HORIZONTAL AND CONGLOMERATE MERGER CONDITIONS: AN INTERIM REGULATORY APPROACH FOR A CONVERGED ENVIRONMENT

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I. INTRODUCTION

The telecommunications marketplace is dramatically changing our world. Cable lines will carry phone calls, phone wires will deliver movies and the airwaves will carry both. This convergence of technology will transform how we live, work, play and shop. It will blur traditional industry lines.¹

Convergence and mergers² have blurred historic service classifications, such as broadcast, cable and common carrier. The Federal Communications Commission’s (“FCC” or the “Commission”) current regulatory framework developed from services that were tied to a specific transmission medium.³ The underlying facilities developed independently under very different circumstances, and the regulatory scheme governing the services delivered over those facilities reflected their unique development. The current framework is designed to regulate services based on the underlying transmission medium—telephone wire, wireless telephony, broadcast (airwaves) or cable plant. This method of regulation, however, is being outmoded by new technology that allows converged services to be delivered over one network. Alternatively, the same service may be delivered over networks of differing transmission media.⁴ What was once carried as a broadcast service is now available over the common carriers’ wires as streaming video or audio; cable providers are carrying voice service, once the domain of common carriers; and High-Definition Digital Television (“HDTV”) supports data channels used to provide high-speed internet access. As convergence allows many services to be delivered over one network, the current regulatory framework that ties a particular service to a certain transmission medium is outmoded.⁵ Thus, basing a regulatory scheme on the assumption that a certain service is tied to a specific underlying transmission medium produces inconsistent rules. For example, telephony over cable could be regulated as a cable service or as a common carrier service.⁶


² The term merger in the context of this comment also includes acquisitions or other combinations and transfers of stock, assets or control that effectuate control of the entities involved coming under a newly combined single entity.

³ In the telephone industry, for example, telephone service is historically tied to the transmission media of copper wire.

⁴ The author uses the term “transmission medium” to denote the underlying infrastructure that carries the communication transmission. For example, the transmission medium for traditional telephony is the physical network of copper wires historically used to carry telephone voice communications. Likewise, the transmission medium for cable television is the cable coaxial network that carries television broadcast signals. The transmission medium for wireless telephony is the spectrum utilized to send and receive voice signals. See Eli M. Noam, Principles for the Communications Act of 2034: The Su-}

perstructure of Infrastructure, para. 11 (visited Apr. 9, 2000) <www.vii.org/papers/citi476.htm> (noting that one of the major problems of the Communications Act of 1934 “is that it deals with separate transmission media differently . . . [i]t is not transmission path neutral”).

⁵ It has been noted that broadcasting, telecommunications and the internet are fast converging into a “single multimedia market in which TV operators supply voice telephony, telecommunications companies supply video images, and where the internet is delivering both basic voice telephony and moving pictures.” Campbell Cowie & Christopher T. Marsden, Convergence, Competition and Regulation, International Journal of Communications Law and Policy, para. 1 (June 1, 1998) <www.digital-law.net/1JCLP/1_1998/jclplwebdoc_6_1_1998.html> [hereinafter Cowie & Marsden].

⁶ The “cross-entry” of telecommunications and broadcasting companies into the other’s market has been said to raise “significant and difficult transitional regulatory issues.” Cowie & Marsden, supra note 5, at para. 2.

⁷ See generally Barbara Esbin, Internet Over Cable: Defining the Future in Terms of the Past, 7 CommLaw Conspectus 37 (1999) (describing the problem of regulating internet over
Such rules may force providers to consider business plans based on regulatory issues rather than economic and technical motivations. Converged technologies do not fit into the regulatory framework shaped by the organizational structure, the statutory structure or the rules of the FCC. As delivery of services converges over an increasing number of transmission media, it becomes increasingly arbitrary to regulate according to the underlying transmission medium over which the service happens to be delivered.8

Also, new innovations and technologies are arriving at a pace that the current regulatory regime cannot address or is too slow to handle effectively.9 The FCC's regulatory scheme is dictated by Congress, which directs the FCC to create rules in furtherance of its statutory mandates. Thus, the FCC's ability to effect change is limited. It can only change the regulatory scheme as much as its statutory directive allows. Changing the regulatory scheme beyond the existing statutory strictures would require congressional action to modify existing statutes or create new statutory language. Adapting the statutory scheme to the fundamental changes brought about by convergence would necessitate a legislative overhaul of the existing statutes, which would be a lengthy process. Even if the FCC can make changes in their rules within the limits of the statutory framework, the rulemaking process is lengthy as well. As a federal agency, the FCC is subject to the Administrative Procedure Act ("APA"),10 which requires time allowances for notice and comment rulemaking.11 Thus, the FCC is bound by procedural requirements to allow time in its rulemaking process to give adequate notice to the public and time for the public to formulate and submit meaningful comments to the agency on the issue. Procedural requirements aside, it is a difficult and time consuming task to write a rule that applies to all participants in an industry sector, attempting to anticipate any situation in which it might apply and predict what the ramifications of the rule will be in each circumstance. It is difficult to address rapidly evolving innovations within these lengthy processes.

The current regulatory framework must be changed to account for the new converged environment.12 But changing the statutory underpinnings of communications regulation to accommodate this very different environment will entail a lengthy legislative process. In the interim, it is uncertain how converged technologies and companies that do not fit into the current regulatory framework should be regulated. The FCC could aptly solve the incompatibility of the present statutory framework with converged entities and services in this interim period by using its broad public interest standard13 to develop merger conditions that do address converged services. New technologies that are delivered over multiple transmission media no longer fit the facilities-

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8 See Johannes M. Bauer & Michelle F. Wilsey, National and Supra-National Regulation of Cybernetworks and Telecommunications Carriers, Address at Cybercomm III, at para. 3, 8 (last modified Sept. 27, 1996) <www.vii.org/papers/citi.htm> ("As convergence has enabled different telecommunications systems to deliver similar if not identical services (internet telephony, video on demand, cable, radio, etc.) a paradoxical regulatory situation is created. Depending on the delivery technology, functionally equivalent services and applications may be subject to quite different sets of rules and regulations.") [hereinafter Bauer & Wilsey].

9 Specific regulation may not be flexible enough to encompass new technology and "technological by-pass" may result in "regulatory obsolescence." See Cowie & Marsden, supra note 5, at para. 29.


11 See 5 U.S.C. §§ 551(1), 552, 553. The FCC has issued its own procedural regulations in furtherance of the APA rulemaking requirements, which require the FCC to allow no less than a specified number of days for each step in its rulemaking process. See generally 47 C.F.R. §§ 1.399-1.430 (1999). Specifically, the Commission must allow at least 30 days after public notice for filing of statements in support of or opposition to a petition for rulemaking; an additional 15 days for a reply to any statement of support or opposition; and at least 30 days after publication of a final rule for it to become effective. See 47 C.F.R. §§ 1.405(a-b), 1.427(a).

12 FCC Commissioner Michael Powell has said that convergence between industry sectors will force the FCC and Congress to make basic choices. See David Kaut, Ness Tries Again to Quell Internet Rumors As Congress Bears Brunt of E-Mail Hysteria, BNA DAILY REPORT FOR EXECUTIVES, Mar. 29, 1999. House Telecommunications Subcommittee Chairman Tauzin also has spoken of "remissioning" the FCC to make it compatible with a communications industry that is shifting from "segmentation" to "convergence." See Tauzin Taps GOP Task Force to Develop FCC Restructuring Ideas, BNA DAILY REPORT FOR EXECUTIVES, Apr. 21, 1999.

