

THE TELECOMMUNICATIONS ACT OF 2000

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION

OF THE

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HOUSE OF REPRESENTATIVES

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TUESDAY, MARCH 14, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Stearns, Shimkus, Pickering, Markey, Gordon, Wynn, and Dingell (ex officio).

Staff present: Justin Lilley, majority counsel; Cliff Riccio, legislative clerk; and Andy Levin, minority counsel.

Mr. TAUZIN. Good morning and welcome to this legislative hearing on the Telecommunications Merger Review Act of the Year 2000. The Chair will recognize himself for an opening statement.

When we in Congress passed the Telecom Act 1996, we eliminated the FCC's statutory authority to review telecom mergers by repealing Section 221(a) of the Communications Act of 1934. Our intent was, of course, to return the function of reviewing mergers in a competitive industry to the Attorney General's office while terminating the FCC's ability to condition mergers based upon market concentration or other antitrust law concerns.

To emphasize this was, in fact, the true intent of Congress, let me quote directly from the Joint Explanatory Statement of the Conference for the 1996 Act.

"By returning the review of mergers to the DOJ, the repeal of Section 221(a) would be consistent with one of the underlying themes of the bill, to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws. The repeal would not affect the Commission's ability to review the transfer of licenses. Rather, it would simply end the Commission's ability to confer antitrust immunity."

Well, despite our best efforts to make clear that the FCC's authority is limited to reviewing license transfers in connection with mergers, the Commission has nonetheless devised a random, ad hoc, subjective system for review that is imprudently broad, arbitrary and capricious and, by all objective reasoning, way out of control.

In case after case, the FCC has cited the public interest, necessity and convenience standard in Sections 214 and 310(b) of the

Communications Act to impose entirely subjective conditions upon license transfers, in particular deals that simply boggle the mind. In almost all of the cases, the affected companies are forced to comply as license transfers are generally crucial to the actual completion of a merger or an acquisition.

Needless to say, these conditions have no basis in law, and meeting these conditions is seldom necessary to bring the affected parties in compliance with existing FCC rules and regulations. As a result, the FCC now routinely reviews telecom mergers in a manner that takes far too long, is far too costly for taxpayers and the industry, creates far too much uncertainty in telecom marketplaces, and is too duplicative of the review conducted by the DOJ and the FTC.

What the FCC apparently fails to respect is that Congress never intended the public interest standard to bestow upon the Commission the broad authority to consider market concentration and other competitive aspects of mergers or acquisitions. To the contrary, the whole point of allowing the FCC to review license transfers in connection with mergers is to ensure that newly merged or acquiring companies are in compliance with existing FCC rules and regulations—rules and regulations, I might add, that the FCC must construct as a matter of law to serve the public interest in the first place. As a result, Sections 214 and 310 clearly contemplated that the public interest, necessity and convenience are inevitably served upon a determination by the FCC that the transfer of licenses in question does not violate existing Commission rules and regulations. Once such a determination is made, little else is required of the FCC to properly carry out its responsibilities under Sections 214 and 310.

While I can understand the appeal of reviewing the many intriguing mergers that are taking place out there, the Commission is clearly abusing its authority so that it can have a hand in all the excitement. Well, that may make working down at the Portals much more interesting, I suppose, but it makes working on the Hill quite frustrating, and I take serious offense to the draconian tactics the FCC resorts to in these merger review processes.

Because the FCC has refused to accept its appropriate role in this process, the members of our committee must now legislate in order to control the Commission's renegade practices.

The discussion draft that we have before us today is a good starting point from which to begin clarifying the congressionally intended scope of the FCC's merger review authority.

The bill mandates that the FCC's denial of conditional approval of an application for the extension of lines under 214, or for the transfer of licenses under 310, be based only upon the determination of what is required under existing FCC rules and regulations. This will prevent case-by-case, subjective determinations of what is in the so-called public interest and keep the FCC from engaging in DOJ/FTC-type review activities under the guise of communications law authority.

The bill as well imposes the following time limits on the Commission review:

In general, the Commission would have 90 days to complete action on applications in connection with mergers and other trans-

actions; the Commission would have 60 days to complete actions on such applications submitted by the “2-percent” companies; and the Commission would only have 60 days to review a pending application that has been pending for more than 30 days.

These time limits will, of course, give the FCC little time to do anything else but determine whether mergers or other transactions are in compliance with existing rules.

I want to thank in particular Mr. Pickering and Mr. Burr who have been the architects of this draft and who are going to be the guardian angels of the legislation as we process it. This is incredibly important work. It is our first step at beginning to impose some common-sense new parameters around the work of the Commission, leading hopefully I hope, I believe, 1 day to a real restructuring effort that will bring the FCC more into the modern age of communications.

I want to close by informing you of a letter I received just this January that reminded me of a letter I received in January 1998 from the Chairman of the FCC. It is a letter that I received and also that Senator John McCain received in connection with requests we made for the FCC to begin under its biennial review the process of looking at cross ownership rules of newspaper and broadcast ownership.

The letter is interesting because it contains a commitment that within 2 weeks—in fact, here is a quote, first as to the newspaper broadcast ownership rules, the mass media bureau is currently preparing a notice of inquiry that will review this rule as well as the FCC’s other broadcast multiple ownership rules not already subject to other pending proceedings. The bureau anticipates presenting this item for Commission consideration in the first quarter of 1998.

People in this industry have been waiting for the first quarter of 1998 for 2 years. Mr. McCain and I have been waiting for the chairman to keep his word to us since the first quarter of 1998. It is this type of delay, this type of a problem we see at the FCC that is causing us to begin this process today, and we will not end this process until I think we have adequately examined the entire procedural aspects by which the FCC does take up matters for review, does do what Congress I think intends it to do and does, in fact, act expeditiously upon its work on mergers and acquisition and other matters so that parties can feel some sense that they will be objectively treated before the Commission. They will have a chance, if they don’t like the Commission’s answer, to take it to a higher authority.

I yield back the balance of my time and yield to my friend, Mr. Markey, for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, very much, and I want to commend you for calling this hearing this morning on media mergers. I think that today’s hearing can assist the subcommittee in its analysis of the procedures and review the Commission procedures that they perform during proposed mergers to effectuate line or license transfers.

At a time when there are sweeping changes being wrought throughout the society by digital technologies and when such radical changes are inducing a wave of media mergers as companies attempt to position themselves advantageously for the future, a re-

view of the procedures that the FCC utilizes when such mergers require line or license transfers is quite timely.

