The Use of Section 214 of the Communications Act of 1934 to Control Shifts in Corporate Control Over Common Carriers

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The Federal Communications Commission (FCC), pursuant to title II of the Communications Act of 1934 (Act),1 is charged with regulating all interstate telecommunications2 in order to ensure wide accessibility to efficient, reasonably priced communication services.3 Because of both the need for one integrated telephone system and the great expense of poles, lines, and easements, the communications industry became highly concentrated in its early years.4 Recent developments in low-cost transmission technology, however, have made competitive telecommunications markets more feasible.5 To protect competition, the FCC has sought to restrict common carriers6 with de jure or de facto monopolies from engaging in

4. FCC REPORT, supra note 2, at 13-14. Additionally, Western Union and American Telephone and Telegraph Company fostered monopoly; the former by aggressive business tactics, id. at 3, and the latter by acquiring telephone companies, id. at 7-11, among other strategies. Until the late 1940’s American Telephone and Telegraph Company, Western Union Corporation, Postal Telegraph-Cable Company, independent local telephone companies, and a few other carriers were the only participants in domestic telecommunications, each being relatively insulated from the others by either service diversity or geographic service area. Id.
5. Prior to 1969, the FCC did not encourage open entry into telecommunications primarily because the prevailing technology was too primitive to make competition realistic. See Recent Federal Actions, supra note 2, at 881-83. See also Comment, Intercity Telecommunications Competition After Execunet, 31 FED. COM. L.J. 117, 119-22 (1978) [hereinafter cited as Competition After Execunet].
6. The concept of common carrier is borrowed from transportation regulation. Com-
interservice cross-subsidization.Absent procompetitive regulation, the financial strength and enormous size of some carriers would allow them to underprice competitive market services by inflating their rates for monopoly services. Although communications firms can use interservice cross-subsidies unobjectionably to finance development and marketing of new products, the FCC has sought to eliminate this practice in all but special circumstances. Despite this FCC policy, efforts to combat cross-subsidi-

munications common carriers are business entities that transmit messages for paying subscribers by wire or radio. As "carriers," they are not concerned with the content of the messages they transmit. Telephone and telegraph companies are examples of common carriers. See National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640-42 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Common carriers have also developed means of transmitting data between computers and their terminals, and a few carriers, such as Telenet and Graphnet, have developed augmented data communication systems capable of sending many data elements simultaneously between computers using different data processing speeds. See, e.g., Customer Interconnection, 61 F.C.C.2d 766, 800-03 (1976); Telenet Com. Corp., 46 F.C.C.2d 680 (1974); Graphnet Sys., Inc., 44 F.C.C.2d 800 (1974); Packet Com., Inc., 43 F.C.C.2d 922 (1973). For a discussion on the range of services available from common carriers, see W. Lucas, Telecommunications Technologies and Services, in COMMUNICATIONS FOR TOMORROW, POLICY PERSPECTIVES FOR THE 1980s 245 (G. Robinson ed. 1978).

7. FCC REPORT, supra note 2, at 96-99. Firms that participate in two or more product markets may enjoy the special advantage of being able to defray the costs of one product through pricing other products well above a reasonable rate of return. In short, they may cross-subsidize one product with the proceeds gained from sales of other products. So long as a firm only sells products in competitive markets, it will only be able to raise the price of a product to subsidize another in the short-run because the overpriced product will lose sales to the extent that it is overpriced. Firms that participate in both a regulated monopoly market and a competitive market are in a much different situation. They may attribute some of the production costs of their competitive products to their monopoly services and seek higher rates from their regulators to cover the malattributed costs. See J. MEYER, W. WILSON, M. BOUGHCUM, E. BURTON & L. CAOUETTE, THE ECONOMICS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 4-18 (1979) [hereinafter cited as Economics of Competition].

8. FCC REPORT, supra note 2, at 96-99. Interservice cross-subsidization has been a consistent problem in private line services. See AT&T and Western Union Private Line Cases, 34 F.C.C. 244 (1961). See also FCC REPORT, supra note 2, at 145-48. Traditionally, private lines were defined as transmission lines between two or more geographic points with capabilities and features not available from the public telephone system. Since the lines are fixed, the subscriber need not wait for the telephone company to establish a connection. Id. at 99-101; Western Union Tel. Co. v. FCC, 541 F.2d 346, 356 n.1 (3d Cir. 1976). With the recent introduction of many so-called private line systems using "switching" devices that transfer the lines to others' use when the private line subscriber is not using the line, the distinctions between private line systems and basic telephone service are fading. See Competition After Execunet, supra note 5, at 121 n.16. See generally W. BAER, Telecommunications Technology in the 1980s, in COMMUNICATIONS FOR TOMORROW, POLICY PERSPECTIVES FOR THE 1980s 61 (G. Robinson ed. 1978).

9. See, e.g., AT&T, 61 F.C.C.2d 587, 608 (1976) (§ 396(h) of the Act permits carriers to provide private lines to educational television stations at noncompensatory rates). The Commission, furthermore, has waived its policy against cross-subsidization when convinced that noncompensatory rates are justified by competitive necessity. Id.
zation have been only moderately successful.10

Among the tools available to control and prevent anticompetitive carrier practices is section 214 of the Communications Act. This provision requires carriers to obtain Commission authorization before they extend, add, acquire, or delete any transmission line.11 The FCC has broad power to determine whether a carrier’s proposed change in lines meets section 214’s public convenience and necessity standard.12 Section 214 also provides that the FCC may condition approval of transmission line changes so that new lines may be used only for services specified by the Commission.13 By denying new line authorizations, or by conditioning their ap-

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11. 47 U.S.C. § 214 (1976) states, in pertinent part:
(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line . . . or shall engage in transmission over . . . such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require . . . the construction, or operation, or construction and operation, of such additional or extended line.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

12. See General Tel. Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971) (§ 214 should be construed so as to achieve the broad aims of the Act); Western Union Div. v. United States, 87 F. Supp. 324, 335 (D.D.C. 1949) (public convenience and necessity standard of § 214 is to be broadly construed); 78 CONG. REC. 8824 (1934) (statement of Congressman Dill in debate on the Communications Act of 1934 prior to its enactment), reprinted in 4 B. SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 2449 (1973) (§ 214 contains provisions that allow the FCC to be liberal in its application).

proval, the FCC can exclude carriers from markets in which they might be able to engage in anticompetitive practices.\textsuperscript{14}