13 As explained later in this article, the FCC's public interest standard includes consideration of whether a merger is consistent with the goals of the Communications Act of 1934, Commission rules and federal communications policy. This includes goals, such as fostering a competitive and deregulatory environment, maintenance and growth of a universal service program, and timely deployment of advanced communications services. See discussion infra Part III.C and accompanying footnotes.
based regulatory scheme, and can be regulated more quickly through merger conditioning than through the formulation or modification of statutes or agency rules. Such a regulatory scheme can be changed quickly in response to market and technological developments. Although only the merging parties are subject to the merger conditions—as opposed to the entire industry being subject to a statute or regulation—the industry impact will still be significant. Assuming the trends in mergers continue, the number and size of companies merging will amplify the effect of individual merger conditions. Although the anticipation of merger conditions on converged technologies might have a deterrent effect on companies considering mergers, generally, merger conditions have not significantly inhibited the overall number of mergers. Similarly, merger conditions have not prevented substantially large companies from attempting to merge, such as SBC-Ameritech or MCI-British Telecom. Thus, the risk of inhibiting efficient mergers does not seem high enough to prevent the use of merger conditions to regulate converged services. This form of regulation also presents a chance to develop finely tailored regulations for one specific set of circumstances, rather than creating rules applicable to an entire industry that must anticipate all applications of the rule in all circumstances. There is also the advantage that the nascent technology is only "regulated" when the merged company is involved. Other companies with that technology do not fall under the condition. If the regulation has unintended effects, it will not impact that technology across the board. Therefore, any deleterious impact is reduced. A merger condition is also much easier to change than a statute or an agency rule. While a change of a rule would require going through the formal rulemaking process, a change to a merger condition is an adjudication that would merely require...
(the “1996 Act” or “Telecommunications Act”), the economics of company business models and technological advances resulting in convergence. Today’s mergers are driven by the rapidly changing economy, and considerations of efficiency and competitiveness, including deregulation, industry consolidation, technological change and strategic maintenance of market strength.  

This merger wave dates back to the early 1990s and reflects strategic acquisitions between synergistic companies with related services or products.  

B. The 1996 Act

The Telecommunications Act spurred the recent wave of mergers in the communications industry. The pro-competitive goals of the 1996 Act created a competitive environment, which threatened incumbent market participants. This pro-competitive environment necessarily spurred innovation and made new ventures less risky by reducing barriers to entry. Existing and newly successful companies, however, are driven to merge in order to compete in this marketplace of rapid innovation and increasing competition. Yet, because barriers to entry have been lowered, a company may feel that in order to maintain market presence, it must merge with another company to quickly gain increased market presence and prevent new competitors from rapidly eroding its market share.

C. Economic Factors

Economic factors drive companies to merge to take advantage of efficiencies, economies of scale or economies of scope. In an industry where a few large companies often dominate markets, merging generates immediate muscle to compete against these companies. A merger can give a company increased economies of scale in advertising, product development and customer reach that approach levels of dominant competitors. Economies of scope can also be obtained where the merging companies combine complementary products, services or capabilities to provide customers more comprehensive or higher quality offerings.

D. Technological Factors—Convergence

Rapid technological advances in all areas of communications make it difficult for any one company to stay on the cutting edge with product and service offerings. Mergers provide a way to quickly offer the latest technological advances or enter a related industry sector. Acquiring a company that has a technological innovation is often more timely and less costly than developing

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18 See Parker & Balto, supra note 17, at 356.
19 See id. at 353.
20 See Richard E. Wiley, Developments in Communications Law: Competition, Consolidation and Convergence, 584 PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES No. 0089 153, 159 (1999); see also Jason E. Friedrich, Thinkable Mergers: The FCC’s Evolving Public Interest Standard, 6 COMMUN LAW CONSPECTUS 261, 262 (1998) (stating that “the 1996 Act has been answered with increased consolidation,” and noting FCC Chairman Hundt’s remark that in transition from a monopoly to competitive environment, telecommunications mergers will increase because they allow entry into new markets cheaper and faster than de novo entry) (hereinafter Friedrich).
22 See Parker & Balto, supra note 17, at 354; see also Michel Kerf & Damien Geradin, Controlling Market Power in Telecommunications Antitrust vs. Sector-Specific Regulation on Assessment of the United States, New Zealand and Australian Experiences, 14 BERKELEY TECH. L.J. 919 n.177 (1999) (giving the example of incumbent local telephone companies driven to merge in order to consolidate their market position).
24 See Erin M. Reilly, Comment, The Telecommunications Industry in 1993: The Year of the Merger, 2 COMMUN L. & POL’Y 591, 591-92 (1999) (noting that the merger wave can be attributed to several factors, one of which is new technology that compels companies to pool technological and economic resources to be able to compete effectively) (hereinafter Reilly).
25 See Aimee M. Adler, Competition in Telephony: Perception or Reality? Current Barriers to the Telecommunications Act of 1996, 7 J.L. & POL’Y 571, 591-92 (1999) (noting that mergers are used to enter new markets); see also Reilly, supra note 24, at 99 (citing Dan Dorfman, Pro Pushes Telecommunications, USA TODAY, Aug. 20, 1993, at 2B, who notes that the significance of some mergers is the blurring of regulatory borders between cable, telephone and wireless). Also note that this phenomenon was brought to the attention of the Senate when Commerce Committee Chairman John McCain introduced The Telecommunications Ownership Diversity Act of 1999 and stated that convergence has caused companies in the communications industry to merge in order to expand into new markets. See The Telecommunications Ownership Diversity Act of 1999: Hearing on S. 1711 Before the Senate Comm. on Finance, 106th Cong. (1999).
the product or service internally. In addition, communications companies are increasingly looking to offer “bundled” services (long distance and local telephony; or local telephony, cable television and cable internet access) and find it easier to enter the necessary markets by merging with existing participants rather than developing their own service offerings. The increasing interconnection and interrelatedness of previously distinct market sectors is driving companies to merge because mergers facilitate timely entry into related markets without the cost of development, building infrastructure, gaining needed expertise, and refocusing company goals and organization.

1. Convergence Defined

Convergence represents the merging of voice, data, video and other services onto a common platform. In a converged environment, voice service, video and data service are provided over a single device, such as a personal computer, on a common, packet-based platform. The platform that is facilitating this convergence is the internet. The convergence of services onto the internet truly represents a paradigm shift in the way we communicate, receive entertainment and share information.

2. Internet Over All . . . Internet Under All

The internet is the global network of computers, interconnected through the common use of the Internet Protocol (“IP”). IP refers to a set of protocols implemented on the machines that compose the internet, while the term “internet” refers to the global network of interconnected computers and devices. The ability to send information in digital format, as ones and zeros, has allowed for development of many new technologies and transmission of the same kind of information over multiple platforms, including the internet.

The internet allows for computers operating on dissimilar networks to exchange information in the form of digital packets. But the internet has done more than allow dissimilar networks of computers to interface and exchange information. The internet is also a commonality that allows services previously tied to a distinct transmission medium to be delivered over any transmission medium. It is the “universal translator” that allows a service to be carried over any transmission medium and thus, fosters convergence.

a. The Internet Over All

IP may ride efficiently on many different types of transmission media. IP is currently supported on any of a multitude of transmission media: copper twisted pair, enhanced copper twisted pair (DSL), fiber, cable coaxial, wireless (cellular), fixed point-to-point wireless, satellite, etc. Therefore, you will be able to provide any service over any of the above transmission media using IP.


31 IP here refers to the Transmission Control Protocol/Internet Protocol (“TCP/IP”) protocol suite. TCP/IP is a suite of protocols and applications or rules that act as a common standard by which devices and networks can understand each other and interface to support data services. See Dodd, supra note 30, at 240, 287. TCP/IP is nonproprietary and nonlicensed, or “open,” thus allowing anyone to implement this protocol. See id. at 228.