The FCC, as with any agency or government anywhere, should periodically review its functions and operations to ensure that it is fulfilling its statutory obligations and, to the extent possible, performing its job efficiently. This is precisely the effort currently under way at the Commission, and I applaud the Commission for the steps that it is taking in this regard.

Concern about the Commission's actions during its reviews of line or license transfers generally break down into two categories. The first is quite straightforward. Many participants in the process complain that it takes too long. To be sure, it often does take a long time. That may be a result, in some instances, of inefficiency at the Commission. The length of time, however, may also reflect the fact that many mergers require the analysis and approval of numerous transfer applications.

In addition, the duration of the FCC's review is sometimes more lengthy than reviews conducted by the Justice Department's Antitrust Division. This is because quite often the FCC waits until the Antitrust Division has completed its review before issuing its decision so that changes made to the transaction, as a result of consent decrees, can be accounted for so that the public has the opportunity to comment and also to ensure that FCC decisions are not used to undermine ongoing antitrust review. Recognizing that timing is important in many mergers, I look forward to the ongoing efforts at the Commission to streamline its process as well as the discussions with colleagues on the committee on other ideas to address issues of timeliness.

The second concern expressed about this issue deals not with the duration of the FCC's review but rather with the substance of the FCC's review. The Communications Act requires the Commission to determine whether applications that are filed to transfer lines or licenses are in the public interest. Over the years, the Commission has performed this function countless times, and over time what constitutes the public interest has necessarily evolved to reflect the evolution in the state of telecommunications competition and changes in American society.

This public interest review is different from the review conducted by the Antitrust Division of the Justice Department. The Clayton Act empowers the Justice Department to challenge a merger that may substantially lessen competition, a standard that is designed to preserve competition that already exists. Of course, in many areas of telecommunications policy where we have had historic monopoly providers or a limited number of licensees, a standard crafted to preserve existing competition is particularly ill-suited to the endeavor embraced by the Telecom Act of 1996 of creating ever more competition.

This makes the FCC's task substantively different than that of the Justice Department. Although to the extent that the public interest standard requires analysis of the competitive effect of a line or license transfer, certain analyses will necessarily be similar at both agencies.

I do not support eviscerating the public interest standard at the FCC simply because it is inconvenient for the media moguls or

broadband barons of today. The public interest standard over the years has been utilized to open communications markets to competitive marketplace forces, to analyze foreign ownership implications and to reflect the broad hopes and desires of the American people or the licensees entrusted to utilize the public's air waves.

I welcome efforts to see that the Commission does its job more efficiently, but we must remember that government is not established to be solely efficient. It is also tasked to perform certain functions on behalf of the public. In looking at these functions today, I hope people will reflect on the fact that, for whatever imperfections the current system holds, the FCC in its stewardship of the U.S. telecommunications industry has helped deliver to the American people the highest quality, most competitive, most innovative telecommunications marketplace in the world, and that result has clearly been in the public interest.

Again, Mr. Chairman, I thank you for holding this hearing. I look forward to hearing from our witnesses.

Mr. TAUZIN. I thank my friend.

The Chair is now pleased to recognize the author of the legislation and, as I said, the prime motivator behind our bill, Mr. Pickering of Mississippi.

Mr. PICKERING. Mr. Chairman, I want to thank you for holding this hearing today and for your work and that of your staff in working with Congressman Burr and Congressman Dingell as we put together this discussion draft. I look forward to hearing from the commissioners today, their insights of what can be done to address this issue, both through this legislation and through their regulatory review and streamlining process.

Since the passage of the Telecommunications Act of 1996, the change in the telecommunications industry has been massive as companies try to position themselves for the new information age economy. Many of these companies are attempting to combine their strengths to better position themselves to compete in a deregulated marketplace.

One of the problems these companies have faced recently is the regulatory uncertainty of the FCC's merger review process. As we all know, the telecommunications industry is one of the key driving forces of our economy. As such, we in the Congress need to ensure that unnecessary government intervention doesn't cause needless delay in bringing new and innovative products to the market. Even more so, we must ensure that the business community is not competitively disadvantaged by an endless and uncertain regulatory review process.

When we passed the 1996 act, the Congress imposed a variety of time constraints on the FCC, again trying to reach the objective of certainty in the regulatory process. I believe that many of us who were involved in that process did not think we would subject the communications community to these lengthy and uncertain delays that are occurring at the FCC.

One of the biggest problems that some of my constituents have raised with me is not knowing if a merger will take 3 months, 9 months or even 16 months. There is no simply no logic nor rationale to the FCC's lengthy process, and this life of uncertainty or—

of certainty of the unpredictable nature of the regulatory process can have devastating effects on both large and small companies.

This potential for lengthy reviews can force companies to miss product rollouts, miss a window of opportunity to raise venture capital, and at times has been manipulated by a competitor to forestall a decision by the agency. We simply cannot allow these scenarios to continue.

This legislation will do what all legislation should do. It requires the process of government to work for the community they are meant to serve.

In closing, I thank the witnesses for appearing today. I look forward to hearing from their testimony.

Mr. Chairman, I look forward to working with you as we go forward in this process, and I look forward to working with the ranking member and with Mr. Dingell. Thank you.

Mr. TAUZIN. I want to thank the gentleman again, thank him and his staff for the excellent work and I think an excellent product that is being developed.

The Chair is now pleased to welcome the ranking minority member of the full committee, my dear friend Mr. Dingell, for an opening statement.

Mr. DINGELL. Mr. Chairman, thank you; and I want to commend you for bringing about this hearing and also to commend my colleagues, Mr. Pickering, yourself, Mr. Burr, Mr. Boucher and Mr. Klink, for their cosponsorship of the legislation under consideration today.

I want to observe that this legislation is a reproof of very serious character to the FCC, and it seeks to do something which the FCC should be doing by itself. I grieve that not more of the commissioners are here to participate in this hearing because it would be I think most beneficial.

There is today, I think, great need to address and to reform the way the FCC handles its merger reviews. These are a remarkable exercise in arrogance, and the behavior of the Commission, oftentimes by reason of delay and other matters, approaches what might well be defined as not just arrogance but extortion.

