. at 22–23.

232 See Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 1, 4–5 (“No preliminary injunction is being sought . . . . This transaction cannot be completed by the Defendants’ self-imposed deadline—regardless of what this Court does—because they need [FCC] approval to complete their transaction.”).


234 See Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 1, 4–5.

granted this withdrawal on January 8, 2003, officially terminating the proceedings.\textsuperscript{236}

As these examples show, the dual review system significantly impacts the operation of antitrust law in the telecommunications industry.\textsuperscript{237} In the four-plus months and the one and a half months, respectively, that the AT&T/T-Mobile and EchoStar/DIRECTV cases were active in U.S. district court, the DOJ did not need to make an evidentiary showing, beyond that in the complaint, that the proposed merger would decrease competition in the relevant market.\textsuperscript{238} Despite this lack of evidence, the parties could not move forward with consummation of their desired merger.\textsuperscript{239} This result runs counter to the DOJ’s burden to prove the likely anticompetitive effects of a proposed merger and the overall cautious stance of antitrust policy.\textsuperscript{240} The preliminary injunction problem shows that telecommunications mergers are treated differently and subject to easier challenge by the government than mergers in other industries.\textsuperscript{241}

\begin{footnotesize}
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  \item \textsuperscript{236} FCC Order \textit{In re Application of EchoStar Commc’ns Corp.}, 18 FCC Rcd. 610, 611–12 (Jan. 8, 2003).
  \item \textsuperscript{237} See infra notes 238–241 and accompanying text.
  \item \textsuperscript{238} See Second Amended Complaint, supra note 189, at 1–4; Amended Complaint, supra note 189, at 1–4; Complaint, supra note 189, at 1–3; see also Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 1, 4–5 (outlining that the DOJ did not seek a preliminary injunction in this case).
  \item \textsuperscript{239} See Memorandum in Support of Plaintiffs’ Motion for Scheduling Order, supra note 10, at 1, 4–5; Schatz & Bensinger, supra note 212; Troianovski & Kendall, supra note 212; AT&T Drops $39-bn Proposed T-Mobile USA Takeover, DOMAIN-b.com (Dec. 20, 2011), http://www.domain-b.com/companies/companies_a/AT&T/20111220_takeover.html; AT&T, T-Mobile Deal Raises Questions, supra note 197, at 6.
  \item \textsuperscript{240} See Mergers and Acquisitions, supra note 9, at 358; Barkow & Huber, supra note 5, at 38; Russell & Wolson, supra note 9, at 151. Antitrust law operates under the assumption that the free market system generally allocates resources in the most efficient and beneficial way for consumers. See supra notes 174–175 and accompanying text. The antitrust laws, therefore, insert government intervention into this system only when specific and serious anticompetitive behavior occurs. See supra note 33 and accompanying text. The preliminary injunction requirement echoes this cautious stance, because it obligates the DOJ to put forward affirmative evidence demonstrating that specific and serious anticompetitive behavior has occurred before the government will insert itself into the free market system by forcing the merging parties to delay consummation. See supra notes 178–180 and accompanying text. Because dual review eliminates the DOJ’s preliminary injunction requirement when it operates in the telecommunications industry, antitrust law is applied with less concern for the protection of the free market. See Mergers and Acquisitions, supra note 9, at 358; Barkow & Huber, supra note 5, at 38; Russell & Wolson, supra note 9, at 151; supra notes 181–187 and accompanying text.
  \item \textsuperscript{241} See Russell & Wolson, supra note 9, at 151; Weiss & Stern, supra note 6, at 206; Rinner, supra note 21, at 1576–77. It is possible that requiring the DOJ to seek a preliminary injunction makes it too difficult for the DOJ to challenge mergers, but this type of concern
\end{itemize}
\end{footnotesize}
Furthermore, in the case of AT&T and T-Mobile, this delay gave the DOJ valuable time to prepare its case and capitalize on increasing political opposition to the merger. Ultimately, the paused progress on consummation fed into growing public opposition to the merger, thereby contributing to the merger’s failure. For example, while the AT&T/T-Mobile suit was ongoing, heavy governmental and private opposition to the merger developed. On the public side, one senator voiced vehement disapproval, citing likely reduced competition and lower quality for consumers. Private citizens also showed concern, reflected in newspaper articles, public FCC comments, and the many petitions to deny received by the court.

The stalled state of the merger also allowed the DOJ and the FCC time to coordinate their opposition. The FCC seemed to support the DOJ’s case against the AT&T/T-Mobile merger by releasing the official analysis and findings of the FCC wireless bureau, which outlined the FCC’s sharp opposition. The release of this document prompted the parties to withdraw their application from the FCC and state that they wished to focus on the DOJ case. In reality, however, the release of this document was the beginning of the end for AT&T and T-Mobile.