In its efforts to foster workable competition in telecommunications, the FCC can also invoke section 7 of the Clayton Act\textsuperscript{15} against anticompetitive common carrier mergers. Section 7 condemns corporate mergers that have a "reasonable probability" of substantially lessening competition or that have a tendency to create a monopoly in any product submarket within a geographic market.\textsuperscript{16} Although section 7 is so far reaching that it has been successfully employed to defeat mergers arguably lacking the anticompetitive consequences Congress sought to prevent,\textsuperscript{17} the FCC has rarely used it to further its regulatory efforts.\textsuperscript{18} In part, the Commission has been reluctant to use section 7 because it has had other comprehensive tools available, including the rate regulation provisions in Title II of the Act.\textsuperscript{19} Furthermore, since the FCC does not possess premerger review power,\textsuperscript{20} the Commission can only invoke its section 7 jurisdiction after a
challenged merger is consummated.\textsuperscript{21} Because effective enforcement of the Clayton Act is often practically impossible once a merger is complete,\textsuperscript{22} the FCC's lack of premerger Clayton Act power has added to the Commission's reluctance to use the Clayton Act.

Recently, in \textit{GTE-Telenet Merger},\textsuperscript{23} the FCC interpreted section 214 expansively to gain unprecedented control over a proposed carrier merger not involving any extension, acquisition, construction, addition, or deletion of transmission lines. The FCC's broad construction of section 214 allowed the agency to condition the merger of a carrier and a holding company to prevent the merged carriers from using cross-subsidization or other anticompetitive practices.\textsuperscript{24} Moreover, the FCC used the section 214 proceeding to conduct a preliminary Clayton Act analysis of the merger. This innovative use of section 214 afforded the FCC premerger review power comparable to that possessed by only the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Unlike the DOJ and FTC powers, however, the FCC's section 214 review was unencumbered by time constraints and was conducted under the section's broad public convenience and necessity standard. This note will examine the significance of the FCC's use of section 214 in \textit{GTE-Telenet Merger} in light of the emerging telecommunications industry of the 1980's.

\section*{I. THE SCOPE OF SECTION 214 OF THE COMMUNICATIONS ACT OF 1934}

\textbf{A. The Federal Communication Commission's Broad Regulatory Charter Over Entry}

Congress intended section 214 of the Communications Act of 1934 to grant the FCC power to prevent unnecessary duplications of transmission facilities that invariably result in higher rates without corresponding benefits to service subscribers.\textsuperscript{25} This section also prevents carriers from delet-

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  \item \textsuperscript{23} 70 F.C.C.2d 2249, \textit{reconsideration denied}, 72 F.C.C.2d 91 (1979), \textit{appeal docketed sub nom.} General Tel. & Elecs. Telenet Corp. v. FCC, No. 79-1468 (D.C. Cir., May 7, 1979) (the FCC denominated the original letter order as General Telephone and Electronics).
  \item \textsuperscript{25} 78 CONG. REC. 10314 (1934). \textit{See, e.g.}, Texas & Pac. Ry. v. Gulf Colo. & Santa Fe
ing transmission lines without prior Commission approval. While section 214's primary purpose is to give the FCC control over extensions and deletions of transmission lines, the Commission has used its section 214 review process in circumstances arguably different and broader than supervising these extensions and deletions. For example, in *Nebraska Continental Telephone Co.*, the Commission required a telephone company seeking to acquire and operate the transmission facilities of its parent telephone company to file a section 214 application stating how the extension of facilities would serve the public convenience and necessity. The telephone companies seeking the transfer of control over the transmission lines were essentially one economic unit, notwithstanding their separate corporate identities. Moreover, that transfer was not designed to affect the quality or area of service but was merely intended to implement a change in the transferee's capital structure.

In another case, *Mackay Radio and Telegraph Company*, the FCC determined that the petitioner would have to secure Commission approval under section 214 to lease an existing authorized transmission circuit between Washington, D.C. and Baltimore, Maryland that was owned by the Postal Telegraph-Cable Company. Although the leased line was preexistent and not a physical extension of lines, the FCC held that by leasing the line Mackay Radio and Telegraph Company had extended its lines within the meaning of section 214.

Although the Commission has expansively interpreted section 214 in a number of instances, the FCC and federal courts have on other occasions found the section inapplicable. In *Mackey Radio and Telegraph Company*, although requiring section 214 approval for one carrier's use of another's lines, the Commission stated, in dictum, that the section could not be invoked to control a carrier's attempt to rearrange its circuits if the carrier did not thereby change its authorized service area or markets.

26. Section 214's concern with service adequacy arose out of a 1943 amendment to the section. See 89 Cong. Rec. 777 (1943).
27. 5 F.C.C. 132 (1938).
28. Id. at 133. Since the lines were only transferred and not reduced or increased, the purposes of section 214 enunciated in its legislative history do not appear to have been served here. The result of the line transfer, an altered capital structure, also seems to lack any public interest consequences properly cognizable under section 214. See notes 25-26 and accompanying text supra.
29. 6 F.C.C. 562 (1938).
30. Id. at 577.
31. See note 29 supra.
32. 6 F.C.C. at 573.
Furthermore, in a 1939 report to Congress on the domestic telephone industry, the Commission, believing section 214 to be inapplicable to transfers of corporate control over carriers, requested that Congress amend the Act to grant the FCC power to control such transactions. Again limiting the requirement for section 214 review, the United States Court of Appeals for the District of Columbia Circuit in *United Telegraph Workers, AFL-CIO v. FCC*, rejected a challenge to Western Union’s proposed Mailgram service, an experimental project in which certain Western Union customers with teleprinters would be able to transmit messages to post offices for delivery as first class mail. To provide this service, Western Union needed only to equip post offices with reception devices. In reviewing the FCC’s order, the Court of Appeals held that a more substantial change in existing services would be needed to require section 214 review.

*MCI Telecommunications Corp. v. FCC* is the most recent federal court decision construing the limits of section 214. In *MCI*, the FCC, in a section 214 review, refused a carrier’s request for permission to offer a new form of long distance telephone service over its authorized lines. On appeal, the United States Court of Appeals for the District of Columbia Circuit ruled that section 214(a) merely addresses unnecessary transmission facility duplication and does not empower the FCC to regulate those services a carrier might choose to offer along authorized transmission lines. The court acknowledged that section 214(c) permits the FCC to impose line use restrictions, but only if the FCC determines that they are required by the public convenience and necessity. The *MCI* court interpreted the FCC’s section 214 prior approval power narrowly, taking account of the congressionally intended scheme for service tariff revisions and filings.
embodied in sections 203 through 205 of the Act.\textsuperscript{41} Specifically, the court noted that frequent use of section 214 to restrict a carrier's range of permissible service offerings would affect the balance between carriers' duty to charge reasonable rates and their right to control their own economic destinies.\textsuperscript{42}

Although section 214 has been interpreted expansively, its history shows that it applies only to carriers' behavior involving extension or deletion of transmission lines. The FCC's decision in \textit{GTE-Telenet Merger}, while accepting this premise, broadens the reach of section 214 to include \textit{de facto} line extensions.