There is indeed today no more timely and important area to target for FCC reform. Hardly a week goes by without some breaking news about a new merger, acquisition, joint venture or other significant transaction in the telecommunications sector. The FCC should interest itself in these matters, but it should do so in accordance with law, in accordance with the Administrative Procedure Act and in accordance with the simple requirements of due process and simple decency.

These are significant events, and the government does have an important responsibility, more so now than ever before, to analyze them carefully and to make sure that they are not harmful to the public and that the action which follows is consistent with the broad public interest.

At the same time, the government has a duty to conduct this analysis fairly and openly and in a way that avoids imposing undue costs, burdens or other uncertainties on the merging parties or on the public.

This is a high responsibility, little heeded by the FCC. Unfortunately, the current process of merger review at the FCC has achieved few, if any, of these goals. Quite the opposite. The FCC has done something which I regard as particularly outrageous. It has a peculiar habit of identifying some potential competitive harm to the public and then on that basis proceeding to extract concessions from the parties, usually concessions which have absolutely nothing to do with the transaction itself or with the perceived harm that the FCC announces would flow from this event.

This is an extraordinary and a curious process. It doesn't serve anybody well. It doesn't protect the public from anticompetitive actions. It delays the process, it is unfair, and, in many instances, it either does or appears to far exceed the authority of the FCC, which chooses this curious way to go forward in order to accomplish some purpose to which they are not entitled for entirely different purposes, and the perceived abuse of the competitive concerns that the FCC sets forth seems to disappear entirely in the transaction once the FCC has gotten what it wanted. One must ask how different this is from protection payments made in Chicago or New York in the days of Al Capone and prohibition.

As mentioned, it does not serve the public well. It does not benefit the public at all, and in order for the public to benefit, I would think that the FCC should justify this by establishing a clear nexus between the conditions placed on the merger and the predicted detrimental effects of the transaction. Unfortunately, such a nexus rarely exists, and it all seems to vanish in some kind of a bureaucratic file at the FCC, if ever such a nexus did in fact exist.

Let us look at the CBS-Westinghouse combination of a few years ago. The FCC found and thundered mightily about how this transaction could impose a competitive threat to the public if it were simply approved without conditions. Oddly enough, the competitive threats disappeared totally when the parties agreed to air more children's educational programming each week.

The FCC has the power to address the question of children's programming, and I happen to think that they should. The question is, why did they choose this extraordinary way to address the children's programming question without ever having a proper proceeding to address it or to do it without tying it to some other set of events?

Now, the public is I think served better by children's television and more of it, but I cannot see the connection between this condition and the competitive threat the Commission was announcing that it was going to alleviate, and I look forward to hearing the Commission tell us about what happened to their concerns on competition that are not manifest in the approval which they brought forward.

So the public then is left to grapple with whatever detrimental effect the transaction might have imposed in exchange for some goody that the Commission extorts from the parties, sometimes by reason of conditions which they impose and sometimes by just the practice of imposing extortion delay upon the parties engaged in a business undertaking which is of great importance to them and which, in frankness, they are entitled to have decided quickly by the Commission, something which seems to be very difficult for the

Commission to do, even when they are not trying to extort something from persons who have business before the Commission.

A better description of the current merger review process could be essentially a paraphrase of the old story which appeared in book form, *How to Win Without Actually Cheating*. We might say how to write the rules without actually following them.

These concessions only apply to the merging parties, are not to be found anywhere in jurisprudence, and they do not apply to the competitors who oftentimes achieve a significant advantage from the practice. The practice is at total odds with the substance and the intent of the Administrative Procedure Act which ensures similar regulatory treatment for all parties similarly situated. But here that practice is not practiced nor is it required, and, indeed, the parties often find it impossible to go to court because of the penalties which they would suffer both in delay and, quite honestly, in punitive actions by the Commission.

Now, I know I am taking more time.

Mr. TAUZIN. The gentleman is recognized. I am enjoying this a great deal. I will let him finish his statement.

Mr. DINGELL. I hope, Mr. Chairman, the Commission is, because they are most needful of hearing these things which the applicants before them do not have either the power or the courage to express.

Having said these things, these ad hoc concessions often obtained during late-night sessions and constructed in curious back rooms and curious process at the FCC fly in the face of due process requirements that are firmly implanted in existing law, and they are something which cannot be challenged by the helpless people who appear before an arrogant and oppressive Commission.

Now, let us look, evading due process requirements is not in the public interest, and I would challenge any member of the Commission to tell us how that kind of action is benefiting the country or the industry or the consumer. It mainly serves competitors, who are, of course, under no obligation to abide by the same conditions that are extracted and extorted from the merging parties. Competitors have every incentive to gain their own fair advantage, and sometimes it is quite obvious that the Commission is conferring a significant advantage on one competitor or another by this kind of extraordinary process.

It is equally obvious that the competitors can gain this advantage with little effort, since the merging parties are under great pressure to strike a deal with the Commission, one from which there is no relief in the courts because of the extraordinary arrogance demonstrated by the Commission in connection with these matters.

But even if the FCC actually imposed conditions that had a reasonable nexus to the ills they purport to cure, they would be unnecessary and wasteful given the intensive antitrust review and enforcement authority already vested in the Department of Justice and the Federal Trade Commission. These agencies have legions of staff superbly trained in the business of evaluating competitive threats to the public.

For the FCC to travel down the same road without a clear standard of review to ensure uniform treatment of all parties before the Commission is remarkable at best. But the fact that the Commis-

sion is able to find these conditions and then trade them off against other concessions by the parties in a process that at best can be described as extortionate tends to indicate that here we have a system and a situation very much in need of control and reform. And I would note that this is in addition to the fact that the process constitutes the height of bureaucratic inefficiency, and I would advise it is also a dangerous and arrogant affront to the democratic process that the Commission is supposed to observe.

Mr. Chairman, I am pleased to support the bill before the subcommittee today because I believe it will inject a dose of rationality into the merger review process. I reiterate, I think we need a strong merger review process. I observe we do not now have it. And, indeed, it appears to be one not just characterized by arrogance, indifference, extortion, laziness and dalliance on the part of the Commission, but it is also one which I think does not meet the high standard of tests set forth both in the Constitution and in the administrative procedure law.

As I understand the bill, it would narrow the focus of review by the FCC to simply determine whether the proposed transaction, if approved, would be in compliance with laws and regulations already on the book or new rules duly promulgated prior to transaction approval. I look forward to hearing the comments of the FCC on whether they accept this welcome and needed constraint on their arrogance.