33 See id. at 89 (stating that the internet is capable of carrying anything that can be expressed in digital form).

34 DSL stands for digital subscriber line, which is a technology that enhances performance of existing copper telephone wirelines with modems on either end of the line that perform advanced signal processing, digital multiplexing and compression algorithms to send data at speeds of 2–8 Mbps downstream (to the user). See Peter W. Huber et al., Fed. Telecommunications Law 990 at § 11.2.2.2 (1999).
One way to think of this capability is to liken it to the ability of a computer operating system, like Microsoft Windows, to run on many different types of computers, such as Compaq, Dell, Gateway or computer workstations. Here, IP functions like the computer operating system, having the ability to ride over many types of transmission media.

b. The Internet Under All

Internet Protocol supports a multitude of services. IP serves as a platform to carry video (broadcast and conferencing), voice, data and more. Converged services include data services, such as web access, business transactions and virtual private networks; voice services, such as local and long distance, enhanced features and call centers; video, such as streaming between users, broadcast TV and video on demand; and other services, such as monitoring and telemetry, and new security systems. This can be likened to the ability of a computer operating system to run many different programs, such as word processing, graphic editing, internet browsers or spreadsheet applications. Again, IP functions like the computer operating system with the ability to support many different services like voice, data or video.

3. Significance of Convergence on Mergers

In the short term, it is reasonable to assume that convergence will continue at internet speeds, producing more convergent technology and rapidly moving toward a converged environment. In the long term, it is likely that convergence will force major regulatory reform. The development of a convergent technology provides consumers an alternative to the existing offering. This naturally threatens incumbents invested in offering that existing service, which may look to mergers to acquire new service offerings. In addition, convergence has prompted a race to offer bundled services. Given the speed of technological advances, existing companies may find that the most efficient way to ensure their market presence is to acquire a company possessing the technology they wish to offer.\(^{35}\) Given the time necessary and the man hours required to refocus a company to produce a technology divergent from their own, this may not be a feasible option. Therefore, the merger trend is likely to continue.\(^{36}\) With the continued rapid deployment of convergent technology and the merger trend producing converged companies, the current regulatory scheme will become increasingly outmoded, forcing the need for regulatory change.

III. FCC REGULATORY FRAMEWORK

A. The FCC's Statutory Framework

As this section will explain, the FCC's statutory framework was predicated on the assumption that a particular service is tied to a particular transmission medium, which conflicts with today's convergence across industry sectors. The FCC is an independent agency created by Congress and therefore operates pursuant to statutory authority.\(^{37}\) The Commission's statutory framework is divided along lines of underlying transmission media. Each Title or Act was designed to regulate a particular service, tied to a particular transmission medium. For example, Title II of the Communications Act of 1934 regulates "common carriers,"\(^{38}\) which originally provided basic telephony. Title

\(^{35}\) See Reilly, supra note 24, at 111 (noting that more companies are using mergers to cross the ownership boundaries of cable and telephony in order to converge different technology types).

\(^{36}\) The race to offer bundled services across industry lines will likely increase the number of cross-industry mergers. See Parker & Balto, supra note 17, at 354.


\(^{38}\) See 47 U.S.C. § 201. Title II regulates common carriers, which are defined as "for hire, in interstate or foreign communication by wire or radio" except broadcasting. Communications Act of 1934, 47 U.S.C. § 153(10). The 1996 Act went on to define a "telecommunications carrier" as: any provider of telecommunications services—telecommunications for a fee directly to the public, regardless of the facilities used, except that the Commission shall determine whether to treat fixed and mobile satellite ser-
VI of the 1934 Communications Act,\textsuperscript{39} and the Cable Television Consumer Protection and Competition Act of 1992\textsuperscript{40} govern cable communications. Title II of the 1996 Act governs broadcast services, generally mass media —AM and FM radio and television.\textsuperscript{41} Title III of the 1934 Act covers wireless telecommunications services.\textsuperscript{42} Finally, the Communications Satellite Act of 1962\textsuperscript{43} governs satellite transmission.

By adding special provisions, the 1996 Act attempted to prevent new services and technologies from being regulated under an old regulatory scheme. These provisions are exceptional in that the transmission medium is irrelevant, whereas other sections of the Communications Act assume a particular service is tied to a specific transmission medium. There is a provision for “advanced services” that mandates that the FCC promote the development and deployment of advanced services “without regard to any transmission media or technology.”\textsuperscript{44} The 1996 Act also distinguishes “information services” from “telecommunications services,”\textsuperscript{45} expressly exempting information services from the same regulation as telecommunications services by carving out a separate definition. In the 1996 Act, Congress explicitly stated that the internet and interactive computer services should not be regulated.\textsuperscript{46} Although, Congress made an attempt in the 1996 Act to provide for new technologies and services, the provisions did not reach far enough and did not account for many emerging services. As noted in the introduction, changing the statutory framework through the legislative process is an intensive and time-consuming effort. Although Congress will likely need to reopen the Communications Act to account for economic, competitive and technological changes, a comprehensive overhaul of the current legislation may take years. Therefore, an interim solution is needed to deal with immediate inconsistencies.

B. The FCC’s Rules Framework

The FCC has also created regulatory limits through its own promulgation of rules and regulations in furtherance of statutory mandates and its own policy goals,\textsuperscript{47} which extend the framework that assumes a specific service is tied to a specific transmission medium. There have been a series of Commission decisions that have shaped the regulation of today’s converged services.\textsuperscript{48} These decisions date back to the Computer I Order,\textsuperscript{49} Computer II Order\textsuperscript{50} and Computer III Order.\textsuperscript{51} A later order

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\textsuperscript{39} Communications Act of 1934 at §§ 601–714.

\textsuperscript{40} 1992 Cable Act, supra note 37.

\textsuperscript{41} See Telecommunications Act of 1996 at §§ 202, 207.

\textsuperscript{42} See Communications Act of 1934 at §§ 301–399(B).

\textsuperscript{43} 1962 Satellite Act, supra note 37.

\textsuperscript{44} Advanced services are defined by § 706 as any “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” Section 706(a), Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. §157.

\textsuperscript{45} See Telecommunications Act of 1996 at § 3(20), (46).

\textsuperscript{46} The 1996 Act defined telecommunications services as "transmission, between or among points specified by the user, of information of the user’s choosing, without change in form or content of the information as sent and received," and information services as "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Id. at § 155 (20), (46).

\textsuperscript{47} See 47 U.S.C. § 230(b)(2) (stating that the internet and other interactive computer services should remain "unfettered by Federal or State regulation").

\textsuperscript{48} This comment notes only the pertinent Commission decisions made in relation to converged services. For a discussion of the historical background and technical and policy considerations underpinning these decisions, see Oxman, supra note 47.


\textsuperscript{50} In re Amendment of Section 64,702 of the Commission’s Rules and Regulations, Final Decision, 77 F.C.C.2d 384 (1980), reconsidered, Memorandum Opinion and Order, 84 F.C.C.2d 50 (1980), and further reconsidered, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), and aff’d, Computer and Communications Indus. Ass’n, v. FCC, 693 F.2d 198 (D.C. Cir. 1982), and cert. denied, 461 U.S. 938 (1983) [hereinafter Computer II Order]. The Commission’s Computer II decision distinguished between “basic” and “enhanced” services. It defined basic services as

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\textsuperscript{51} A later order

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asserted ancillary jurisdiction over information services, but recognized that they do not fall under Title II regulation, and that they include enhanced services and protocol processing used in internet protocol. In a Report to Congress, the FCC stated it would continue to classify Internet Service Providers ("ISPs") as information service providers, which are not regulated under Title II and not mandated to contribute to the Universal Service Fund. It noted that although computer-to-computer IP telephony would not be regulated, phone-to-phone IP telephony (using "smart" phones) resembled traditional telephony more closely and would likely be regulated as a telecommunications service. This approach deviates from traditional regulation by transmission medium and would seem more logical in a converged environment where a service, such as telephony, can be delivered over a number of transmission media. Nonetheless, this was merely a forward-looking policy statement, not a rulemaking. The FCC recently decided that ISP traffic is "largely interstate," but classified ISPs as "end users" so that access charges are not applicable. In contrast, other service providers that carry interstate traffic are required to pay access charges to local exchange carriers ("LECs") to compensate LECs for transferring traffic onto their lines. Such inconsistencies, based on categorizing services according to their underlying transmission medium, leave uncertainty and the potential for new business models to exploit the vagueness of the regulations.