\textbf{B. GTE's Acquisition of Telenet — The FCC's Application of Section 214 to Carrier Mergers}

In December, 1978, General Telephone and Electronics Corporation (GTE) notified the FCC of its proposed purchase of Telenet Corporation (Telenet),\textsuperscript{43} asserting that the proposed stock purchase was not subject to prior FCC approval.\textsuperscript{44} In response, the FCC informed both firms that they were required to file an application pursuant to section 214, pleading why the acquisition would be in the public interest.\textsuperscript{45} Although Telenet would continue to operate its own facilities as a subsidiary of GTE,\textsuperscript{46} the Commission regarded the corporate acquisition as a \textit{de facto} acquisition of Telenet's transmission facilities requiring section 214 authorization.\textsuperscript{47} Telenet and GTE filed a section 214 application under protest and sought

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\item \textsuperscript{41} 561 F.2d at 374-75; 47 U.S.C. §§ 203, 204, 205 (1976). Section 203 provides that all services must be represented by comprehensive tariffs describing all relevant aspects of the service, while § 204 sets forth the procedures to be followed in adjudicating the lawfulness of tariffs. Section 205 grants the FCC authority to prescribe rates and practices for carrier services.
\item \textsuperscript{42} 561 F.2d at 374-75 (quoting American Tel. & Tel. Co. v. FCC, 487 F.2d 865, 880 (2d Cir. 1973)).
\item \textsuperscript{43} GTE-Telenet Merger, 72 F.C.C.2d 111, 113 (1979).
\item \textsuperscript{44} \textit{Id}. GTE intended to purchase all the outstanding shares of Telenet stock and to incorporate Telenet into the GTE corporate family as a wholly-owned subsidiary. The acquisition was consummated on June 13, 1979.
\item \textsuperscript{45} 70 F.C.C.2d at 2251.
\item \textsuperscript{46} Telenet is a resale carrier (one that rents its basic transmission lines from other carriers and equips them for sub-leasing). 72 F.C.C.2d at 153. Its major submarket is augmented data transmission service (data communication service capable of enhancing the quality of transmission by such technologies as "packet switching" which allows one to send many data bits simultaneously and inexpensively). \textit{Id} at 119.
\item \textsuperscript{47} 70 F.C.C.2d at 2250-51. The FCC regarded the establishment of Telenet as a subsidiary of GTE to be a mere formality, although Telenet would still own and operate its own transmission lines. In the Commission's view, once Telenet became a part of GTE, irrespective of how it was related to its parent, GTE was the real owner and operator of Telenet's lines. \textit{Id}.
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reconsideration of the FCC's decision that authorization was required.\textsuperscript{48} The Commission denied reconsideration in an opinion substantially reiterating its original reasons for requiring review of the acquisition.\textsuperscript{49} Three Commissioners dissented from the FCC's finding that the proposed corporate acquisition was cognizable under section 214. The dissenters reasoned that since Telenet had received section 214 authorizations for its lines and had anticipated no change in its services, the proposed merger lacked any consequences that section 214 was designed to address.\textsuperscript{50}

In a subsequent adjudicatory proceeding,\textsuperscript{51} the FCC considered the merits of GTE and Telenet's application for section 214 authorization of the merger.\textsuperscript{52} After reviewing comments received from interested parties, and without an oral hearing on the issues,\textsuperscript{53} the FCC approved the purchase of Telenet's stock subject to ten conditions designed to ensure that Telenet would continue to compete fully and fairly as a member of the GTE corporate family.\textsuperscript{54} These conditions were intended to impose an

\textsuperscript{48} The Commission was faced with the classic ingredients for interservice cross-subsidization. GTE is a holding company that owns numerous telephone companies enjoying monopoly markets and other wholly-owned subsidiaries that provide ancillary communication services. Telenet, on the other hand, is a small carrier that operates in a competitive market. Once merged, the sharing of such expenses as equipment costs, advertising expenses, general overhead, and administrative costs could make service cost attribution impossible. See 72 F.C.C.2d at 133-37; Uniform Sys. of Accounts for Tel. Cos., 70 F.C.C.2d 719, 721-24 (1978). See also notes 7-10 and accompanying text supra.

\textsuperscript{49} 72 F.C.C.2d 91 (1979). The FCC noted that it had reviewed the acquisition under § 7 of the Clayton Act. \textit{Id.} at 109. Had the Commission assumed a § 7 violation or believed the merger to be one, however, it would have been required to serve a complaint upon GTE and Telenet directing them to show cause why the merger should not be prohibited. See Denver & Rio Grande W.R.R. v. United States, 387 U.S. 485, 502 (1967). \textit{But see United States v. FCC, No. 77-1249, slip op. at 30-33 (D.C. Cir. March 7, 1980) (en banc).}

\textsuperscript{50} 70 F.C.C.2d at 2255. Telenet, as a resale carrier, owns no transmission lines. \textit{Id.}

\textsuperscript{51} The § 214 certification process is an adjudication within the ambit of § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1976). This section prescribes oral hearings when mandated by the enabling act. Since the Communications Act of 1934 does not require oral hearings in § 214 authorization adjudications, however, none need be granted. See 72 F.C.C.2d at 164-65 (and cases cited therein).


\textsuperscript{53} See note 51 \textit{supra}.