It is important to note, however, that the public interest standard itself and the Commission's broad rulemaking authority that is derived from it are in no way impaired by the bill. The FCC will retain all its existing powers to write rules as it deems necessary and appropriate to protect the public interest. The bill would simply ensure that even the merger review context rules apply to everyone and are developed in a fair and open process with full participation by the public. What a terrible thing it is that the Congress must introduce legislation of this kind to curb excesses in an arrogant agency.

Thank you again, Mr. Chairman, for holding this hearing. I look forward to moving ahead with this first, very important step toward FCC reform. I am hopeful that it will not have to be followed by legislation to abolish the Commission.

Mr. TAUZIN. The gentleman's 5 minutes has expired. I want to thank the gentleman.

The Chair will ask on a point of personal privilege to make a few additional comments, without objection.

Let me first say, Mr. Dingell, that your concerns about the FCC duplicating the work of the Justice Department are amplified in today's report on this hearing where we are told that, as part of the FCC's current review of the AOL Time Warner merger, that the FCC's general counsel is seeking additional information to better define the new market. It is a market analysis. Again, something you would think would be done by the DOJ in connection with this merger, another good example of what we are talking about.

I wanted to take a personal privilege to clarify something. We have with us today an excellent panel, and I want to thank the commissioners who are here today and Mr. Ryan for coming to share with us your thoughts on this topic. I made a lot of com-

ments in preparation for this bill and for the hearings that I think will follow and hopefully the congressional action that will follow. Some have thought my comments were judicious.

Let me first say I share Mr. Dingell's passion, Mr. Pickering's passion about our concerns in this area. No citizen of our country ought to be treated differently before a Commission than another citizen similarly situated, yet that is what is happening in this process, and that is so disturbing. And no citizen of this country ought to be subjected to the kind of things that happen to too many citizens of this country while they are waiting interminably for the Commission to act on an application, and the examples that have been brought to me are horrifying, and they stir the kind of passion that I think I exhibited in my words.

But I want to straighten something out. In none of my comments have I tried to reflect negatively upon the commissioners. I happen to respect Chairman Kennard and every one of the members of the Commission very greatly, and I know that all of you serve indeed our country because you believe in public service and you come to this office at the Commission with that intent. I think that is true of every one of our commissioners, and I have deep respect and admiration for every one of you.

It is the practices, the policies, the mindset, the circumstances, the results of some of those activities that so trouble me and so stir me to the words that I have used in many speeches.

I am not going to back down from those words. As Mr. Dingell has pointed out, it is time that we address some of these problems, and I don't want to bring anybody up and put paper bags on their heads to tell their stories, and I don't want anybody arrested and sent to prison. I am not after anybody's head. I am after changing the procedures by which people can be abused in this process and by which Americans suffer at the hands of people who take advantage of them because they have made been vulnerable in this process. That is what I seek to cure.

I know that the members of the Commission who are here today to testify share those concerns with me. You have expressed them to me privately. We want to find an answer. So I thank you for coming.

Mr. Kennard himself I think is still in Peru today, is not yet back, although we extended an invitation to him to testify, but we will be looking forward to his testimony and his perspective on this at future hearings. In the meantime, I am pleased to welcome this panel and, indeed, delighted that we have been honored to have Harold Furchtgott-Roth and Commissioner Powell and Bruce Ryan with us today to share their thoughts on this important questions.

We will begin with Commissioner Furchtgott-Roth, and we have a 5-minute rule, but we have a light panel. This is the only panel; and, as I said, we have time. I will extend to you to the same courtesies I extended to Mr. Dingell in fully elaborating on your comments and appreciate you doing so at this time. Commissioner Roth.

STATEMENTS OF HON. HAROLD W. FURCHTOTT-ROTH, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; HON. MICHAEL K. POWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; AND BRUCE D. RYAN, PARTNER, PAUL, HASTINGS, JANOFSKY & WALKER, LLP

Mr. FURCHTOTT-ROTH. Thank you, Mr. Chairman.

Chairman Tauzin, distinguished members of the subcommittee, thank you for inviting me to testify before you today on the FCC merger review process. It is a great honor for me to be here today. I must say I only wish we were downstairs in the main committee room, which has the towering figures of Chairman Bliley and Mr. Dingell.

This is a great committee. I think it is the greatest committee in Congress. It is the committee of Madison. It is the committee that has had many distinguished chairmen over the years. It has had many great accomplishments, and to have been downstairs today would have been a poignant reminder of Chairman Bliley's recent announcement of his retirement. I will miss him dearly in this committee, and the past 6 years have been extraordinary years for this committee. It has accomplished great things, and it remains the greatest committee on Capitol Hill.

During my tenure at the Commission, I have developed great concerns about the process and practices employed in FCC merger reviews, the general topic of today's hearing.

First, the Commission has no specific set of standards that it applies when reviewing applications to transfer licenses under the public interests standard. Our decisional precedents provide little concrete guidance on the substantive standard for approval of Title II or Title III license transfers. The proposition that a merger is in the public interest if it is not anticompetitive or if it is at all pro-competitive, it is too generalized to be of any real help. This places applicants in an untenable position and raises real concerns as to whether they have received fair notice of their legal obligations.

The Commission must attempt to set out the substantive tests for the review of license transfer applications. In my opinion, the public interest test for license transfers is satisfied if at the time of filing the proposed transfer complies with all applicable provisions of the Communications Act and all extant Commission rules and regulations. This interpretation of the public interest promotes clarity and transparency for applicants and the Commission itself.

The ability to gauge in advance whether a particular transaction is likely to be permissible or not could save parties a lot of time, a lot of energy and a lot of costs in the transactional marketplace. Besides that, it is only fair, and the ability to know which standards to apply would allow the Commission to dispatch its duties with greater efficiency. Clearly, if the Commission's inquiry were not such an open-ended one, it would go a lot faster.

I have also developed great apprehension about the Commission's practice of conditioning grants for license transfer applications. I think it is entirely appropriate under the Commission's organic statute for the Commission to condition license transfer on compliance with existing statutory provisions and on existing FCC regulations. All too often, however, the Commission places conditions on license transfers that have no basis in the text of the Communica-

tions Act. That is, the Commission requires companies to do certain things, things that it could not for lack of statutory authority require outright in a rulemaking as a quo for the quid of receiving a license. Thus, the Commission imposes rules on merging companies that at best have never been considered and at worst have been considered and rejected by Congress.