242 See infra notes 243–253 and accompanying text.
243 See Wyatt, supra note 221; Merced, supra note 217.
244 See infra notes 245–246 and accompanying text.
246 See, e.g., Petition to Deny of Free Press, supra note 202, at 2–3; Petition to Deny of Public Knowledge and Future of Music Coalition, supra note 202, at 4; Wortham, supra note 197; Search for Filings Results 11-65, FCC, http://apps.fcc.gov/ecfs/proceeding/view?name=11-65 (click “Search for Comments in 11-65” at the top of the screen; then click “Modify Search”; then, in the “received” textbox, narrow date range to comments after August 31, 2011, when the DOJ Complaint was filed) (last visited Sept. 19, 2012).
247 See infra notes 248–253 and accompanying text.
249 Merced, supra note 217. The current statutory framework does not require merging parties to file with the DOJ and the FCC at the same time. See 15 U.S.C. §§ 1–7, 18 (2006); 47 U.S.C. §§ 214(a), 310(d) (2006). If AT&T and T-Mobile had prevailed against the DOJ at trial, therefore, they would have been permitted to refile for FCC approval at that time. See 15 U.S.C. §§ 1–7, 18; 47 U.S.C. §§ 214(a), 310(d). Because both DOJ and FCC approval is required before a telecommunications transaction can go forward, however, most merging parties seek DOJ and FCC review concurrently to minimize the review period for the transaction. See Barkow & Huber, supra note 5, at 30–31, 41, 49.
250 Wyatt, supra note 221; Merced, supra note 217.
After the parties withdrew from the FCC, the D.C. District Court granted delay for the parties to reevaluate whether they wished to proceed with the transaction, and ultimately it dismissed the case when AT&T withdrew its bid entirely. The FCC and the DOJ typically coordinate their review of telecommunications mergers in this way; the FCC usually waits until the DOJ has finished its review before issuing its own decision. By providing time to build opposition and allowing for coordination with the FCC, the delay in consummation of the merger ultimately allowed the DOJ to prevail in its action to block the merger without making an evidentiary showing to support its claims.

III. THE SOLUTION: REFORM WITHIN THE DUAL REVIEW SYSTEM, CURTAILING THE FCC’S ROLE

The DOJ’s failure to seek a preliminary injunction during its challenge to the proposed AT&T/T-Mobile merger illustrates broader structural problems in the dual agency review system. The dual review system leads to the inconsistent application of antitrust law by eliminating the DOJ’s need to seek a preliminary injunction. There are two types of reforms that would solve the preliminary injunction problem by ensuring that the DOJ retains its burden to seek a preliminary injunction in all industries under its purview. First, the dual review structure could be completely eliminated by giving one agency exclusive jurisdiction to review telecommunications mergers. Second, reforms could operate within the existing dual review structure, altering the working relationship between the DOJ and the FCC while preserving some role for each agency. This Part explores two options under each approach and concludes that curtling the FCC’s procedural and substantive authority to review mergers, while maintaining a limited FCC role, would solve the preliminary injunction problem and

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251 Wyatt, supra note 221; Merced, supra note 217.
253 See supra notes 248–252 and accompanying text.
254 See Mergers and Acquisitions, supra note 9, at 358; Barkow & Huber, supra note 5, at 38.
255 See supra notes 220–253 and accompanying text.
256 See Curran, supra note 61, at 769–70. Professor David Curran recognizes both types of reforms, but he argues that the FCC should be granted the exclusive authority to review mergers in the telecommunications industry. See id. at 749–50. This Note’s proposal, alternatively, would significantly curtail the substance and timeline of the FCC’s review, thereby maintaining some role for the FCC. See infra notes 344–374 and accompanying text.
257 See id. at 770.
258 See id. at 769.
would best promote the current goals of antitrust and telecommunications policy.259

Section A discusses two reforms that would eliminate dual review entirely.260 First, the FCC could receive exclusive jurisdiction to review telecommunications mergers under its public interest standard.261 Second, the role of the FCC could be eliminated, leaving only the DOJ to review mergers in the telecommunications industry.262 Section B discusses two more moderate reforms that would address the preliminary injunction problem while maintaining the overall structure of dual review.263 First, a clearance process could be implemented whereby specific mergers are assigned to review by either the DOJ or the FCC depending on peculiarities and the industry involved.264 Alternatively, a strict timeline for FCC review could be adopted and the substance of FCC review wedded to its statutory authority.265 This final option, reducing the procedural and substantive authority of the FCC, would best vindicate antitrust and telecommunications policy and would solve the problems demonstrated by the AT&T/T-Mobile merger.266