Convergence outmodes these definitions and rules so they no longer adequately categorize services or providers. For example, modern digital telephony systems transmit information as strings of ones and zeroes that are by the nature of modern communications technology, being transformed and processed, frequently generated, acquired, retrieved and stored, at least briefly. The service is telephony; however, this process fits the statutory definition of an information service. Modern packet switches, routers and bridges

"pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information," and enhanced services as "any offering over the telecommunications network, which is more than a basic transmission service." Computer II Order, 77 F.C.C.2d at 420, para. 96. It further found that it has jurisdiction over enhanced services, but would forebear from regulating them. See Computer II Order, 77 F.C.C.2d at 428, para. 114. Thus, an enhanced service provider is exempt from most Title II regulation as they are viewed as providers of a service that is beyond a telecommunications service. See id. In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 104 F.C.C.2d 958 (1986) [hereinafter Computer III Order]. Computer III imposed a "non-structural safeguards" system that required Bell Operating Companies ("BOCs") to provide nondiscriminatory interconnection for enhanced service providers. See Computer III Order, 77 F.C.C.2d at 387-88, para. 8.

53 See id. at 21956, paras. 103-04. Thus, telecommunications service equates to a basic service, and information service roughly equates to an enhanced service.
55 See id. at 11549, para. 100.
56 See id. at 11549, para. 98. For an in depth discussion of IP telephony regulatory and policy issues, see Leonard J. Kennedy & Lori A. Zallaps, If It Ain't Broke . . . The FCC and Internet Regulation, 7 COMM.LAW CONSPECTUS 17 (1999). The authors note the challenge to the Commission in applying the statutory framework created by Congress to emerging services, particularly those offered by cable operators and common carriers. See id. at 18-19. They also note that communications services have traditionally been separated into distinct categories with broadcast carrying radio and television signals; telephone companies carrying one-to-one voice communications; and cable delivering additional television broadcast. See id. at 20. The authors continue to say that as networked "multi-purpose terminal devices" become widespread, the distinctions between the discrete communications markets will fade, and have already begun to do so, with cable companies offering telephone service and telephone companies offering video service. See id. at 21.
58 See Universal Service Report to Congress, supra note 55, at 11547, para. 96.
59 For example, a long-distance carrier must transfer its traffic from the edge of its long-distance network onto the LEC's local network in order to get to the end user. See BRANDS & LEO, supra note 49, at 36.
60 FCC Commissioner Powell pointed out these inconsistencies when he said that traditional regulatory categories have an "increasing Alice in Wonderland quality" with the convergence across industry sectors. See David Kaut, Ness Tries Again to Quell Internet Rumors As Congress Bears Brunt of E-Mail Hysteria, BNA DAILY REPORT FOR EXECUTIVES, Mar. 29, 1999.
61 A packet switch forwards a packet through a network based on a pre-determined route. See DODD, supra note 30, at 238.
62 Routers are devices within a physical network that forward packets of information over the best available network segment to the next router toward the packets' ultimate destination. See DODD, supra note 30, at 239.
63 Bridges are devices that connect small numbers of networks together that do not need routing intelligence. See DODD, supra note 30, at 254.
contain digital signaling processing chips and specialized data communications computers fundamental to modern communications that frequently change the form of the information they route. Thus, the terms “telecommunications” and “information” do not reflect either the policy purposes of the distinction or a difference that will survive convergent technologies.65

C. The FCC’s Organizational Structure

The FCC’s organizational structure also helped to establish and perpetuate regulation according to transmission medium, as the agency is divided into bureaus and offices on this basis.66 Five bureaus67 regulate the delivery of a specific service over a specific transmission medium. The Common Carrier and Wireless Telecommunications Bureaus were formed primarily to regulate two-way voice communications,68 while the Cable,69 Mass Media70 and International Bureaus71 were formed mainly to regulate the one-way broadcast of signals.72 This segregated organizational structure, with each bureau dealing with only one

65 Some in the communications industry have noted that different treatment for data traffic and voice traffic is not good policy, and is not possible in this era of technological convergence. See David Kaut, Tauniz, Dingell Offer Bell Data Relief Bill; Hollings Measure Threatens Bells With Fines, BUREAU OF NAT’L AFF. DAILY REP. FOR EXECUTIVES, July 2, 1999.

66 See Cowie & Marsden, supra note 5, at paras. 31, 34 (noting that the FCC is comprised of “specialist” bureaus, each dedicated to a particular part of the communications industry, in contrast to Australia, which initiated general competition law in place of industry-specific regulation with the establishment of the Australian Competition and Consumer Commission in 1997).

67 In August of 1999 FCC Chairman Kennard introduced a strategic plan to reorganize the FCC. See FCC Chairman William E. Kennard, Draft Strategic Plan: A New FCC for the 21st Century (last modified Aug. 12, 1999) <http://www.fcc.gov/21st_century/draft_strategic_plan.txt> [hereinafter Draft Strategic Plan]. Two new bureaus were created: the Consumer Information Bureau, handling public inquiries and complaints, and the Enforcement Bureau, designed to consolidate enforcement functions of all bureaus, enforcing the Communications Act, FCC rules and other FCC policies. See id.


69 The Cable Bureau was established in 1993 to regulate television signals over a coaxial cable plant. See generally 1992
to restructure. By 2001, it will choose one bureau that is centered on a specific platform of delivery, such as the Cable Bureau, and restructure it along functional lines. Thus, the Commission recognizes that its current organizational structure based on underlying transmission medium is not well suited for a converged environment. The Commission, therefore, is actively working to address this problem through major reorganization. Changing the organizational structure will help, but the FCC must still operate within its statutory framework as established by Congress.

D. Carrier and Service Classifications for the Future

The existing statutory framework assumes only a certain service is provided over a given transmission medium. This system is already becoming outdated. It appears that convergence is forcing government to rethink these schemes. The FCC, per Congress' mandate, recently considered definitions of several classifications of carriers and services. Convergence has created a number of difficult issues for the FCC; the most recent issues have been IP telephony and ISP issues. Both of these disputes entail regulating converged services and entities with traditional regulatory classifications of a service tied to a specific transmission medium. A future regulatory approach may be one that takes a more consistent view of regulation, separating service from transmission medium. However, modifying the statutory underpinnings of communications regulation will be a time-consuming process and in the interim period, converged technologies and companies that do not fit into the current regulatory framework must be addressed in some way. It is the proposition of this comment that this problem can be solved by using the FCC's broad public interest standard to develop merger conditions that address converged technologies and companies that do not fit into the current regulatory scheme.

IV. MERGER REVIEW

A. General

This paper focuses on the effects of mergers across different sectors of the communications industry. Mergers such as this are classified as "horizontal" or "conglomerate" mergers. Horizontal mergers are defined as "between companies performing similar functions in the production or sale of comparable goods or services" and are thought to present the greatest threat to competition in a market. An example of this type of merger would be a cable distribution company...
merging with a satellite television company. Conglomerate mergers are defined as between two companies with unrelated products.\(^{85}\) For example, Microsoft merging with AT&T would be a conglomerate merger, because the companies have unrelated products and services. Under antitrust review, this merger is generally viewed as posing no competitive threat. However, as sectors within the communications industry continue to blur, previously unrealized threats to competition may be seen in conglomerate mergers. One such merger that will be considered in this paper is the pending AOL-Time Warner merger. With these points in mind, it is helpful to review the FCC's authority to review mergers, its standard of review and its analytical framework in order to understand how the FCC is capable of using merger conditions as an interim regulatory tool to deal with converged services that do not fit the current regulatory framework.