Even where the condition in question could conceivably be grounded in the Communications Act, company-specific regulation by condition as opposed to industrywide regulation by rulemaking is a problematic practice. It is the exceedingly rare case I believe in which a substantive duty ought to be required of only one telecommunications company but not similarly situated other companies who happen not to have filed license transfer applications. Such patchwork regulation begins to look like irrational regulation.

The selective application of regulatory burdens to some entities but not others is not only difficult to justify as a legal matter but creates competitive disadvantages in the marketplace. When one company, due to the fortuity of a license transfer application, is subject to strictures not applicable to its competitors, the Commission in effect handicaps that company and advantages its competitors.

Let me also note that much of the quid pro quo at the FCC is conducted behind closed doors, beyond public view and scrutiny. There are secret deals that are not revealed to the public—some written down, some not written down. All too often, the public interest standard at the FCC ignores a critical component, the public.

There are many examples in the Commission's recent proceedings that illustrate the problems that I have described. I think the most forceful one, however, is that involving Southwestern Bell and Ameritech.

A recent article in the *Legal Times* by Randolph J. May, entitled "Any Volunteers? The FCC unfairly regulates by condition when it extracts concessions from merging telecom companies," explains it well, "to merge their local telephone companies, SBC Communications and Ameritech had to obtain the FCC's permission to transfer the necessary licenses. After months of waiting for agency approval, the companies, "volunteered," last October to abide by 30 regulatory conditions, filling more than 60 pages."

Let me note, Mr. Chairman, that among those conditions that SBC and Ameritech volunteered were conditions that, in essence, required SBC to break the law at the time of the license transfer and to break the law every day since then, to fall outside of the Communications Act, nondiscriminatory provisions. I have described this in detail in my separate statement in which I dissented from those conditions.

Now, returning to Mr. May's article, he says, "Regulation by condition is unsound, because it imposes new burdens only on the merging parties. In the case of SBC and Ameritech, the merged companies are in no different position than other incumbent carriers, like BellSouth, which are not subject to the same requirements. The bottom line is that this process unfairly singles out merger applicants for regulation that, if justified at all, should be applied on an industrywide basis."

We can only be thankful, Mr. Chairman, that some of the conditions imposed on SBC, certainly the ones that require it to break the law, have not been imposed on an industrywide basis, so occasionally the ad hoc process is not as bad as if it were industrywide.

Mr. Chairman, I am aware that the Chairman of the Commission has established a task force to review the FCC's merger review process. As I have told him as well as the capable staff heading that project, I applaud him for the step in the right direction. It is gratifying to know that my comments on this topic during my tenure at the Commission have been heard by the Chairman, and I deeply appreciate his responsiveness to my concerns. It is not clear, however, that the scope of the task force's review will be adequate to solve the problems associated with merger reviews.

The task force is focusing solely on the procedural issues involved in merger applications, primarily timing. I feel obligated to observe that the Commission's merger review team has no plans to address any substantive issues related to merger review, such as legal standards of review or the practice of conditioning mergers. Quick perusal of the Web page dedicated to the review effort will confirm this. Thus, Mr. Chairman, the Commission merger review does nothing to address the problems at which your legislation is aimed.

While any procedural reforms are to be commended, the substantive issues must, in my opinion be addressed. Reform of merger review that goes only to process and leaves in place the problems of ill-defined standards and conditional grants and secret meetings will have no effect on what commentators have called the FCC's version of, "let's make a deal."

Thank you, Mr. Chairman.

[The prepared statement of Hon. Harold W. Furchtgott-Roth follows:]

PREPARED STATEMENT OF HON. HAROLD W. FURCHTGOTT-ROTH, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION

Chairman Tauzin, distinguished Members of the Subcommittee, thank you for inviting me to testify before you today on the FCC's merger review process. It is an honor to be here.

The FCC Lacks "Merger" Review Authority

As a threshold matter, I would like to define the scope of the Commission's actual authority when reviewing, under sections 214 and 310 of the Communications, license transactions involving merging parties. Contrary to its frequent assertions, the Commission does not possess statutory authority under those provisions to review, writ large, the mergers or acquisitions of communications companies.

Rather, that Act charges the Commission with a much narrower task: review of the proposed transfer of radio station licenses from one party to another and review of the proposed transfer of interstate operational authorizations for common carriers. Nothing in the Communications Act speaks of jurisdiction to approve or disapprove the mergers that may occasion a transferor's desire to pass licenses on to a transferee. Under that Act, the Commission is required to determine whether the transfer of licenses serves the public interest, convenience and necessity.

To be sure, the transfer of radio licenses and common carrier authorizations is an important part of any merger. But it is simply not the same thing. A merger is a much larger and more complicated set of events than the transfer of FCC permits. While we can consider the use of the licenses by the proposed transferee, the Commission almost always involves itself in an extended discourse on, and analysis of, lines of the company's business that have nothing to with the use of the licenses at issue.

By using the license transfer provisions of the Communications Act to bootstrap itself into possession of jurisdiction over the entire merger of two companies that

happen to be the transferee and transferor of licenses, the Commission greatly expands its organic authority.

The Commission does possess authority under the Clayton Act, which prohibits combinations in restraint of trade, to review mergers per se. See 15 U.S.C. section 21 (granting FCC authority to enforce Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy). That power is rarely invoked by the Commission, however. If the Commission intends to exercise authority over mergers and acquisitions as such, it ought to do so pursuant to the Clayton Act, not the licensing provisions of the Communications Act. And under those provisions, I repeat, we review radio license transfers, not mergers.

Duplication of Department of Justice & Federal Trade Commission Efforts

The Commission's focus on mergers rather than on license and authorization transfers creates another problem: our work often duplicates that of the Department of Justice's Antitrust Division and the Federal Trade Commission.

Merging companies should not have to jump through excessive federal antitrust hoops, and those hoops should be held out by the institutions with the express statutory authority and expertise to do so. Those agencies are the Department of Justice and the FTC. When the FCC gets into the game as well, it increases the costs of the merging parties and expends taxpayer funds, while adding little value from an antitrust perspective. A report issued last month by the International Competition Policy Advisory Committee reached this very conclusion.

If the Commission limited its review to the actual subject matter of 310—the transfer of radio licenses, as opposed to the proposed merger that triggered the transfer—this problem of duplicated efforts and wasted resources would be avoided.