A. Too Many Cooks in the Kitchen? Possible Reform by Eliminating Dual Review Altogether

Two obvious options for reform emerge as solutions to the preliminary injunction problem: Congress could remove the DOJ’s power to review telecommunications mergers, or it could eliminate the FCC’s power to review mergers altogether.267 Although both options would solve the preliminary injunction problem presented by the AT&T/T-Mobile case, completely eliminating the role of one agency would create inconsistencies in antitrust or telecommunications policy.268

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259 See infra notes 267–374 and accompanying text.
260 See infra notes 267–321 and accompanying text.
261 See infra notes 269–306 and accompanying text.
262 See infra notes 307–321 and accompanying text.
263 See infra notes 322–374 and accompanying text.
264 See infra notes 324–343 and accompanying text.
265 See infra notes 344–374 and accompanying text.
266 See infra notes 344–373 and accompanying text.
267 See Curran, supra note 61, at 770, 779 (raising the two possibilities).
268 See Weiss & Stern, supra note 6, at 206–08 (arguing that DOJ and FCC review are both necessary); infra notes 295–321 and accompanying text.
1. The First Option: Kick the DOJ Out of the Telecommunications Merger World

First, Congress could assign exclusive jurisdiction to the FCC to review mergers in the telecommunications industry and eliminate the role of the DOJ. This option would solve the preliminary injunction problem confronted by AT&T and T-Mobile. Without the involvement of the DOJ, the AT&T/T-Mobile merger would have required only FCC review under its public interest standard. Unless the FCC began acting on its Clayton Act authority (as opposed to its 1934 Act authority), the parties would not have been subject to antitrust review under the Clayton Act and would never have encountered the court system in the first place. Although the FCC’s limitless review would still subject some merging parties to considerable delay, this delay would be primarily a reflection of telecommunications policy and the FCC’s unenforceable self-imposed time limit; telecommunications would be removed from the purview of antitrust law, which would then apply consistently across all other industries.

There are several arguments that support exclusive FCC telecommunications merger review. First, the FCC is an expert agency that has superior technological expertise to the DOJ. Given the unique contours and constantly evolving nature of telecommunications, it may be especially important to subject mergers to review by an agency sensitive to these peculiarities. Second, the FCC’s public interest standard considers a broader range of sources in its analysis than the DOJ’s competitive effects approach does. For example, the public interest standard takes a forward-looking stance to competition, accounting for

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269 See Curran, supra note 61, at 770 (advocating this position).
270 See infra notes 271–272 and accompanying text.
271 See Barkow & Huber, supra note 5, at 30–31, 40; supra notes 134–158 and accompanying text.
272 See id. at 35–40. Before passing legislation to implement this solution, Congress would need to consider closely the likelihood and desirability of the FCC beginning to review mergers under its concurrent Clayton Act authority. See 15 U.S.C. §§ 18, 21 (2006).
274 See infra notes 275–281 and accompanying text.
275 Curran, supra note 61, at 770; see also Harold Feld, The Need for FCC Merger Review, Comm. Law., Fall 2000, at 20, 21 (arguing that the FCC plays an important role in merger review).
276 See Curran, supra note 61, at 773–74.
277 Benjamin et al., supra note 85, at 1056–59.
the development of the industry over time. Additionally, the public interest standard weighs not only the competitiveness of the industry, but also the quality and diversity of offerings in the industry. Some scholars argue that this type of broad review best serves the interest of the public at large. Finally, there are other industries in which merger review by sector-specific agencies, to the exclusion of the general antitrust laws, continues to function well.

Upon closer examination, however, the futility of these arguments becomes clear. Consider, for example, two hypothetical telecommunications mergers: under the Clayton Act antitrust analysis, one merger is deemed anticompetitive and the other is deemed competitively neutral or procompetitive. Antitrust policy dictates that the anticompetitive merger should be blocked no matter what the FCC thinks and no matter what plausible public interest benefits can be raised. Denying this point would undermine Congress’s decision to subject telecommunications mergers to antitrust review. The FCC’s expertise may be valuable in evaluating the merger under the antitrust framework, but this does not justify full-fledged FCC review under a different standard.

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280 See, e.g., Curran, supra note 61, at 772–73; Koutsky & Spiwak, supra note 278, at 340–41.

281 See James F. Rill, The Evolution of Modern Antitrust Among Federal Agencies, 11 GEO. MASON L. REV. 135, 137–38 (2002). For example, the Surface Transportation Board has exclusive jurisdiction over railroad mergers and the U.S. Department of Transportation retains exclusive jurisdiction over international airline alliance agreements. Id.