B. Authority to Review Mergers\(^{86}\)

The FCC has jurisdiction to review mergers involving radio license transfers or common carriers\(^{87}\) under Section 1 of the Sherman Act, Sections 7 and 11 of the Clayton Act,\(^{88}\) and Sections 214(a) and 310(d) of the Communications Act.\(^{89}\) It has authority to condition mergers through consent decrees under the Clayton Act,\(^{90}\) or under Sections 214(c) and 303(r) of the Communications Act.\(^{91}\) The merging parties mandatory applications for transfer and control of licenses and authorizations trigger the FCC's review,\(^{92}\) and it is the applicants' burden to prove that the merger is in the public interest.\(^{93}\) It is significant to note that the conditions are "voluntary" conditions agreed to by the applicants, so once accepted, it is unlikely that a court will entertain a challenge by the applicants.\(^{94}\) Also, the FCC can block a merger\(^{95}\) with its own authority, which would receive substantial judicial deference in a court challenge.\(^{96}\) Thus, by the nature of its authority, FCC merger conditions can be used as effective and powerful regulatory tools.

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85 See id. at 282.
86 It should be noted that four bills on FCC merger review authority have been introduced in this Congress to date, with the general effect of limiting the FCC's merger review authority substantively or through imposition of time limits. See Antitrust Merger Review Act, S. 467, 106th Cong. (1999); Telecommunications Merger Review Act, S. 1125, 106th Cong. (1999); Fairness in Telecommunications License Transfers Act of 1999, H.R. 2553, 106th Cong. (1999); To Amend the Communications Act of 1934 to Establish Time Limits for Federal Communications Commission Review of Merger, Acquisitions and Other License Transfers, H.R. 2783, 106th Cong. (1999).
88 15 U.S.C. §§ 1, 18, 21(a) (1998). This concurrent jurisdiction is shared with the Department of Justice and Federal Trade Commission. See id.
89 47 U.S.C. §§ 214(a), 310(d) (1998). Section 214(a) gives the FCC authority over the application for acquisition or transfer of lines by common carriers, while Section 310(d) gives the FCC authority over transfer of construction permits or station licenses. See id.
91 47 U.S.C. § 214(c), 303(r). Section 214(c) allows the FCC to attach "such terms and conditions as in its judgment the public convenience and necessity may require," while section 303(r) allows the FCC to prescribe "conditions . . . as may be necessary to carry out the provisions of this Act." Id.
92 See Communications Act of 1934, §§ 214(a) and 310(d) (codified at 47 U.S.C. §§ 214(a), 310(d)); see also Saferstein & Boyko, supra note 87, at 78.
93 See In re Applications of NYNEX Corporation Transferee, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd. 19985, 20000-20001 para. 29 (1997) [hereinafter BA-NYNEX Order]; see also Rachelle B. Chong, Study Materials on Regulatory Dynamics in the Telecommunications Industry, PLI CORPORATE LAW AND PRACTICE HANDBOOK SERIES No. B0-00A9, at 61, 66 (1999) [hereinafter Chong].
95 The FCC would technically be blocking the transfer of licenses and authorizations underlying the merger. See 47 U.S.C. §§ 214(a), (c), 310(d). Section 214(a) states that "[n]o carrier shall undertake the construction of a new line or . . . shall acquire or operate any line . . . until there shall first have been obtained from the Commission a certificate." Section 214(c) states that "[t]he Commission shall have power to issue such certificate as applied for, to refuse to issue it," Section 310(d) states that "[n]o construction permit or station license . . . shall be transferred, assigned . . . except upon application to the Commission."
96 The FCC's decision would be subject to a highly deferential arbitrary and capricious review standard under 5 U.S.C. § 706(2)(A), where the court generally will not substitute its judgment for that of the agency's. Note that under antitrust authority, the DOJ/FTC must bring judicial suit and prove their case by a preponderance of the evidence in order to block a merger, placing the burden on the government rather than the applicants. See Telecommunications Merger Act of 2000, Hearing before the Subcomm. on Telecommunications Trade
C. The Public Interest Standard of Review

Although the FCC has jurisdiction to review mergers for anti-competitive effects using antitrust analysis under Section 1 of the Sherman Act and sections 7 and 11 of the Clayton Act,97 the FCC has declined to use this authority and instead conducts its review under the broader mandate and authority of its public interest standard,98 which involves traditional antitrust analysis for anti-competitive effects as well as the public interest standard of the Communications Act.99

The FCC must affirmatively find a merger to "serve the public interest, convenience and necessity."100 The public interest standard is broad and flexible and includes consideration of whether the merger is consistent with the goals of the Communications Act, Commission rules and federal communications policy.101 Some considerations are the goals of the Communications Act,102 such as fostering a competitive and deregulatory environment,103 maintenance and growth of a universal service program,104 and timely deployment of advanced communications services.105 Applicants bear a positive burden of proving not just that the merger is not anti-competitive, but that it is "pro-competitive."106 Also, the Commission may consider industry trends and needs, factors behind Congress enacting specific provisions, and the "complexity and rapidity of change in the industry."107

Thus, the FCC has the broad power to consider all effects of a possible merger to ensure the merger will create results that are generally in the public interest and may condition the merger to ensure this result. In particular, the considerations of industry needs and trends and the complexity and rapidity of change within the industry allows the Commission to take into consideration the rapid deployment of services and technology that do not fit well, or are not considered in the current regulatory scheme. This gives the FCC leeway to construct conditions for converged services that are not a factor in antitrust analysis and are ill fitted to the current regulatory scheme. It should be noted that, although the public interest standard is broad, it is not a source of unrestrained discretion. Therefore, it should be used in a predictable and transparent way to address valid concerns.108

D. Merger Review Framework

Since the FCC considers competitive effects, the structure of its review is similar to that of the FTC and DOJ, which is based on competitive effects and analysis of market power, antitrust laws and the DOJ/FTC Horizontal Merger Guidelines.109 First, the relevant markets are defined in terms of the product,110 scope and geographic111

For a full discussion of the considerations of and development of the FCC's public interest standard, see generally, Friedrich, supra note 20.

97 15 U.S.C. §§ 1, 18. Here, the FCC shares concurrent jurisdiction with the Department of Justice and Federal Trade Commission, except that the FTC does not have authority to review common carrier transactions. See Saferstein & Boyko, supra note 87, at 75. Although the FCC's review is independent of the DOJ/FTC review, it must give "substantial weight" to the DOJ's comments. See id. at 78; see also 15 U.S.C. §§ 1, 18. The Sherman Act makes mergers resulting in "restraint of trade or commerce" illegal. Id. at § 1. The Clayton Act proactively bars mergers that act to "substantially to lessen competition or tend to create a monopoly." Id. at § 7.

98 See BA-NYNEX Order, 12 FCC Rcd. at 20008, para. 29. See also, Saferstein & Boyko, supra note 87, at 77; Berresford, supra note 84, at n.6; Chong, supra note 93, at 66.

99 See BA-NYNEX Order, 12 FCC Rcd. at 20008, para. 29; Senkowski, supra note 94, at 132. Also, the FCC's review is open to the public and is based on the public record, pleadings and comments rather than independent fact-finding, as in the DOJ analysis. See Saferstein & Boyko, supra note 87, at 78.

100 See BA-NYNEX Order, 12 FCC Rcd. at 20009, para. 32.

101 See BA-NYNEX Order, 12 FCC Rcd. at 20008, para. 32.

102 See Saferstein & Boyko, supra note 87, at 77.

103 See 1996 Act, at preamble (describing "[a]n Act to promote competition and reduce regulation"); see also BA-NYNEX Order, 12 FCC Rcd. at 20002-03, para. 31.

104 See Saferstein & Boyko, supra note 87, at 77; see Chong, supra note 93, at 65.

105 See 1996 Act at § 706(a) (stating the "[t]he Commission... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans")

106 See Friedich, supra note 20, at 262.; see also Senkowski, supra note 94, at 135.

107 See BA-NYNEX Order, 12 FCC Rcd. at 20004, para. 32.

108 See infra, text at section VI.D. See also Friedrich, supra note 20, at 265 (noting the public interest standard is "not without its limits" and must be used "to advance a legitimate communications policy objective").