Potentially Arbitrary Review: Choice of Transfers for Full-Scale Review and Substantive Standards To Be Applied

I also have grave concerns about the process and practices employed in FCC merger reviews. The current system—or rather, the lack of a clearly delineated one—puts merging entities in an inequitable and difficult situation.

The Commission annually approves tens of thousands of license transfers without any scrutiny or comment; others receive minimal review, and a select few are subjected to intense regulatory scrutiny. For example, mergers of companies like Mobil and Exxon involve the transfer of a substantial number of radio licenses, many of the same kind of licenses as those at issue in other high-profile proceedings, such as AT&T/TCI, and yet we take no Commission level action on those transfer applications. I do not advocate extensive review of all license transfer applications, but mean only to illustrate that we apply highly disparate levels of review to applications that arise under identical statutory provisions.

Unfortunately, there is no established Commission standard for distinguishing between the license transfers that trigger extensive analysis by the full Commission and those that do not. Nor do any of the Commission's orders in "merger" reviews elucidate the standard. Regulated entities and even their often sophisticated counsel are left to wonder whether or not their applications will receive relatively quick, *pro forma* review by the relevant Bureau, or whether their applications will take many months to process and engender open meetings, so-called public "fora," and full Commission action.

If the Commission did establish a threshold test for determining which license transfer applications should receive strict scrutiny, the Commission would still need to set out the substantive tests for the differing scrutiny levels. As a general matter, our decisional precedents provide little concrete guidance on the substantive standard for approval of Title II or Title III license transfers: the proposition that a merger is in the "public interest" if it is not anti-competitive (or if it is also pro-competitive) is too generalized to be of any real help.

Moreover, there is clearly a different "public interest" test being applied, *sub silentio*, in different cases under the very same statutory provisions, usually sections 310 and 214. The cases that undergo extensive inquiry exhaustively discuss all kinds of service areas and issues ancillary to the use of the actual radio licenses, and the decisions that are granted at the Bureau level are relatively perfunctory in their public interest analysis. We should, after identifying the threshold test for license transfers that warrant thorough inquiry, articulate clearer substantive criteria to guide the Commission's inquiry.

The long and short of it is this: regulated entities currently have little basis for knowing how their applications will be treated, either procedurally or substantively. The license transfer process at the Commission is lacking in any transparent, fixed and meaningful standards. A person—even a well-trained lawyer—who wished to prepare for this process could find scant guidance in public sources of law. Rather,

one would have to be trained in the unwritten ways of this Commission to know what to expect, and those expectations would often have little to do with the text of the Communications Act.

In my opinion, the “public interest” test for license transfers is satisfied if, at the time of filing, the proposed transfer complies with all applicable provisions of the Communications Act and all extant Commission rules and regulations. This interpretation of the public interest has the benefits of simplicity and administrability. It promotes clarity and transparency for regulated entities and the Commission itself.

Under this understanding of the public interest, regulated entities could refer to Title 47 of the U.S. Code and of the Code of Federal Regulations in order to ascertain, *ex ante*, the substantive standards to which their contemplated transfers would be subject. The ability to gauge in advance whether a particular transaction is likely to be permissible or not could save parties a lot of time, energy, and costs in the transactional marketplace. And the ability to know which standards to apply would allow the Commission to dispatch its duties with greater efficiency; clearly, if the Commission’s inquiry were not such an open-ended one, it would go a lot faster.

“Conditional” Approval of License Transfer Applications

Finally, I would like to express today, as I have done many times before, great apprehension about the Commission’s practice of “conditioning” grants for license transfer applications. I think it is entirely appropriate, under the Commission’s organic statute, for the Commission to condition license transfer on compliance with existing statutory provisions and the FCC regulations that implement them. In fact, the Communications Act specifically contemplates such conditions. Section 303(r) provides that the “Commission shall . . . prescribe such . . . conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”

All too often, however, this Commission places conditions on license transfers that have no basis in the text of the Communications Act. That is, the Commission requires companies to do certain things—things that it could not for lack of statutory authority require outright in a rulemaking—as a *quo* for the *quid* of receiving a license. Thus, the Commission imposes rules on merging companies that at best have never been considered, and at worst have been considered and rejected, by Congress.

Even where the condition in question could conceivably be grounded in the Communications Act, company-specific, regulation-by-condition—as opposed to industry-wide, regulation-by-rulemaking—is a problematic practice. If, in the context of a license transfer, opponents of the transfer allege that additional regulations are necessary to achieve a certain end, that contention is most properly addressed in the context of rulemaking, not a company-specific order. It is the exceedingly rare case, I believe, in which a substantive duty ought to be required of one only telecommunications company but not similarly situated others, who happen not to have filed license transfer applications. Such regulation begins to look like irrational regulation.

The selective application of regulatory burdens to some entities but not others is not only difficult to justify as a legal matter, but creates competitive disadvantages in the marketplace. When one company, due to the fortuity of a license transfer application, is subject to strictures not applicable to its competitors, the Commission in effect handicaps that company.

I am also concerned about situations in which this agency becomes an enforcer of the rules and regulations of other governmental agencies. We have no jurisdiction to enforce rules not promulgated under the Communications Act. We cannot and should not do the enforcement work of others, thus putting ourselves in the position of potential enforcer of non-FCC rules should the transferee fail to conform to that regulation. For instance, if the Department of Justice enters into an antitrust agreement with a party, we have no business attempting to enforce the obligations created thereunder in our licensing orders, as the Commission has in the past suggested.

I am doubly concerned about conditional FCC approval when the rule at issue is not just that of another agency, but when that agency has made no formal, final, and material findings of a violation. That is, I do not think we should take official notice of alleged violations, including matters under investigation or in litigation, or of informal concerns that an agency is not yet ready or willing to pursue through their own established procedures. When we give formal weight to anything short of formal, final findings by other agencies, we create a situation that is rife with incentives for inter-agency gaming of the system, e.g., registering an objection with an agency about a matter that the complaining agency is not prepared to pursue itself, and requires the Commission to do extensive reviews in areas where it simply has no experience or authority.