282 See infra notes 283–306 and accompanying text.

283 See supra notes 64–69 and accompanying text (explaining that the DOJ’s Clayton Act analysis balances the anticompetitive effects of the merger, judged by its impact on market power, against any procompetitive and mitigating factors).


286 See Telecommunications Merger Review Act, S. 1125, 106th Cong. (1999) (proposing that the FCC may submit comments to the DOJ or FTC to aid in its review).
Turning to the hypothetical competitively neutral or procompetitive merger, FCC analysis would have an impact only where it recognized public interest harm that would outweigh the neutral or positive competitive effect.\textsuperscript{287} Allowing public interest factors to negate a competitively neutral or precompetitive transaction is not desirable for two reasons.\textsuperscript{288} First, the FCC’s public interest review is speculative.\textsuperscript{289} For example, the FCC often attempts to predict the competitive environment likely to result years after the proposed transaction is finalized.\textsuperscript{290} Second, the FCC is unbounded in what factors it may consider as part of public interest promotion.\textsuperscript{291} For example, the FCC has considered the impact of transactions on the FCC’s own ability to regulate the industry effectively.\textsuperscript{292}

It conflicts with the common conception of antitrust law for the FCC to block competitively neutral or procompetitive mergers due to these speculative and unbounded public interest concerns.\textsuperscript{293} If Congress intends for concerns like service quality, job promotion, diversity of sources, and regulatory ease to be weighed against the transaction’s impact on competition, it should provide for consideration of these factors in all mergers, not just those in the telecommunications industry.\textsuperscript{294}

Granting the FCC exclusive jurisdiction would thus conflict directly with antitrust and telecommunications law and policy.\textsuperscript{295} It is true that some other industries operate successfully in a sector-specific merger regulation regime.\textsuperscript{296} Transitioning to a sector-specific review of telecommunications mergers, however, would suggest that the telecommunications industry has unique characteristics that justify exclusion from the antitrust laws.\textsuperscript{297} In the early days of the FCC, concerns with natural

\begin{itemize}
\item \textsuperscript{287} See 47 U.S.C. §§ 214(a), 310(d); \textit{supra} note 18.
\item \textsuperscript{288} See \textit{infra} notes 289–292 and accompanying text.
\item \textsuperscript{289} See Barkow & Huber, \textit{supra} note 5, at 55–56.
\item \textsuperscript{290} \textit{But see} Curran, \textit{supra} note 61, at 772–73 (arguing that this predictive review is not speculative but rather grounded in real data).
\item \textsuperscript{291} Barkow & Huber, \textit{supra} note 5, at 42.
\item \textsuperscript{292} \textit{Id.} at 54.
\item \textsuperscript{293} \textit{See id.} at 57.
\item \textsuperscript{294} \textit{See id.} at 81–83. In fact, at one point, antitrust law tried to embrace these types of public interest considerations, but it has ultimately rejected these arguments due to the same concerns about unpredictability and inconsistency. Daniel L. Brenner, \textit{Ownership and Content Regulation in Merging and Emerging Media}, 45 DePaul L. Rev. 1009, 1018–20 (1996).
\item \textsuperscript{295} See \textit{infra} notes 296–306 and accompanying text.
\item \textsuperscript{296} See Rill, \textit{supra} note 281, at 137–38; \textit{supra} note 281 (offering examples of sector-specific merger regulation).
\item \textsuperscript{297} See \textit{Benjamin et al.}, \textit{supra} note 85, at 695–98.
\end{itemize}
monopoly provided such a rationale. The FCC, accordingly, had the authority to exempt mergers from antitrust scrutiny. The breakup of the Bell monopoly and the passage of the 1996 Act, however, revolutionized the status of telecommunications. The 1996 Act aimed to encourage transition from regulation and monopoly to deregulation and competition in telecommunications. As a result, the Act removed the FCC’s ability to exempt mergers from antitrust oversight and explicitly authorized antitrust review of telecommunications mergers. With this legislative change, telecommunications has entered the competitive world, and therefore interruption is warranted only in cases of anticompetitive conduct. Congress no longer views telecommunications as inherently monopoly-prone or otherwise deserving of special treatment. It follows that broad public interest consideration is no longer appropriate, because Congress believes that the competitive market will more efficiently take care of consumers. Telecommunications mergers thus should be treated like mergers in most other industries and be subject to review by the DOJ under the antitrust laws.