109 See Chong, supra note 93, at 67. See also BA-NYNEX Order, 12 FCC Rcd. at 20008, para. 77.

110 The term product also includes services delivered by a company. A product market is the market for a company's product, and in addition, the products that are reasonably interchangeable with it. The FCC does not have its own defi-
area.\textsuperscript{112} Second, the market participants—actual competitors or likely entrants—are identified.\textsuperscript{113} Third, these markets are examined to determine the competitive effects of the merger, focusing on possible exercise of increased market power through unilateral or coordinated anti-competitive behavior.\textsuperscript{114} The pre-merger and post-merger degree of concentration in the relevant market (or markets) is determined by calculating the market share of each company by using objective measurements, such as revenue share or the number of customers within a market.\textsuperscript{115} A merger that leaves a market overly concentrated or that sharply increases the level of concentration receives close scrutiny because the likelihood of anti-competitive effects is great.\textsuperscript{116} The examination considers anti-competitive effects such as increased price, or decreased quality or availability; and pro-competitive effects, such as, reduction of a dominant firm’s market power or prevention of coordinated anti-competitive actions.\textsuperscript{117} Lastly, the harmful effects are balanced against existing mediating conditions, such as ease of entry of a competitor; and against positive effects of the merger, such as increased efficiencies resulting in decreased cost, increased productivity or increased innovation.\textsuperscript{118} It is notable that beneficial effects need not directly counteract the harmful effects, so long as the merger is in the public interest overall. If a negative effect on competition is found, action may be taken to halt the merger, but more commonly, the merger is conditioned.\textsuperscript{119} Generally, these conditions can be classified as behavioral (requirements to deal with a merging partner’s competitors or reporting requirements) or structural (divestitures to lower market share or separate subsidiary requirements).\textsuperscript{120} Behavioral requirements are obviously more burdensome on an agency because the parties’ compliance must be monitored, and non-compliance must be addressed. Structural conditions, however, heavily impact the involved companies, which might be reluctant to agree to such onerous conditions. This requires a delicate balance of the type of conditions imposed and the extent of each condition’s reach.

V. EXAMPLES OF MERGER CONDITIONING

A. SBC-Ameritech

Several conditions of the SBC-Ameritech merger concerned the provisioning of advanced services, such as DSL. One condition required SBC-Ameritech to provide any advanced services through a separate affiliate, even within a local access and transport area (“LATA”).\textsuperscript{121} Another condition required SBC-Ameritech to provide “surrogate” line sharing charges, where it leased competitor, (measured by numbers of current customers, recently added customers, gross revenues, net revenues or amount of product placed in the market within the year) squaring each market share, then summing all squared market shares. The same is then done for post-merger market shares and the two sums are compared, indicating the change in market concentration due to the merger. See id. at 283–85.

\textsuperscript{111} A geographic market is the “area of effective competition” where consumers have sources for a particular product, or where competition from other sellers holds down prices. See Berresford, supra note 84, at 275 (quoting Philadelphia Nat’l Bank, 374 U.S. at 359).

\textsuperscript{112} See BA-NYNEX Order, 12 FCC Rcd. at 20008–09, para. 37; Chong, supra note 93, at 68; Senkowski, supra note 94, at 134; Berresford, supra note 84, at 250.

\textsuperscript{113} See BA-NYNEX Order, 12 FCC Rcd. at 20008, para. 37; see also Chong, supra note 93, at 68; Senkowski, supra note 94, at 134.

\textsuperscript{114} See BA-NYNEX Order, 12 FCC Rcd. at 20008–09, para. 37. See also Chong, supra note 99, at 68; Senkowski, supra note 94, at 134.

\textsuperscript{115} See Berresford, supra note 84, at 283. The Herfindahl-Hirschman Index (“HHI”) typically measures the degree of concentration in the relevant market. The HHI is calculated by determining the pre-merger market share of each relevant

\textsuperscript{116} The Horizontal Guidelines provide numeric benchmark post-merger HHI values of 1000, 1000–1800 and over 1800, respectively, indicating an unconcentrated market, a moderately concentrated market or a highly concentrated market. See id. at 283.

\textsuperscript{117} See Senkowski, supra note 94, at 134.

\textsuperscript{118} See BA-NYNEX Order, 12 FCC Rcd. at 20009, para. 37; see also, Senkowski, supra note 94, at 135.

\textsuperscript{119} See Berresford, supra note 84, at 304.

\textsuperscript{120} See id.

\textsuperscript{121} See In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, 14 FCC Rcd. 14,712, 14,969–90, app. C 2–29 (1999) [hereinafter SBC-Ameritech Order]. A LATA is a local access transport area, and BOCs are required by § 272 of the Communications Act of 1934 to provide interLATA services through a separate affiliate. See 47 U.S.C. § 272(a).
“part” of the line to competitors for the provision of advanced service, charging less than the price for an entire line, although the rest of line was not used.122 Four other conditions123 were applied to advanced services to ensure competitors could offer advanced services over SBC-Ameritech’s separate affiliates under nondiscriminatory terms.124

In the SBC-Ameritech Order, the Commission has chosen to condition a converged service, broadband internet, with a traditional regulatory mindset, based on the underlying transmission medium, rather than make the same services carry the same burdens regardless of the underlying transmission medium. The decision typifies the traditional regulatory mindset that services provided over a common carrier network should be regulated. The same services provided over a different network, such as wireless or cable, would not be regulated because services provided over those facilities historically have not carried the same level of regulation.125 This decision can be contrasted to the AT&T-TCI decision discussed below at Part B, where the Commission chose not to condition broadband internet delivered over cable.

B. AT&T-TCI

Here, the FCC’s review focused on the likelihood that the new company would provide a local telephony alternative, and on the danger that the combination would lessen cellular service competition because TCI owned Sprint PCS tracking stock, a competitor to AT&T’s wireless service.126 The transfer was granted on the condition that TCI transfer its Sprint tracking stock to an FCC-approved trust, and that any economic benefit from that stock be directed to shareholders in Liberty Media Group, a TCI entity.127

The AT&T-TCI merger represents what might be traditionally classified as a conglomerate merger128 that does not pose a competitive threat because it is a combination of two companies whose primary products are unrelated—long-distance telephone service, and cable programming and delivery.129 However, the Commission is to consider industry trends and needs, and the “complexity and rapidity of change in the industry” within its merger review.130 Thus, it should consider how these cable lines might be used in the future and what control of these lines, with their likely attendant uses, will mean to the overall communications industry. In the AT&T-TCI Order, the Commission considered use of the lines for two convergent services—provision of cable internet service and provision of local telephony service131—but did not impose any conditions.132

It found that use of these lines for internet service should not necessitate any attendant conditions, such as a requirement to make the lines accessible to all ISPs—widely known as the cable open access issue.133 Although this was considered a non-merger specific issue,134 imposing a condition to effect open cable access would have been a way to exact parity between broadband internet over cable and over telephone lines, Digital Subscriber Lines ("DSL"), without going through the lengthy