In sum, at the intersection of two areas—non-FCC rules and no final determination of a violation by a responsible entity—our authority to impose conditions on a license transfer is at its weakest. Where non-FCC rules are at issue but there is a final, record finding of a material infraction thereof, there is a middle ground: we should take notice of that fact in deciding upon the application but not condition approval upon compliance. Finally, where extant FCC rules are involved, our power to condition a proposed transfer upon compliance with those rules and to enforce compliance, if necessary, is at its apex. We should never, however, impose conditions that have no basis in the text of the Communications Act, thus using our license transfer authority to impose new substantive obligations that Congress never contemplated.

Conclusion

There are many examples in the Commission's recent proceedings that illustrate the problems that I have described. I think the most forceful one, however, is that involving Southwestern Bell and Ameritech.

A recent article in the *Legal Times* by Randolph J. May, entitled "Any Volunteers? The FCC unfairly regulates 'by condition' when it extracts concessions from merging telecom companies," explains it well. I quote:

To merge their local telephone companies, SBC Communications and Ameritech had to obtain the FCC's permission to transfer the necessary licenses. After months of waiting for agency approval, the companies "volunteered" last October to abide by 30 regulatory conditions, filling more than 60 pages. Most of these conditions—such as requiring the merged company to substantially restructure, provide huge discounts for competitors' use of its network, and roll out advanced services to low-income households—go far beyond the requirements of the Communications Act or the FCC's rules.

Legal Times, March 6, 2000, page 62. And, as the article further explains:

[R]egulation by condition is unsound, because it imposes new burdens only on the merging parties. In the case of SBC and Ameritech, the merged companies are in no different position than other incumbent carriers, like BellSouth, which are not subject to the same requirements. The bottom line is that this process unfairly singles out merger applicants for regulation that, if justified at all, should be applied on an industrywide basis.

Id.

Mr. Chairman, I am aware that the Chairman of the Commission has established a task force to review the FCC's merger review process. As I have told him, as well as the capable staff heading that project, I applaud them for this step in the right direction. It is gratifying to know that my comments on this topic during my tenure at the Commission have been heard by the Chairman, and I deeply appreciate his responsiveness to my concerns.

It is not clear, however, that the scope of the task force's review will be adequate to solve the problems associated with merger reviews. The task force is focusing solely on the procedural issues involved in merger applications, primarily timing. (As an aside, I note that on the topic of time limits, the Commission's blanket 180-day (or 6-month) proposal is arguably inconsistent with section 5 of the Communications Act, which provides that with respect to applications not requiring a hearing the Commission should have "the objective of rendering a final decision... within three months from the date of filing.")

More importantly, however, I feel obligated to observe that the Commission's merger review team *has no plans to address any substantive issues related to merger review*, such as legal standards of review or the practice of conditioning mergers. Quick perusal of the web page dedicated to the review effort will confirm this.

Thus, Mr. Chairman, the Commission merger review does *nothing* to address the problems at which your legislation is aimed. While any procedural reforms are to be commended, the substantive issues must, in my opinion, be addressed. Reform of merger review that goes only to process, and leaves in place the problems of ill-defined standards and conditional grants, will have no effect on what commentators have called "the FCC's version of 'Let's make a deal.'" *Id.*

Thank you.

Mr. TAUZIN. Thank you very much, Commissioner.

I am pleased to—by the way, before I introduce Commissioner Powell, let me ask unanimous consent that the written statement submitted by Chairman Kennard be made part of the record. Without objection, it is so ordered.

[The prepared statement of Hon. William E. Kennard follows:]

PREPARED STATEMENT OF HON. WILLIAM E. KENNARD, CHAIRMAN, FEDERAL
COMMUNICATIONS COMMISSION

Thank you for the opportunity to submit this testimony for the record concerning the role of the Federal Communications Commission (FCC) in reviewing applications for transfers and assignments of licenses associated with mergers. I regret that this hearing was scheduled after I committed to appear at several overseas meetings. Nonetheless, I am pleased to discuss a critical service that the FCC performs for the American people, and to give you an update of our ongoing efforts to make the agency's merger review process more efficient, transparent, and predictable.

Mergers in the Context of the Evolving Communications Marketplace

Mergers and acquisitions involving firms holding licenses are not a new phenomenon. The FCC always has considered whether or not the transfers of control that are part and parcel of such transactions serve the public interest. We are not using novel procedures or applying new standards of review when considering these applications. We are, however, cognizant of the effect on our process of three accelerating and related trends since 1996: technological innovation, deregulation, and consolidation.

Technological innovation, visible in the explosive development of the Internet, the shift to "converging" digital and "broadband" technologies, and the creation and expansion of a multitude of new enterprises, offers both enormous promise for growth and competition and a significant threat to more established firms based on status quo technology.

Much of this innovation has resulted from deregulation under the Telecommunications Act of 1996 (1996 Act). After its passage, we shifted from the old model of regulated monopolies to a new model of achieving and maintaining vigorous competition in telecommunications markets. The opportunities opened up by the 1996 Act have stimulated incentives to innovate, and the resulting technological change has heated up competition.

Following passage of the 1996 Act, the industries that hold licenses and authorizations from the FCC have experienced unprecedented consolidation, involving both large numbers of mergers and individual mergers that have set record after record for the value of assets being bought. When MCI WorldCom and Sprint proposed what was then the largest merger in history, six of the ten largest merger deals in history were within the telecommunications sector. The MCI WorldCom-Sprint merger has since been overtaken, first by AOL-TimeWarner, and most recently by Vodaphone-Mannesman.

In some ways, mergers may assist competition and technological innovation. For example, mergers create more aggressive and efficient firms with larger pools of assets for research and development and reduce the transaction costs of cooperation among separate firms with complimentary technologies. On the other hand, existing firms may combine or purchase newer firms for defensive motives. They may seek to gain control over a new technology that competes with them in order to reduce the speed of its impact, or they may seek to preserve their position by size and leveraging control over related markets, rather than competition on the merits. Typically large mergers reflect a mixture of offensive and defensive strategies.

The rising tide of mergers brought to the FCC a flood of applications for transfers and authorizations. Some of the largest mergers have involved parts of the old telephone monopoly seeking to get back together. Other mergers have involved increasing concentration in markets where the 1996 Act has been relying on vigorous competition to achieve the goals of making advanced telecommunications services available as quickly and inexpensively as possible to all Americans. Because of their number, size, and ambiguous impact on competition in their industries, these mergers have generated intense public scrutiny.