2. The Other End of the Spectrum: Kick the FCC Out of Merger Review

At the other extreme, removing the FCC’s authority to review mergers would also solve the preliminary injunction problem posed by the AT&T/T-Mobile example. Without concurrent FCC review to prevent the consummation of the merger, the DOJ would be forced to seek a preliminary injunction in order to move forward with any merger case. The DOJ would therefore be unable to challenge a merger

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298 See id.
299 47 U.S.C. § 221(a) (1994), repealed by Telecommunications Act of 1996 § 601(b)(2); Benjamin et al., supra note 85, at 1057; supra note 18 (discussing Congress’s decision to allocate antitrust review to the DOJ).
300 See Benjamin et al., supra note 85, at 723–46, 1056–59.
302 47 U.S.C. § 152 note (2006); Barkow & Huber, supra note 5, at 37; McFadden, supra note 84, at 460; see supra note 18.
303 See Barkow & Huber, supra note 5, at 36–37.
304 See id. at 57; McFadden, supra note 84, at 461. But see Feld, supra note 275, at 22.
305 See Hovenkamp, supra note 30, at 8–12; Sowell, supra note 175, at 11–37; Telecom Antitrust Handbook, supra note 101, at 353.
306 See Barkow & Huber, supra note 5, at 35–37.
307 See infra notes 308–310 and accompanying text.
308 See 15 U.S.C. § 25 (2006); 47 U.S.C. §§ 214(a), 310(d) (2006); Frankel, supra note 70, at 169 n.37; Weiss & Stern, supra note 6, at 197; Sorkin et al., supra note 4.
without making a preliminary showing of anticompetitive effects. In the case of AT&T and T-Mobile, this would have resulted in a review more consistent with the import of antitrust law by reinstating the DOJ’s obligation to take action to prevent pre-trial consummation of the merger.

The complete elimination of the FCC’s role in reviewing mergers, however, would create its own problems and inconsistencies. First, the FCC’s technical expertise is valuable in determining the competitive effect of any given merger. For example, AT&T argued that it needed access to the additional spectrum space that the T-Mobile merger would provide so that it could increase service quality and effectively compete. After parties put forth a claim of the anticompetitive impact of the proposed merger, courts consider whether the merger would generate efficiencies that outweigh the anticompetitive concerns. The FCC may be in a better position to evaluate the strength of these efficiency claims than the DOJ. Second, eliminating the FCC’s authority would create inconsistencies in the application of telecommunications policy. Elimination of the FCC’s role in merger review would mean that the FCC would no longer have authority to review license transfer transactions related to mergers, but it would retain its authority to review license transfers outside of the merger context. The statutory language, however, instructs the FCC to review all license transfers for promotion of the public interest. Finally, eliminating FCC authority

309 See supra notes 70–78, 189–223 and accompanying text (explaining that the DOJ is typically required to seek a preliminary injunction in its merger challenges, and outlining how the DOJ did not need to seek a preliminary injunction during its challenge of the AT&T/T-Mobile merger).

310 See supra notes 237–253 and accompanying text (describing the problems implicated by the DOJ’s failure to seek a preliminary injunction in the AT&T/T-Mobile case); supra note 240 (explaining how the preliminary injunction problem in telecommunications merger review results in a perversion of antitrust law and its typical caution).

311 See infra notes 312–321 and accompanying text.

312 See Curran, supra note 61, at 778; Feld, supra note 275, at 23; Weiss & Stern, supra note 6, at 206.

313 Answer, supra note 208, at 2–3.


315 See Answer, supra note 208, at 1; MERGER GUIDELINES, supra note 58, at 29–31; Curran, supra note 61, at 778; Feld, supra note 275, at 23; Weiss & Stern, supra note 6, at 206.


317 See id. §§ 214(a), 310(d).

318 See id. §§ 214(a), 310(d) (authorizing the FCC to review license transfers in all contexts); Separate Statement of Commissioner Harold Furchtgott-Roth Concurring in Part, Dissenting in Part, 14 FCC Rcd. 14,712, 15,174–89 (Oct. 6, 1999) [hereinafter Separate Statement of Commissioner], reprinted in BENJAMIN ET AL., supra note 85 at, 1075. But see Feld, supra note 275, at 22.
could create unintended inefficiencies.\textsuperscript{319} For example, merging parties could obtain clearance from the DOJ and consummate their transaction, only to find out after the fact that the merger violated existing FCC regulations, a result that could be avoided by some FCC review early on.\textsuperscript{320} These problems caution against the complete elimination of FCC authority to review license transfers in the merger context.\textsuperscript{321}

B. \textit{Moderation Is the Best Policy: Measured Reform Within the Dual Review System}

The problems associated with complete elimination of the role of either the DOJ or the FCC points toward a more moderate approach that would solve the discrete preliminary injunction problem while maintaining the overall structure of the system.\textsuperscript{322} These solutions advocate relatively minor changes that would preserve the benefits of dual review and could be accomplished without revolutionary policy change.\textsuperscript{323}