\textsuperscript{54} These conditions were designed to accomplish four interrelated goals: (1) ensuring that Telenet remained a strong and innovative competitor; (2) guaranteeing Telenet's integrity; (3) ensuring that Telenet would continue to serve the public interest; and (4) ensuring viable competition. 72 F.C.C.2d at 135. These conditions prohibited GTE from marketing Telenet's services, participating in the latter's support, advertising, research, sales and management activity, giving the latter proprietary information not available to other carriers, and giving Telenet resale lines on more favorable terms than GTE extends them to other carriers. \textit{Id.} at 135-49.
arms-length parent/subsidiary relationship upon the merged firms.\textsuperscript{55} In setting these conditions, the FCC sought to balance Telenet's interest in enjoying the economic benefits of a parent/subsidiary relationship with the FCC's desire to shield GTE's monopoly service ratepayers and Telenet's competitors from interservice cross-subsidies and other competitive abuses.\textsuperscript{56}

GTE responded to this order by assailing the conditions as stringent, ambiguous, and against the public interest.\textsuperscript{57} In response, the FCC invited interested parties to file comments and scheduled an oral presentation before the Commission. After considering additional testimony, the FCC modified the conditions to permit a closer operational relationship between Telenet and GTE.\textsuperscript{58} In its second Memorandum Opinion and Order, however, the Commission emphasized its commitment to competition in telecommunications and resolved that the conditions imposing an arms-length separated parent/subsidiary relationship upon Telenet and GTE were necessary to ensure workable competition in Telenet's chief market — augmented data communication services.\textsuperscript{59} Moreover, the FCC asserted that the conditions imposed upon the merger reflected the agency's duty to enforce section 7 of the Clayton Act.\textsuperscript{60} Thus, by applying section

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\textsuperscript{55} Id. at 195 (Fogarty, Comm'r, concurring).
\textsuperscript{56} Id. at 135-36. The FCC termed the effect of these conditions upon the interactions of the merged firms as "maximum separation." As the FCC has noted, the form of "maximum separation" differs with each application, but the essential ingredient has always been the requirement that the existing carrier form a separate subsidiary to provide the new telecommunications service. Id. at 132. For an example of the application of "maximum separation," see note 14 supra.
\textsuperscript{57} 72 F.C.C.2d at 516.
\textsuperscript{58} Id. at 519-29. The relaxation of the conditions was premised upon GTE's representation that it would expeditiously develop an accounting system capable of disaggregating and attributing the costs shared between GTE and Telenet. Id. at 529. Additionally, the FCC modified some of the conditions because it found such modifications could produce lower service costs by allowing the firms to interact more closely without significantly increasing the danger of interservice cross-subsidization. Id. at 526. The modified conditions provided that the firms might share office space and personnel, exchange non-customer proprietary information, and engage in some joint research and development. Aside from these changes, the conditions remained substantially identical. Thus, the FCC upheld its imposition of "maximum separation" upon the firms, albeit in an attenuated form. See note 56 supra and note 59 and accompanying text infra.
\textsuperscript{59} 72 F.C.C.2d at 518. Three of the seven Commissioners concurred with the majority, noting that when the FCC had imposed separate subsidiary requirements upon carriers in the past, it had failed to analyze the impact of such organizational forms upon service costs. Id. at 532 (Fogarty, Comm'r, concurring). Additionally, the concurring Commissioners warned that the agency's emphasis on curbing cross-subsidization and fostering competition in telecommunications might be at cross purposes to the public interest-promoting telecommunications consumer welfare. Id.
\textsuperscript{60} See note 49 supra.
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214 to a putative de facto line acquisition, the FCC effectively conducted a premerger review, thereby imposing substantial conditions upon the merger designed to thwart interservice cross-subsidization.

II. GTE-Telenet Merger — Extending the Limits of Section 214 in a Salutary Way

A. De Facto Line Acquisitions by De Facto Carriers

The FCC's action under section 214 in GTE-Telenet Merger reflects the Commission's use of old tools in new ways to meet the challenge of regulating an industry that has experienced unforeseen technological progress. When the Communications Act of 1934 was enacted, there were only two forms of effective telephonic communication — telephone and telegraph. The Act was drafted to enable the FCC to regulate the provision of these carrier services in monopoly markets; high entry barriers inherent in the art of telecommunications in the 1930's made competition infeasible. Since the anticompetitive harms mergers may create are generally less significant in markets where monopoly is encouraged and regulated, it is not surprising that the Act lacks provisions designed to prohibit mergers. In fact, the Act actually encourages carrier mergers. For example, under section 221, merging telephone companies may seek the FCC's approval to immunize their merger from the operation of the antitrust laws. Consistent with the Act's monopoly orientation, section 221 powers may be invoked only by the merging telephone companies; the FCC is not empowered to thwart the merger. Similarly, section 222, enacted in 1943, grants the FCC power to approve telegraph company mergers. Unlike section 221, however, it must be invoked by merging telegraph

61. See note 4 supra.
63. See note 4 and accompanying text supra.
64. The chief economic problems mergers create are a result of the monopoly power they engender. But, to the extent merging firms are regulated, their consolidation will generally be innocuous. See McLean Trucking Co. v. United States, 321 U.S. 67, 85 (1944) (strict regulation and supervision, particularly rate regulation, is an effective deterrent to the evils of monopoly). But see 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 287-89 (1971).
67. 47 U.S.C. § 222 (1976). Section 222 was enacted in 1943 to permit Postal Telegraph-Cable Company and Western Union Company to merge with immunity from the antitrust laws. Customer Interconnection, 61 F.C.C.2d 766, 778 (1976). The section's enactment was
companies and permits the FCC to halt such mergers. Although on its face section 222 seems to favor competition, its legislative history indicates otherwise. Section 222 was enacted to save one of the nation’s two telegraph companies from impending insolvency by allowing the carriers to merge without violating the antitrust laws. Thus, like section 221, section 222 was aimed at encouraging rather than prohibiting mergers.

Progress in microwave radio transmission has fostered competition in telecommunications and has induced the FCC to open many communication markets to competition. Although the Act was not intended to regulate competitive markets, the breadth of its provisions has made it a useful regulatory tool in this regard. For example, the sections of the Act pertaining to the regulation of broadcast systems have assisted the Commission in regulating competition among microwave carriers. Because carriers utilizing microwave radio techniques are radio licensees under section 309 of the Act, changes of ownership among them are cognizable by the FCC under section 310. Since most common carriers hold radio licenses for microwave transmission, the FCC is able to direct or prohibit

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69. See note 67 supra.

70. See 89 Cong. Rec. 348-54 (1943). A large portion of § 222 is dedicated to provisions designed to curb the unemployment that would result from such mergers. See 47 U.S.C. § 222(f) (1976).

71. See Customer Interconnection, 61 F.C.C.2d 766, 779-80 (1976). See also Washington Utils. & Trans. Comm’n v. FCC, 513 F.2d 1142, 1156 n.21 (9th Cir. 1975). Microwave transmission technology began to grow during World War II. Its development was hastened by the United States Army’s need for a communication system in North Africa that the Axis forces could not easily destroy or monitor. Because microwave radio transmits a narrow signal that may be carried by antenna towers located up to 35 miles apart, it was ideally suited to the military’s needs. 61 F.C.C.2d at 779.