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123 These conditions include: 1) development and deployment of electronic operational support systems ("OSS") interfaces for competitors to pre-order and order facilities needed to provide advanced services, and a 25% discount on unbundled loops for advanced services until such interfaces are employed; 2) access to advanced services loop information for unaffiliated carriers to obtain information to market advanced services; 3) mandatory filings of cost studies and proposed rates for conditioning loops for provisioning of advanced services in accordance with FCC UNE pricing rules formulas; 4) at least 10% of DSL deployment in rural or urban wire centers will be from low-income rural or urban wire centers after DSL has been deployed in 20 rural or urban wire centers, respectively. See id. at para. 372-76.
124 See id.
125 See discussion supra Part III.
126 See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, 14 FCC Rcd. 3160 (1999) [hereinafter AT&T-TCI Order].
127 See id. at 3161, para. 1.
128 See id. at 3161, para. 1.
129 See discussion supra Part IV, A.
130 Note that a merger may be conglomerate in some aspects, but horizontal in others.
131 BA-NYNEX Order, 12 FCC Rcd. at 20003, para. 32.
132 See AT&T-TCI Order, 14 FCC Rcd. at 3183, paras. 44-96.
133 See id. at 3161, para. 1.
134 See id. at 3207, para. 96. Before the AOL-Time Warner merger was announced, AOL Senior Vice President George Vradenberg, III noted the inconsistency of cable open access requirements being labeled as internet regulation that goes against current FCC policy, though the phone system has been under such regulation for years. See David Kaut, Powell Says Question is How, Not Whether, to Regulate, as ‘Worlds’ Collide on Internet, BNA DAILY REP. FOR EXECUTIVES, Oct. 8, 1999.
135 See AT&T-TCI Order, 14 FCC Rcd. at 3161, para. 96.
rulemaking process. A condition is also waived more easily than changing or repealing a rule, so that if the condition had undesirable effects, it could be readily removed. The Commission further found that use of cable lines for provision of local telephony service would affect public benefit by creating competition with the incumbent local exchange carriers ("ILECs"), therefore, there should be no conditions related to this use.\(^\text{135}\) By forgoing conditioning of these services, the Commission missed an opportunity to establish, or at least test, a method of regulating these converged services that do not fit the current regulatory scheme. Thus, there remains uncertainty as to whether cable telephony will be regulated differently than telephony provided by common carriers over the public switched telephone network ("PSTN"), and the provision of internet service will continue to be regulated differently for ILECs than for others.\(^\text{136}\)

It also seems that the Commission did not consider what it means for one company to have control over a combined network capable of delivering local telephony, long-distance telephony, internet service and television programming, with a national footprint in all markets. This combination of services across traditional industry markets is the hallmark of the converged company in this new era of convergence and consolidation. What are the competitive effects of such a combination? Antitrust analysis does not consider such ramifications, but the FCC public interest standard could. In the short term, allowing the converged services of this merger to go without conditions may create competition in the local telephony market or promote delivery of advanced services (broadband internet) to all Americans. But, the long-term effects of having such a large company control such a significant market share for multiple services nationwide, may stifle other competitors in any of the involved markets through bundling of services, increased customer base, and increased economies of scope and scale against which smaller companies cannot compete.\(^\text{137}\)

C. AOL-Time Warner

The pending AOL-Time Warner merger presents another conglomerate merger—an ISP merging with a programming developer and distributor that is the second largest owner of cable facilities. Like the AT&T-TCI merger, this merger involves the use of a cable network to deliver broadband internet service and gives the FCC another chance to regulate this converged service. It is unlikely, however, that the FCC will impose any conditions on this service. It did not do so in the AT&T-TCI merger\(^\text{138}\) and the Commission is satisfied with AOL and Time Warner's assurance that their broadband cable networks will be open to competitive ISPs.\(^\text{139}\) After passing AT&T-TCI's merger without requiring open cable access,\(^\text{140}\) it would be very inconsistent to require it in the AOL-Time Warner merger. It would be more consistent to waive the condition it imposed in the SBC-Ameritech merger, requiring the company to lease its enhanced lines at a "surrogate" line-sharing rate\(^\text{141}\) to competitors for advanced services delivery. This would create parity in the regulation of broadband internet delivery over cable and over copper wire (telephone lines), while achieving the deregulatory goal of the Commission.

As in the AT&T-TCI merger, one company will gain control over combined services and networks that span across industry sectors nationwide. Again, the Commission should consider what it means for one company to have control over nationwide programming, program delivery, print and internet content, and internet service and industry consolidation may be reaching a point where smaller competitors would be in danger because there is a size where “ability to dominate with brand and pricing becomes overwhelming for all others.” Kaut, supra note 135.

\(^{135}\) See id. at 3187, paras. 51–59 (noting especially para. 51 where commenters suggested that the Commission should impose conditions similar to those of an incumbent local exchange carrier under its § 310(d) authority).

\(^{136}\) FCC Chairman Kennard has noted that the current statutory structure "did not fully anticipate the convergence of phone and cable high-speed systems" and that "local phone companies are subject to requirements that cable has avoided." David Kaut, Kennard Says FCC Has Power to Impose Cable ISP-Access Duties, But Remains Wary, BNA DAILY REP. FOR EXECUTIVES, May 20, 1999 [hereinafter Kaut].

\(^{137}\) The CEO WinStar, Rouhana, remarked on the pending MCI WorldCom-Sprint merger, expressing concern that

\(^{138}\) See discussion supra Part V.B.


\(^{140}\) See discussion supra Part V.B.

\(^{141}\) See discussion supra Part V.A.
networks. Effects of having a mega-company with vast market share for multiple services nationwide may inhibit competitors in any of the involved markets through the use of bundling of services, increased customer base, and increased economies of scope and scale.

VI. MERGER CONDITIONS AS A REGULATORY TOOL

A. Significant Impact

Although merger conditions apply only to the two companies merging, the impact is significant. Behavioral merger conditions may directly affect how the merged company must deal with competitors. Structural conditions may alter the merged company’s position in an industry sector or change how the company can operate. Additionally, the large size of companies merging today means that the merger conditions will impact the workings of one of the largest participants in a market, which would necessarily have a notable impact on other companies’ participation in a market. Also, the number of companies merging today indicates that more merger conditions are almost certain to follow, so that new conditions will continue to affect the evolving communications industry. Lastly, mergers happening today impact the outcome of mergers in the immediate future. Thus, merger conditions affect the whole industry by directly influencing the merged company’s behavior or structure, and through future merger conditions on other merging companies. As seen in the section below, these conditions do impact the industry as a whole, yet they are more tailored and effective than general regulation because they are developed for and applied to only the merging parties.

B. Less Regulatory, More Precise

The Commission is faced with regulation in an era of tremendous change, yet the 1996 Act charges the FCC with a duty to reduce regulation. Thus, the FCC faces the challenge of dealing with convergent technology that does not fit the current regulatory structure, while also creating a deregulatory environment. Promulgating new rules to deal with new technology is onerous, may stifle investment and innovation, and is contrary to its deregulatory mandate. Merger conditions, however, provide a viable alternative to rulemaking for convergent technologies and companies.

By using merger conditions, the Commission could affect more appropriate controls over converged companies and technologies that are not conducive to regulation under the current scheme. Note that this method would pertain only to the parties involved in the merger and their products or services. The terms would not be applicable to all companies throughout the industry. Thus, the “regulation” would be much more limited in application than a rulemaking, which would apply to every company in the industry.

In addition, these terms are tailored to a specific set of conditions. The Commission does not have to foresee how the terms would play out in every set of circumstances with different companies at different instances in the future—a difficult task in such a rapidly changing environment. Thus, the terms are necessarily more

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142 See generally BA-NYNEX Order, 12 FCC Rcd. 19985 (mandating certain performance standards for network performance and OSS, as well as interconnection pricing and unbundled network elements).

143 See generally In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control in MCI Communications Corp. to WorldCom, Inc., 13 FCC Rcd. 18025 (1998) (ordering divestiture of certain internet backbone assets) [hereinafter MCI-WorldCom Order].

144 A good example of this impact is the case of the blocked MCI WorldCom-Sprint merger on the heels of the MCI-WorldCom merger. Here the MCI-WorldCom merger resulted in higher levels of concentration in the long-distance telephony market and FCC Chairman Kennard said approval of the subsequent MCI WorldCom-Sprint merger would be a “surrender.” See Statement of FCC Chairman Kennard on Proposed Merger of MCI WorldCom, Inc. and Sprint Corp., FCC News, Oct. 5, 1999. The DOJ was said to have sought an injunction to block the MCI WorldCom-Sprint merger in part due to the difficulties with the internet backbone divestiture condition of the MCI-WorldCom merger that resulted in a court case and eventual settlement between companies. See David Kaut, Analyst Expects MCI WorldCom-Sprint Deal to Be Blocked by DOJ; Companies Confident, BNA DAILY REP. FOR EXECUTIVES, Mar. 16, 2000. The FCC also explicitly reiterates this principle in its BA-NYNEX Order when it states that future applicants “bear an additional burden” in proving their merger will be in the public interest because the present merger reduced the number of incumbent local exchange carriers. BA-NYNEX Order, 12 FCC Rcd. at 19994, para. 16.