1. Trying for Teamwork: Can the DOJ and the FCC Work It Out?

The first moderate approach would implement a clearance system whereby the FCC and DOJ would work together to decide which agency should review each specific proposed merger.\textsuperscript{324} The DOJ and the FTC utilize this type of clearance system to distribute mergers for review under their concurrent Clayton Act authority.\textsuperscript{325} In 1948, the DOJ and the FTC signed an interagency agreement that outlined a process for assigning merger applications to one agency for review.\textsuperscript{326} First, both agencies conduct an initial review of the proposed merger.\textsuperscript{327} If either the DOJ or the FTC wishes to pursue an investigation, it will seek clearance from the other agency.\textsuperscript{328} If both agencies wish to investigate,

\textsuperscript{322} \textit{See Weiss & Stern, supra note 6, at 209–10}; Rinner, \textit{supra note 21}, at 1580.
\textsuperscript{323} \textit{See Weiss & Stern, supra note 6, at 209–10}; Rinner, \textit{supra note 21}, at 1580.
\textsuperscript{324} \textit{See id.} (advocating this position).
\textsuperscript{325} \textit{See Mergers and Acquisitions, supra note 9, at 13–16}.
\textsuperscript{326} \textit{Id.}
\textsuperscript{327} Ling, \textit{supra note 28}, at 944.
\textsuperscript{328} \textit{Id.}
the merger will be assigned to the agency with the most experience and expertise in the industry.\textsuperscript{329} A similar model could be implemented to distribute telecommunications merger review between the DOJ and the FCC.\textsuperscript{330} This model would require the two agencies to come to an independent agreement and to outline standards for assigning mergers to each agency.\textsuperscript{331} For example, the agencies could divide up mergers based on the underlying technology involved or the overall competitiveness of the specific industry.\textsuperscript{332} This type of clearance system would solve the preliminary injunction problem because only one agency, the DOJ or the FCC, would ultimately investigate each proposed merger.\textsuperscript{333}

Two significant problems, however, would render the implementation of this solution undesirable.\textsuperscript{334} First, it would be difficult to decide on a methodology for allocating mergers between the two agencies because the FCC has considerably more expertise in telecommunications issues than the DOJ does.\textsuperscript{335} The DOJ, alternately, has a wider range of experience analyzing all issues of competition and antitrust.\textsuperscript{336} For this reason, it is unlikely that either the FCC or the DOJ would voluntarily agree to cede its merger review authority on a case-by-case basis.\textsuperscript{337} Even if an agreement could be reached and discernible standards set for assigning the mergers for review, the FCC and the DOJ would review their set of assigned mergers under very different standards.\textsuperscript{338} The merging parties assigned to the FCC would have the burden of demonstrating that the transaction is in the public interest.\textsuperscript{339} The DOJ, alternately, would bear the burden to establish the anticompetitive effects of its assigned cases and would not consider other public interest factors.\textsuperscript{340} Competitively neutral mergers thus would be approved if
assigned to the DOJ for review but could be challenged by the FCC. This result would be a system in which telecommunications mergers would be subject to different standards and different results depending on how the DOJ and the FCC divide proposed mergers among themselves. This would create arbitrary results and is therefore an untenable approach to solving this problem.

2. A Happy Medium: Docking the Scope and Timeline of the FCC’s Merger Review

A second moderate approach would be to rein in the FCC’s authority by holding its review to a strict time limit and reducing the scope of its review to better reflect its statutory grant. To ensure that FCC review operates concurrently without impacting the DOJ’s case, the FCC would have to complete its review before the DOJ brings suit. This would be accomplished by subjecting the FCC to a strict time limit and mandating that FCC and DOJ review of each transaction begin simultaneously. To address the time limit, one scholar has proposed that the DOJ’s stringent HSR timeline apply to the FCC’s review of mergers under its 1934 Act authority. In order to accomplish this solution, the FCC would need to issue a final decision on the transaction within sixty days by rendering moot any conditions imposed or hearings scheduled after the expiration of this period. Finally, mandating that the merging parties file with the FCC at the same time they file with the FTC and DOJ would guarantee that the FCC’s sixty-day review period coincides with that of the DOJ. Under this solution, the FCC would have an ini-