72. See, e.g., Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971) (FCC adopts policy of open entry into the domestic private line market); Domestic Communications-Satellite Facilities, 35 F.C.C.2d 844 (1972) (FCC considers authorizing GTE to operate a communication satellite carrying interstate telephone traffic in competition with American Telephone and Telegraph Company); Resale and Shared Use of Common Carrier Servs., 62 F.C.C.2d 588 (1977) (Commission adopts policy in favor of resale and sharing of telecommunication services and open entry into the resale market).

73. Although the Act does not mention private line carriers, resale carriers, or data communication carriers, these and other hybrid service carriers are regulated under title II of the Act. See cases cited in note 72 supra.


most carrier mergers using section 310. Arguably, section 310 was not intended to control carrier mergers since its drafters hardly could have foreseen in 1934 the widespread use of radio waves for private message transmission. Moreover, the legislative history of section 310 indicates that its purposes were to control broadcast frequency ownership by aliens and to prevent hidden holding companies from controlling the broadcast licenses of their subsidiaries. Yet, although the Act is obsolete, the FCC has been successful in coping with such unforeseen developments through expansive interpretation.

In *GTE-Telenet Merger*, the FCC was faced with an impending resale carrier acquisition by a holding company owning the nation's second largest telephone system. The Commission sought control over the merger, fearing the acquisition would create the potential for anticompetitive conduct, but control was not available under section 310. Telenet, as a resale carrier, was not licensed as a radio frequency operator under section 309. However, because Telenet's transmission line leases were subject to Commission authority under section 214, the FCC considered section 214 review a condition precedent to the merger's consummation.

Although the Commission's power to control the acquisition of transmission lines under section 214 has long been clear, section 214 had never before been used to condition the acquisition of a carrier. Because the Commission had in dictum disclaimed any power to control such acquisitions under section 214, its interpretation of this section as conferring such power is a significant shift in Commission policy.

The principal justification advanced by the FCC for applying section 214 to the GTE-Telenet merger is that the acquisition would result in GTE's control over Telenet's carrier operations. Although the form of the merger allowed Telenet to function as a GTE subsidiary with separate operations, the Commission characterized the merger's form as a mere

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78. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 167-78 (1968) (although the regulation of cable television was not within the contemplation of Congress when it enacted the Act, the FCC's authority under the Act is broad enough to permit the agency to regulate cable television). For a discussion of the impact of § 310 on carrier mergers, see 72 F.C.C.2d at 105-06.

79. For a definition of resale carrier, see note 46 supra.


81. See note 34 and accompanying text supra.

82. 72 F.C.C.2d at 114. See also 70 F.C.C.2d at 2255 (Fogarty, Comm'r, dissenting).
corporate fiction having no regulatory significance.\textsuperscript{83} Thus, the FCC regarded the merger as a \textit{de facto} transmission line acquisition subject to section 214.\textsuperscript{84} A necessary premise in this interpretation is that GTE is in fact a carrier because section 214 governs only extensions and deletions of lines by carriers.\textsuperscript{85} The FCC again pierced the corporate veil to find GTE, a holding company, to be a \textit{de facto} carrier.\textsuperscript{86} The Commission reasoned that GTE's control of the second largest telephone system in the nation and of the Comstar communication satellite rendered it a carrier for regulatory purposes.\textsuperscript{87}

Although the Commission's unwillingness to exalt form over substance reflects commendable regulatory initiative, its application of section 214 to the merger is inconsistent with the section's language and legislative history. Further, the Commission's disregard for corporate formalities is unsupported by the Act.

Section 214 was enacted as an integral part of the monopoly regulatory scheme for carriers. Patterned after section 1 of the Interstate Commerce Act,\textsuperscript{88} it seeks to prevent the unnecessary duplication of transmission facilities and to prevent line deletions in geographic areas needing service.\textsuperscript{89} Unlike section 310, section 214 does not affect transfers of control among entities holding transmission authorizations.\textsuperscript{90} Moreover, section 214 does not apply to changes in the operation of lines unless the changes affect the adequacy or the quality of service.\textsuperscript{91}

The plain language of section 214 and its congressionally announced purposes\textsuperscript{92} have guided courts interpreting the reach of that section. In \textit{United Telegraph},\textsuperscript{93} a federal court reversed an FCC determination that section 214 applies to an experimental service. Even though the service

\textsuperscript{83} 70 F.C.C.2d at 2250-51.
\textsuperscript{84} Id.
\textsuperscript{85} See notes 37-42 and accompanying text \textit{supra}. Because Telenet would continue to hold its transmission line authorizations, it would not be deleting transmission lines by merging.
\textsuperscript{86} 70 F.C.C.2d at 2250-51.
\textsuperscript{87} Id.
\textsuperscript{89} See notes 25-26 and accompanying text \textit{supra}.
\textsuperscript{90} 47 U.S.C. \S\ 214(a) (1976). On the contrary, \S\ 214 refers only to "lines," defined as "any channel of communication established by the use of appropriate equipment."
\textsuperscript{91} Id.
\textsuperscript{92} For a discussion of the congressional purposes for \S\ 214, see notes 25-26 and accompanying text \textit{supra}.
\textsuperscript{93} 436 F.2d 920 (D.C. Cir. 1970). For a discussion of \textit{United Telegraph}, see notes 35-36 and accompanying text \textit{supra}.
involved an extension of the carrier’s lines, the court held that the proposed service was too temporary to be regarded as a line extension subject to section 214 review. Similarly, in *MCI*\(^94\) a court found that the FCC’s use of section 214 to limit a carrier’s use of its authorized lines exceeded the plain language and the purposes of section 214. Although a new use of lines by a carrier may constitute entry into a new communication field, the *MCI* court was not persuaded that new authorizations were required by section 214.\(^95\) If a carrier may offer new services over previously authorized lines without FCC approval under section 214, it is difficult to understand why an acquisition of a carrier by a holding company should be subject to section 214 review. The latter situation involves substantially less change in the carrier’s services than the former.