145 See 1996 Act, supra note 17, at preamble.

146 FCC Chairman Kennard described the use of the public interest test for merger conditions as follows: on a case-by-case basis . . . [the public interest standard] is more efficient, and much less regulatory, than writing...
precise and less likely to retard innovation and investment.

C. More Efficient

The communications sector is experiencing rapid technological advances and convergence, as well as unprecedented consolidation, but the FCC's public notice and comment rulemaking process is lengthy and can be cumbersome. Under the terms of the Communications Act, the Administrative Procedure Act and the Commission's rules, there are certain timelines that cannot be shortened, due to time allowances for public notice and comment. Furthermore, rulemaking is often challenged under judicial review, lengthening the process even more. Although this process has ensured the public safeguards and a voice, it can be too lengthy to deal with new technologies when subsequent technological advances may outdate the newly established rule or at least necessitate modification.

Merger conditions, however, bypass this delay. Since merger conditions are not rules that apply generally to all companies in the industry, they are not submitted to the same notice and comment rulemaking process. The FCC has to deal only with the merging parties in negotiating an agreement, and merger conditions are essentially a contract between the merging parties and the FCC. As such, it is unlikely that a court would entertain an appeal from one of the parties upon accepting the grant for transfers of licenses and authorizations for the merger. Although interested parties may challenge the merger in court, no parties have done so to date. Inter-

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The author has found no judicial challenges to FCC merger conditions after searching for court documentation, news articles and scholarly pieces on Westlaw, Lexis and Pike and Fischer databases.

Recall also, that it is the merging parties responsibility to show that the merger is in the public interest. See discussion supra Part IV.B.

The FCC has recently formed a new intra-agency merger team to make the merger review process more efficient and coordinate review across the bureaus. Although the initiative is procedural and does not affect the substantive review of mergers, it is notable that a primary goal is to make the review more predictable and transparent by explaining the public interest test with written guidelines and utilizing the specialized skills of staff involved in merger reviews to ensure consistency between decisions. See Mergers in the Telecommunications Industry, Hearing Before the Senate Comm. on Commerce, 106th Cong. (Nov. 8, 1999) (statement of FCC Chairman Kennard).
regulatory tool. Speed of approval, predictability, transparency and consistency in reviews will make the process less risky in terms of business plans, creating an environment of certainty that fosters innovative business plans and technologies. In an industry as large and far-reaching as the communications industry, failed mergers or mergers with initially unanticipated conditions may lead to a good deal of monetary loss or loss of market strength for the companies, and have some impact on the industry as a whole.

Predictable merger conditions, or at least known analytical factors that are applied consistently to each merger, would go a long way toward making sound business decisions and sound policy decisions. Currently, merger reviews are conducted under the public interest standard, an evolving standard developed on a case-by-case basis, by its nature lacking consistent guiding principles. In addition, the FCC uses a balancing approach where it can find a merger is in the public interest if the total benefits (including conditions) outweigh the total harms, regardless of whether the benefits actually mitigate the harms—or even relate to them. This makes conditions less predictable. One solution would be to issue a set of guidelines like the DOJ/FTC did with their 1992 Horizontal Merger Guidelines. By issuing such guidelines and acting consistently within them, within reason, the Commission could establish a very predictable merger review. This would give companies a way to fairly anticipate and prepare for possible outcomes of the merger review, and it may increase the efficiency with which the Commission conducts the review by limiting factors considered. Finally, it may well lend the Commission’s decisions more credibility.

The merger review process should also be transparent, with the involved parties knowing where they stand in the process and what is expected at the next step. With the burden on the applicants to prove that the merger is in the public interest, without guidelines, it may be a guessing game for applicants to decide on the next step or come up with an agreeable offering. The FCC also has been criticized for holding secret meetings during the merger review process. It would be burdensome on both the companies involved and the FCC’s efficiency to have merger condition negotiations open to the entire Commission or the public, but some transparency may be achievable without hindering the process. It may be too much to shift the burden of proving the merger is not in the public interest to the FCC. This would make the process much more cumbersome and intensive if the FCC had to build a case against a merger. However, the issuance of an FCC advisory statement to the parties at key points in the review with specific findings and considerations for resolution may make the process more transparent. Thus, some amount of transparency can be achieved without hindering the process to the extent of notice and comment rulemaking.

Lastly, the conditions themselves should be reasonably anticipated. One suggestion is to adhere to a standard of merger conditions having a reasonable nexus to a legitimate and clearly identified harmful effect of the merger. This would enable the applicants to fairly anticipate what conditions they might expect and ensure that the Commission does not trade off a harmful effect

152 See Testimony of Comm’r Powell, supra note 96 (noting that the public interest standard lacks guiding principles that would lend predictability to Commission decisions).
153 See id. (noting that the public interest standard does not require that conditions cure or remedy identified harms, just that they outweigh them).
154 Note that Comm’r Powell suggests something akin to FCC merger guidelines, calling for the Commission to outline basic principles it uses in applying the public interest standard in order to achieve predictable, reasoned applications of the standard and guard against subjective conditioning. See MCI-WorldCom Order, 13 FCC Rcd. at 18165–66 (separate statement of Comm’r Powell).
155 It is notable that there is a Commission initiative to streamline the merger review process to speed review of mergers by making review more procedurally efficient and coordinated across bureaus. The initiative recognizes the need to address merger reviews more quickly in light of the increase in number, size and complexity of mergers. It aims to keep merger reviews to a 180-day timeline and make internal procedures uniform and transparent across the Commission with a consistent public interest analysis. Although this is a procedural reform and will not change the substantive review, the goals of developing uniform and transparent internal procedures and a consistent public interest analysis will make the FCC’s merger review process more streamlined. See FCC Implements Predictable, Transparent and Streamlined Merger Review Process, FCC News, Jan. 12, 2000 (visited Apr. 9, 2000) <http://www.fcc.gov/Bureaus/OGC/News_Releases/2000/nrge0001.html>.
157 Commissioner Powell makes a similar suggestion. See MCI-WorldCom Order, 15 FCC Rcd. at 18165–66 (separate statement of Comm’r Powell).
for an unrelated policy goal in order to further promote a desired policy objective.

VII. CONCLUSION

Rapid advances in technology have pushed the communications industry into a converged environment where a specific service is no longer tied to a specific transmission medium. This has blurred the lines between industry sectors. The current regulatory framework that is based upon the assumption of a specific service being tied to a specific transmission medium is not applicable to these converged services and is quickly becoming outmoded. Although this convergence will likely necessitate an overhaul of the current statutory underpinnings of the regulatory framework, this is time-intensive, and converged services must be dealt with in a consistent manner in the interim period.

Merger conditions offer a viable interim solution as an alternative to general regulations applicable to the entire industry. Use of merger conditions allows the FCC some relief from working within the strictures of an outmoded regulatory scheme of service classification by underlying transmission medium. In a rapidly evolving market, merger conditions offer the advantage of a faster process than rulemaking. Merger conditions also offer a way to "test" regulation of a converged service. If the result is not desirable, it can be waived more quickly than a rule can be repealed. A condition also only affects the merged entity, rather than being applicable to the entire industry so that any negative impact would be minimized. Merger conditions would still have significant effect given the size and numbers of companies merging in the industry. However, if merger conditions are to be used to effectuate regulation on converged services, the process must be predictable, somewhat transparent, and conditions must have a reasonable nexus to a legitimate and clearly identified public interest harm in order to lend certainty to business decisions and validity to Commission decisions.