341 Barkow & Huber, supra note 5, at 49.
342 See Baker, supra note 338, at 415; Barkow & Huber, supra note 5, at 49.
343 See Baker, supra note 338, at 415; Barkow & Huber, supra note 5, at 49.
344 See infra notes 350–351 and accompanying text.
345 See supra notes 181–187 and accompanying text (noting the delay that arises when FCC review continues after the DOJ brings suit).
346 See Rinner, supra note 21, at 1578–80.
347 See id.
348 See id. at 1580–81. The FCC has the ability to request an administrative hearing to determine “substantial and material question[s] of fact” to aid in its review. 47 U.S.C. § 309(e) (2006). In fact, the FCC signaled its desire to initiate such a hearing during the final days of its review of the AT&T/T-Mobile merger. See Amy Schatz, AT&T Faces New Hurdle–Its $39 Billion T-Mobile Buy Is in Deeper Jeopardy as FCC Slaps on Extra Review, WALL ST. J., Nov. 23, 2011, at B1. If the HSR timeline were applied to FCC review, any administrative hearing would have to be completed during the sixty-day time frame. See Rinner, supra note 21, at 1580–81.
tial thirty-day period to review a proposed merger, would be able to seek supplemental information from the parties during this initial thirty days, and would then have an additional thirty days to come to a decision.\textsuperscript{350} This solution would mitigate the preliminary injunction problem illuminated by the failed AT&T/T-Mobile merger because a final FCC decision would be issued before the DOJ issued any complaint to enjoin the merger.\textsuperscript{351}

Critics of this approach counter that the FCC would not be able to conduct a thorough public interest review in such a short amount of time.\textsuperscript{352} Curtailing the substance of the FCC’s authority, however, would allow it to complete its review within the sixty-day time limit.\textsuperscript{353} The FCC’s review should be limited to whether the license transfer, not the merger as a whole, would be in the public interest.\textsuperscript{354} The language of the 1934 Act supports this proposal.\textsuperscript{355} The FCC’s authority to review license transfers that accompany mergers is the same authority that allows the FCC to review all license transfers.\textsuperscript{356} The content of FCC merger review, therefore, should mirror the review conducted for license transfers outside the merger context.\textsuperscript{357} When a license transfer does not accompany a merger, FCC review is generally quick and simple.\textsuperscript{358} The FCC analyzes the transaction for compliance with its own rules and regulations, and it ensures that the proposed licensee is trustworthy.\textsuperscript{359} FCC merger review should be similarly limited, and should not con-

\textsuperscript{350} See \textit{Mergers and Acquisitions}, \textit{supra} note 9, at 25; Rinner, \textit{supra} note 21, at 1580–81.

\textsuperscript{351} See Rinner, \textit{supra} note 21, at 1580–82. Holding the FCC to its own self-imposed 180-day time limit would not solve the preliminary injunction problem because, assuming the DOJ and FCC review begin on the same day, the DOJ could bring suit around day sixty and the FCC review could then hold up the merger for an additional 120 days as the DOJ moved toward trial. \textit{See} 15 U.S.C. § 18a; \textit{Mergers and Acquisitions}, \textit{supra} note 9, at 25–30; Rinner, \textit{supra} note 21, at 1574.

\textsuperscript{352} See Feld, \textit{supra} note 275, at 24.


\textsuperscript{354} See Troy, \textit{supra} note 353, at 508–09 (advocating this position).

\textsuperscript{355} See 47 U.S.C. §§ 214(a), 310(d) (2006); Tramont, \textit{supra} note 319, at 55–57.

\textsuperscript{356} See 47 U.S.C. §§ 214(a), 310(d); Tramont, \textit{supra} note 319, at 55–57.

\textsuperscript{357} See 47 U.S.C. §§ 214(a), 310(d); Troy, \textit{supra} note 353, at 509.

\textsuperscript{358} See Dugan, \textit{supra} note 353, at 445; Tramont, \textit{supra} note 319, at 55–56.

\textsuperscript{359} See EchoStar Hearing Designation Order, \textit{supra} note 228, at 20,576–79; Tramont, \textit{supra} note 319, at 56. The FCC considers whether the potential licensee has the required “citizenship, character, financial, technical, and other qualifications.” EchoStar Hearing Designation Order, \textit{supra} note 228, at 20,576. In making this determination, the FCC considers the licensee’s prior felony convictions, fraudulent misrepresentations, and any violation of antitrust laws. \textit{Id.}
sider the competitive impact of the entire transaction or speculation about the future effect on service quality, diversity, or other extraneous factors.\textsuperscript{360} In fact, in its EchoStar hearing designation order, the FCC explicitly considered whether the license transfer complied with existing FCC rules before moving on to the broader implications of the merger for competition, diversity, and spectrum policy.\textsuperscript{361} The FCC quickly concluded—in four pages—that the license transfer did not conflict with any rules and that the parties were qualified as licensees; it then spent twenty-five pages on public interest concerns and ninety pages on competition analysis.\textsuperscript{362} If FCC review were confined to the material in those four pages, license transfer review would be faster, “nondiscriminatory, routine, and predictable.”\textsuperscript{363}