*General Telephone and Electronics Corp.*\(^96\) casts the propriety of the FCC’s section 214 invocation in *GTE-Telenet Merger* into further doubt. In the former case, GTE had applied for FCC authority under section 310 of the Act to acquire Hawaiian Telephone Company (HTC). Although HTC operated section 214 authorized lines, the Commission did not require section 214 authorization for the companies to merge. Relying upon the plain language of section 214, the FCC found that the section was not applicable to the merger because it would “not result in any change in the HTC facilities or service, or in any way change the relationship of HTC to the Commission.”\(^97\)

Interestingly, the GTE-Telenet merger closely parallels the acquisition of HTC by GTE. The two mergers differ only in the applicability of section 310 and the type of carrier being acquired. Since section 214 does not differentiate among carrier types, the two mergers were identical for section 214 purposes. It is therefore difficult to justify the Commission’s application of section 214 to one merger but not to the other.

Like the *de facto* line acquisition doctrine of *GTE-Telenet Merger*, the FCC’s attribution of *de facto* carrier status to GTE is inconsistent with previous Commission practice and with provisions of the Act. Historically, the FCC has respected corporate formalities in section 214 proceedings. For example, in *Nebraska Telephone*\(^98\) the Commission applied section 214 to the transfer of telephone lines from a telephone company to its subsidiary. The FCC rejected the petitioner’s argument that the parent


\(^{95}\) 561 F.2d at 380.

\(^{96}\) 8 F.C.C.2d 183 (1967).

\(^{97}\) *Id.* at 189.

\(^{98}\) 5 F.C.C. 132 (1938). See notes 27-28 and accompanying text *supra*. 
and subsidiary were the same entity under the Act's regulatory scheme. Had the FCC interpreted the parent/subsidiary relationship of the transferring companies in Nebraska Telephone as it did in GTE-Telenet Merger, section 214 would not have been applied to the former case. Conversely, had the respect given corporate formality in Nebraska Telephone guided the FCC in GTE-Telenet Merger, section 214 would not have been applied to GTE's acquisition of Telenet. The preferability of the Nebraska Telephone approach is supported by a comparison of section 214 with sections 218 and 219 of the Act. Sections 218 and 219 empower the FCC to demand operational and financial reports from carriers and all entities that are controlled by or that control carriers.99 In contrast, section 214 addresses only carriers. It appears that if Congress had intended the term "carrier" in section 214 to include the owners of carriers, it would have expressed this intention. By disregarding corporate relationships, the FCC may be performing what it considers to be its regulatory duty, although the Act seems to dictate a different perspective. Again, General Telephone and Electronics Corporation conflicts with GTE-Telenet Merger. In the former case, the FCC characterized GTE as a holding company and refused to find that the merger resulted in GTE's acquisition of HTC's lines. Notably, the Commission did not explain its departure from General Telephone and Electronics Corporation reasoning in GTE-Telenet Merger.

Although GTE, as a holding company, will exert some control over Telenet, such control does not make GTE a carrier. Telenet retains principal control over its day-to-day operations and is the carrier of its services. Furthermore, as a part of the GTE corporate family, Telenet's responsibilities under the Act are not changed. Any attempt it makes to acquire or delete transmission lines will still be subject to prior section 214 authorization. Although GTE may now be able to order Telenet to initiate service changes which Telenet might not have proposed as an unaffiliated carrier, section 214 is blind to the source of ideas behind line changes. Section 214 requires only that proposed line additions and deletions serve the public convenience and necessity. In this light, GTE's control of Telenet is, at most, of incidental significance under section 214.

Notwithstanding the Commission's broad construction of section 214 in GTE-Telenet Merger, the FCC's use of section 214 closed a loophole that otherwise might have permitted a potentially anticompetitive merger to escape the Act's coverage. Although the FCC's action may not be in strict conformity with the Act, it is consistent with the Act's overall goal — pro-

moting the welfare of the telecommunications consumer.\textsuperscript{100} The conditions imposed on the merger by the FCC under section 214 should prevent substantially the merged firms from commingling service costs — a major source of cross-subsidization.\textsuperscript{101} Still, Telenet will benefit from its relationship with GTE, a firm with considerable experience in telecommunications and with great financial power.

B. \textit{Section 214 as a Quasi-Clayton Act Enforcement Tool}

The FCC has always possessed the power to invoke section 7 of the Clayton Act against anticompetitive carrier mergers. Yet, in its thirty-six year history, the Commission has never used its Clayton Act powers.\textsuperscript{102} In \textit{GTE-Telenet Merger}, the FCC expressed concern that the merger of GTE and Telenet might be in violation of the Clayton Act.\textsuperscript{103} However, the Commission found the congressionally intended scheme for enforcement of the Clayton Act, set out in section 11, to be inadequate.\textsuperscript{104} Instead, the Commission analyzed the merger using section 7 criteria as part of its section 214 review. This analysis revealed that the merger did not violate the Clayton Act.\textsuperscript{105} Thus, in one proceeding the Commission was able to fulfill simultaneously its responsibilities under section 214 of the Communications Act and under section 7 of the Clayton Act. Moreover, by conducting a section 7 analysis of the merger in a section 214 proceeding, the FCC was able to employ powers similar to the premerger notification and enforcement powers under the Clayton Act possessed only by the FTC and the DOJ.\textsuperscript{106}

\textsuperscript{100} This goal was reiterated by Commissioner Fogarty in \textit{GTE-Telenet Merger}, 72 F.C.C.2d at 532 (Fogarty, Comm'r, concurring).

\textsuperscript{101} See note 7 supra.


\textsuperscript{103} 70 F.C.C.2d at 2249-50.

\textsuperscript{104} 72 F.C.C.2d at 108-10.

\textsuperscript{105} \textit{Id.} at 149-59. See note 115 infra.

\textsuperscript{106} The FTC, under 15 U.S.C. § 53(b) (1976), and the DOJ, under 15 U.S.C. § 25 (1976), are the only federal agencies with statutory power to seek preliminary injunctions against the consummation of mergers that will violate § 7. Prior to 1973, when 15 U.S.C. § 53(b) was amended, the FTC did not have statutory authority to halt the consummation of mergers. However, the United States Supreme Court had found that, in limited circumstances, the FTC could exercise such power under § 41(a) of the All Writs Act, 28 U.S.C. § 1651 (1976). \textit{FTC v. Dean Foods Co.}, 384 U.S. 597 (1966). Section 7(a) of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1976), was enacted by Congress in 1976 to supplement the premerger § 7 enforcement powers of the DOJ and FTC by requiring participants in major proposed mergers to notify these agencies prior to merger. Under this Act, either agency can delay the merger's consummation for up to 50 days after it receives sufficient notice of the merger plan. During this time, the two agencies may investi-
The FCC's use of section 214 in GTE-Telenet Merger serves to highlight and cure some of the deficiencies inherent in agency enforcement of section 7 of the Clayton Act. Primary among its faults, section 11 of the Clayton Act only empowers agencies to enforce the Clayton Act when they have "reason to believe that any . . . [carrier] . . . is violating or has violated" the Clayton Act. It does not authorize agencies to proceed against proposed mergers that will violate the Clayton Act when consummated. Since it is frequently impossible once firms are merged to eliminate all the anticompetitive consequences of the merger by ordering divestiture, premerger prohibitive injunction power is crucial to effective Clayton Act enforcement.