Some within the FCC have recognized the limits of FCC statutory authority over mergers and the desirability of market-based approaches to license regulation.\textsuperscript{364} For example, former FCC Chairman Harold Furchtgott-Roth spoke out against the breadth of FCC merger review; he noted that the FCC does not have the statutory authority to review the entire merger transaction, and that the expansion of its authority creates redundancy with DOJ work and unpredictability for applicants.\textsuperscript{365} Additionally, the FCC has noted the value of deferring to the market to determine its licensing scheme, stating, “As liberalization, privatization, and competition increasingly characterize wireless communications policy around the world, market-based licensing policies will play a critical role in ensuring that the benefits of telecommunications technologies and services are made available to the widest range of people in the most timely and efficient manner.”\textsuperscript{366}

Nonetheless, the FCC’s expansive view of its public interest license transfer standard has, unfortunately, received endorsement from Con-

\textsuperscript{360} See Separate Statement of Commissioner, \textit{supra} note 318, at 15,174–89; Dugan, \textit{supra} note 353, at 445. If the FCC believes its expert opinion would be relevant to the DOJ’s antitrust analysis, it should be permitted to submit comments to the DOJ, but it should not be allowed to duplicate DOJ antitrust review. \textit{See} Telecommunications Merger Review Act, S. 1125, 106th Cong. (1999) (proposing that the FCC may submit comments to the DOJ or FTC to aid in its review).

\textsuperscript{361} EchoStar Hearing Designation Order, \textit{supra} note 228, at 20,626–34; \textit{see supra} notes 225–236 and accompanying text.

\textsuperscript{362} EchoStar Hearing Designation Order, \textit{supra} note 228, at 20,626–34.

\textsuperscript{363} See Tramont, \textit{supra} note 319, at 56.

\textsuperscript{364} See \textit{infra} notes 365–366 and accompanying text.

\textsuperscript{365} Separate Statement of Commissioner, \textit{supra} note 318, at 15,174–89.

gress and the courts.\textsuperscript{367} Congress, through the 1996 Act, expressly provided that the FCC should seek to encourage the enhancement of competition through its policies and regulations.\textsuperscript{368} Prior judicial precedent, which gave the FCC discretion to interpret its statutory grant broadly and consider the competitive effect of the merger as a whole, poses an obstacle to reforming the FCC’s authority.\textsuperscript{369} Congress, therefore, must pass a law that imposes a strict time limit on FCC review and explicitly states the boundaries of this review.\textsuperscript{370}

Although congressional reform can be difficult to achieve, there is a history of support for reforming telecommunications merger review in Congress.\textsuperscript{371} The 106th Congress introduced six different bills, four in the House of Representatives and two in the Senate, aimed at eliminating or reducing the FCC’s role in merger review.\textsuperscript{372} The bills proposed a range of options, from completely eliminating the role of the FCC in merger review, to subjecting the FCC to varying degrees of enforceable time limits (some echoing the HSR language), to limiting the FCC’s authority to attach conditions to license transfer approval.\textsuperscript{373} These bills suggest that there is significant congressional support for reform to the dual review system, and furthermore, that achievement of the moderate reforms advocated by this Note is feasible.\textsuperscript{374}

\textsuperscript{367} Feld, supra note 275, at 22.

\textsuperscript{368} Benjamin et al., supra note 85, at 1056–59; see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (stating the purpose of the Act as “promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

\textsuperscript{369} See id.; Feld, supra note 275, at 22.

\textsuperscript{370} See Feld, supra note 275, at 22; Rinner, supra note 21, at 1580.

\textsuperscript{371} See Chen, supra note 132, at 1337; Shelanski, supra note 279, at 381.

\textsuperscript{372} See Chen, supra note 132, at 1337; Shelanski, supra note 279, at 381; infra note 373.


\textsuperscript{374} See supra notes 372–373 and accompanying text.
Conclusion

Concurrent FCC and DOJ review of telecommunications mergers simply does not make sense. Both agencies conduct an analysis of the effect of the mergers on competition. The agencies, furthermore, conduct this review under different legal standards, different burdens of proof, and with different guiding policies. The failed merger between AT&T and T-Mobile shows that under this system, neither antitrust nor telecommunications policy is being effectuated. Analysis of mergers under antitrust law should apply consistently across industries, but dual review prevents this from happening. Substantial reform is clearly needed, and curtailing the FCC’s authority to review mergers provides the most viable and meaningful way forward. Absent complete overhaul of telecommunications policy, maintaining some role for the FCC is necessary to ensure consistency with the 1934 Act. The 106th Congress considered many different reform options to rein in FCC merger review authority. Although none of those bills were ultimately signed into law, the framework and support remain. Recent public engagement with the debate surrounding the AT&T/T-Mobile merger should act as an impetus to re-launch conversations about reform in Congress and finally address the problem of dual merger review in telecommunications.

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