Congress, having determined that lack of premerger enforcement rendered section 11 too weak, amended the Federal Trade Commission Act in 1973 to grant the FTC premerger Clayton Act enforcement authority. However, Congress has not extended such power to the other regulatory agencies with Clayton Act authority. Thus, there is a fragmentation of Clayton Act enforcement authority. With regard to common carrier mergers, for example, the FTC possesses premerger enforcement power while the FCC possesses postmerger authority. Because agencies with Clay-
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The FCC's enforcement authority have a duty, unmitigated by prosecutorial discretion, to enforce the Act; this bifurcation of authority is especially troublesome. It seems more logical, for example, for the FCC to be able to prevent or condition mergers while still proposed, rather than to disapprove or alter radically mergers after their consummation, thereby causing havoc to the firms, their customers and their creditors.

The FCC circumvented this limitation in its Clayton Act authority by conducting a section 7 analysis of the GTE-Telenet merger before its consummation as part of its section 214 review. Although the Commission found the merger legal under the Clayton Act, it would have been in an excellent position to institute prompt Clayton Act enforcement proceedings as soon as the merger was consummated if it had found the merger unlawful. The section 214 review, however, only provided the FCC with a vehicle for studying the merger's lawfulness under the Clayton Act; it did not afford the Commission the opportunity to invoke the Clayton Act to enjoin or condition the merger. Nonetheless, the FCC used its section 214 review process to achieve similar results but without shouldering the high burden of proof necessary to enjoin unconsummated mergers under section 7. Moreover, the FCC was able to consider the merger in light of the objectives of both the Clayton Act and the Communications Act, whereas a Clayton Act proceeding is designed only to address Clayton Act issues. For example, to receive Clayton Act approval a proposed merger need only have less than a reasonable probability of substantially lessening competition and no tendency to create a monopoly, while section 214 requires a proposed merger to satisfy a broad public convenience and necessity standard. Additionally, section 214 does not contain a number of the time-consuming procedures found in the Clayton Act. For example, section 214 permits the FCC to review a proposed merger without first holding an oral hearing.

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114. These possible ramifications are a few of many that render the divestiture remedy to § 7 violations bittersweet. See Pyrrhic Victories, supra note 109, at 53-74.
115. The FCC analyzed the merger under § 7 and found that, as conditioned, the acquisition would not be in violation of the Clayton Act. 72 F.C.C.2d at 149-59.
116. See note 134 infra.
117. Section 11 of the Clayton Act grants named federal agencies the authority to enforce §§ 2, 3, 7 and 8 of the Clayton Act and provides the only mechanism through which these agencies can enforce those sections of the Clayton Act. It does not address separate administrative issues. See 15 U.S.C. § 21 (1976).
118. See 72 F.C.C.2d at 164-66 (and cases cited therein).
the issues presented. Finally, premerger review under section 214 is not encumbered by the strict time limitations mandated by a premerger Clayton Act review. Thus, while the FCC’s Clayton Act authority and section 214 of the Communications Act are quite different, in GTE-Telenet Merger the FCC effectively used section 214 to conduct a premerger review similar to that conducted under the Clayton Act, but without the procedural and substantive limitations of the Clayton Act.

C. Legislative Initiatives in the Wake of GTE-Telenet Merger

If the United States Court of Appeals for the District of Columbia Circuit disapproves of the FCC’s use of section 214 jurisdiction in its review of GTE-Telenet Merger, a gap will exist in the Commission’s ability to prevent anticompetitive practices. The FCC will lack statutory authority to guide carrier mergers not resulting in the transfer of transmission lines or in the shift of control over radio licenses. Although large carrier mergers will still be subject to FTC and DOJ review under the Hart-Scott-Rodino Act, a legislative extension to the FCC of Clayton Act premerger notification and enforcement authority might distribute more rationally antimerger law enforcement responsibilities. The FCC’s continuous economic regulation of the carrier industry enables it to understand the nature and the impact of forces at work in an industry with extremely intricate technical and financial relationships. This knowledge has been supplemented by the Commission’s exhaustive investigations into anticompetitive carrier practices. Moreover, once a merger is complete,

121. See 72 F.C.C.2d at 164-66.
122. The DOJ conducted a premerger review of the proposed GTE-Telenet merger and did not take any action to prevent it. 72 F.C.C.2d at 163.
123. J. Shuman, The Application of the Antitrust Laws to Regulated Industries 82 (1977) (unpublished thesis in Georgetown University Law Center Library) (flexibility and scope of fact-finding apparatus make agencies suited to decide certain factual matters); Far East Conference v. United States, 342 U.S. 570, 575 (1952) (limited function of judicial review is better used by preliminary resort to agencies); accord, 6 H. Toulmin, ANTITRUST LAWS 169 (1974); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 886 (S.D.N.Y. 1965) (§ 7 analysis problems are largely factual, their solutions depending upon intimate agency familiarity with particular features of industries). But see J. Shuman, supra at 92 (agency expertise is limited to administrative questions and should not impinge on courts' antitrust jurisdiction).
125. For a survey of the investigations the FCC has conducted to study anticompetitive carrier practices, see Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).
the FCC may be reluctant to institute section 7 proceedings because of the impact of divestiture on employment and the functioning of the firms.\footnote{126}

There are, however, countervailing considerations that may militate against extending premerger Clayton Act power to the FCC. Granting premerger notification and enforcement authority to the Commission would subject prospective mergees to the scrutiny of yet another agency.\footnote{127} This burden might be aggravated by the conflicting interpretations of the Clayton Act that are apt to emerge.\footnote{128} While this might minimize the likelihood of anticompetitive mergers, it might also inhibit potentially legal and beneficial mergers.\footnote{129} The history of section 7's construction reveals its capacity to be read to achieve results that fall short of fostering competition.\footnote{130} Furthermore, it is uncertain whether Clayton Act premerger notification and enforcement jurisdiction would materially aid the FCC in its regulatory efforts. Thus far, with the exception of its use in \textit{GTE-Telenet Merger}, the FCC has not exercised its Clayton Act authority.\footnote{131} While the trend toward deregulation may encourage the FCC to use its Clayton Act powers,\footnote{132} changes in carrier technologies may create

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127. Businesses are generally displeased at being subject to the Clayton Act enforcement authority of both the FTC and the DOJ. \textit{See} Roll, \textit{Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure}, 31 Bus. Law. 2075, 2077 (1976). The FTC and the DOJ have reduced the premerger notification burden on corporations by assigning premerger investigation responsibilities between the two agencies through a liaison procedure. \textit{Id.} at 2079. \textit{See also} Schenefield, \textit{The Disclosure of Antitrust Violations and Prosecutorial Discretion}, 38 Fed. B.J. 76, 80 (1979) [hereinafter cited as \textit{Disclosure and Discretion}].

128. Since an agency conducting premerger § 7 review is largely speculating as to the future effects a merger might have, differences of interpretation can be great. \textit{See} L. Schwartz & J. Flynn, \textit{Antitrust and Regulatory Alternatives} 259 (1977). \textit{See also} note 17 and accompanying text \textit{supra}.

129. This understanding has led the DOJ to exercise its Hart-Scott-Rodino Antitrust Improvements Act premerger notification powers with moderation. It realizes that a request for additional information on a proposed merger may easily lead to the abandonment of merger plans. \textit{Disclosure and Discretion, supra} note 127, at 80. \textit{See also} L. Schwartz & J. Flynn, \textit{Antitrust and Regulatory Alternatives} 164 (1977).

130. \textit{See} note 17 and accompanying text \textit{supra}.

131. \textit{See} note 18 and accompanying text \textit{supra}.

132. Deregulation is the movement to replace regulation of firms with competition between firms. To the extent that deregulation substitutes competition for regulation, there should, theoretically, be a reduction in the conflict between regulatory schemes and § 7 of the Clayton Act. \textit{See} Fulda, \textit{Antitrust Considerations in Motor Carrier Mergers}, 56 Mich.
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economies of scale that will increase the maximum efficient size of carriers, thereby further reducing the Commission's incentive to enforce section 7. Moreover, since proposed mergers are inherently unstable, unrestrained use of premerger notification power may frustrate many otherwise beneficial merger plans. Finally, since mergers that may be lawful under the Clayton Act may not be consistent with the policies of the Communications Act, the FCC would probably prefer to review carrier mergers under the standards of its own Act. Although those factors do not collectively support the conclusion that Clayton Act premerger notification and enforcement power would not be beneficial to the FCC, they do suggest that the FCC might exercise merger control power more effectively under another scheme.

An alternative to extending premerger Clayton Act enforcement authority to the FCC would be to amend section 214 to embrace all carrier mergers. The FCC's broad power under section 214's public convenience and necessity standard, and its authority to place protective conditions upon its approval of section 214 applications would allow the Commission to structure carrier mergers so as to avoid their anticompetitive effects. This power would far exceed premerger notification and enforcement power under the Clayton Act by allowing the FCC to reach mergers that would be legal under the narrower Clayton Act standard. Moreover, it would permit the Commission to adapt to the changing exigencies of carrier regulation and to promote goals other than competition where appropriate.


133. Economies of scale are characterized by decreasing costs per unit of output as production is increased. See C. COLE, MICROECONOMICS: A CONTEMPORARY APPROACH 183 (1973). See also 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 116-26 (1970). In some industries, the economies of scale are so large that it is most efficient for a few firms to supply the entire market of the industry. See L. SULLIVAN, ANTITRUST § 117 (1976).

134. See note 129 supra. There are some substantive limitations on the award of preliminary relief that render premerger injunction jurisdiction relatively impotent. Agencies seeking such relief against threatened Clayton Act violations are handicapped not only by the high burden of proof required for such equitable relief but also by courts' reluctance to grant preliminary injunctions when the standard of proof the agency will have to meet at trial is a question of probability. L. SCHWARTZ & J. FLYNN, ANTITRUST & REGULATORY ALTERNATIVES 259 (1977). See also Schneiderman, Preliminary Relief in Clayton Act Section 7 Cases, 42 A.B.A. ANTITRUST L.J. 587 (1973); Note, "Preliminary Preliminary" Relief Against Anticompetitive Mergers, 82 YALE L.J. 155 (1972). The DOJ has sought to limit premerger investigation to a procedural role because of its capacity to frustrate unduly merger plans. Disclosure and Discretion, supra note 127, at 80.

135. Section 214 adjudications are guided by the broad and flexible public convenience and necessity standard. See note 11 supra. This standard gives the FCC great discretion in the exercise of its authority. Compare FCC v. RCA Communications, Inc., 346 U.S. 86, 91
This alternative gives the FCC power within its traditional expertise, whereas extending the Commission's Clayton Act authority may give it antitrust responsibilities that it is ill-equipped to discharge. Such an extension of section 214 is consistent with the thrust of legislation recently introduced in Congress and serves to bring the Communications Act of 1934 more in line with the Commission's current regulatory needs.

III. Conclusion

Anticompetitive practices remain a persistent common carrier regulation problem. Although the FCC has taken steps to solve this problem, the practice continues. The Commission's novel use of section 214 of the Communications Act of 1934 to conduct a premerger review of the acquisition of a competitive carrier by a holding company in GTE-Telenet Merger is an example of the Commission's expansive application of the Communications Act of 1934 to meet the regulatory challenges of telecommunications in the 1980's.

While the FCC's use of section 214 in GTE-Telenet Merger enhances the Commission's ability to foster competition in telecommunications, judicial review of the Commission's action may determine that the FCC has exceeded its section 214 authority. In this instance, Congress should consider the merits of extending the FCC's authority under section 214 to encompass premerger review.

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(1953) (the court's role is limited to saying whether the FCC has exercised fairly its discretion in applying the public interest standard) and General Tel. Co. of Cal. v. FCC, 413 F.2d 390, 401 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969) (FCC's interpretation of its Act is subject to great judicial deference), with Manufacturers Hanover Trust Co. v. United States, 240 F. Supp. 867, 886 (S.D.N.Y. 1965) (the standards of legality under the Clayton Act must ultimately be determined by the United States Supreme Court). The primary and guiding standard of the Clayton Act, on the other hand, is competition. See Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951). See also Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir.), cert. denied, 363 U.S. 843 (1959).

136. See Shuman, supra note 123, at 92.