The FCC Has a Legal Duty to Review Mergers

The FCC has the responsibility under Sections 214 and 310 of the Telecommunications Act to review whether the transfers or assignments of licenses or the authorizations sought in connection with a merger are in the public interest. Under the Communications Act, the FCC reviews applications relating to mergers in public proceedings, subject to the Administrative Procedure Act (APA) and judicial review. As a result, the FCC has addressed the often controversial issues surrounding these combinations. We do so in a forum that provides an opportunity to use our substantial expertise to examine the potential consequences of the proposed transactions with full participation by interested members of the public. Applying its expertise and taking the public comments into account, the FCC prepares a written decision addressing the issues. All of the FCC's decisions are subject to judicial review.

Competition remains an important consideration in these proceedings. The FCC must consider the impact of transactions on competition as part of the public interest standard. Also, *creating competition where none existed before* is a basic goal of the 1996 Act, but it is not the focus of the more general antitrust law provisions administered by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). In addition, *preserving competition* is of particular concern in an environment where vigorous competition is being relied on to achieve goals formerly served by regulations and where mergers of unprecedented number and size are taking place.

The FCC is Working to Make the Process Better

The dramatic increase in merger activity, the complexity of the issues involved, and the extensive public comment on major mergers have required a substantial commitment of the FCC's resources. The FCC and its staff have worked hard to meet this challenge. I have taken additional steps in the last several months to make the FCC's process for reviewing merger-related applications more efficient, transparent, and predictable.

We now have in place a Transactions Team within the Office of General Counsel to develop and implement measures to improve the merger review process. Since its creation, the Transactions Team has consulted with the Federal Communications Bar Association and the Antitrust Bar to develop proposals for improving our review process. On March 1, 2000, the Transactions Team presented specific proposals in a Public Forum at the Commission. Those proposals include:

- A timeline that identifies the stages of FCC review and assigns times for performing tasks with the goal of reaching a Commission decision on applications associated with even the most complex mergers within 180 days following public notice, as long as the applicants do their part by providing necessary information promptly and not making major revisions late in the process
- A home page on the FCC Internet site, launched on March 1, 2000, that will serve as a central location for providing information on the process of review and for tracking the progress of pending applications
- Clarifying instructions for filing applications and explaining the processes for considering them
- Streamlining procedures to encourage early and full disclosure of relevant information and efficient and meaningful public comment, and
- Continued cooperation with other agencies to avoid duplication and maximize efficient use of the relative strengths of the agencies involved.

These proposals can be implemented rapidly, without the need for changes in the FCC's existing procedural rules. Comments on these proposals are due by March 21, 2000 and we are already implementing several of them, subject to any changes that seem advisable in light of public comment. We believe that these proposals will achieve the goals of efficiency, transparency, and predictability, while preserving the FCC's valuable role as a forum for public consideration of these transactions by an agency with expertise in the industry.

In addition, we are working toward resolving the status of pending applications relating to proposed mergers of radio stations that would result in very high concentration of ownership in local markets. This week, I have circulated to the Commission a proposed policy to guide in the expeditious processing of these cases. As soon as this policy is approved, we will expedite and resolve cases like Cumulus Broadcasting.

The Draft Bill Would Deny the FCC Sufficient Flexibility to Resolve Merger Cases

Finally, I would like to specifically address some of the proposals in a draft bill circulating on the Hill this past week known as "The Telecommunications Merger Review Act of 2000." I believe that the steps we have taken and are taking address the issues of speed, certainty, and inter-agency cooperation in a manner consistent with the FCC's duties and responsibilities under the law.

In contrast, the proposed bill would limit regulation to rulemaking and impose drastically shortened time limits on FCC action. These solutions would create speed and certainty only by sacrificing the meaningful participation of the American people, by eliminating regulatory flexibility in a context where it is most essential, and by casting significantly increased responsibilities (but no additional resources) on the DOJ and FTC while eliminating inter-agency cooperation. The bill is, in short, a recipe for making scrutiny of mergers less public, less flexible, and less likely.

With respect to public participation, the FCC process offers the *only forum* where the merger is considered in a *public proceeding* conducted under the APA. The DOJ and FTC investigations are exercises in prosecutorial discretion, conducted under

the cover of confidentiality, with no requirement to explain action or inaction unless a lawsuit is initiated.

The bill requires final agency action within 60 or 90 days from the filing of an application, with no provision that the application be accurate or complete or that the applicant submit information to allow informed consideration by the agency or the public.¹ By statute, the public has at least 30 days from public notice (which can occur only after the application is checked for accuracy and completeness) to file petitions to deny an application, and additional time is needed to allow responses to the petitions. This leaves the FCC very little time to obtain any additional information it needs in order to analyze the transaction and prepare a decision addressing the issues, including those raised by the public, sufficiently to survive judicial review. Speed in the administrative process will do the parties little good if decisions are reversed by the courts.

Requiring regulation by rulemaking, as opposed to case-by-case adjudication, is particularly inappropriate in the context of evaluating mergers in markets where technology is rapidly evolving. Rules work best when the future is fairly predictable and we can anticipate with confidence what factors will be relevant and what standards will reflect sound policy. Rules take a relatively long time to enact and to change and would not adapt to the quickly evolving communications industry. Of course, this oversimplifies the issue, since the question is not whether there will be any rules—there always are—but how much flexibility the standards will allow.

The FCC Role Is Not Duplicative of Other Agencies

Finally, with respect to duplication with DOJ and the FTC, let me emphasize that the FCC has a special responsibility and somewhat different standard in cases involving the creation of competition to replace former regulated monopolies. We look at whether the proposed merger is consistent with the pro-competitive and market-opening goals of the 1996 Act, as opposed to the DOJ and FTC, which focus on possible injury to existing competition. As I noted previously, we also provide for public involvement in our review process and engage in procedures that are judicially reviewable. For these and other reasons, the Assistant Attorney General in charge of the DOJ Antitrust Division recently expressly disagreed with a tentative majority recommendation in the recent report of the International Competition Policy Advisory Commission (ICPAC) that the DOJ and FTC be given exclusive jurisdiction over competition issues in telecommunications. The report noted that ICPAC had not discussed its recommendations with the sector regulatory agencies and all members agreed that more study and consideration of the consequences of such action are needed before any final action.

In sum, I want to emphasize that the FCC plays a crucial role in the review of merger transactions in the communications industry, and we are taking the steps to improve our review process while preserving its integrity and unique contributions. The FCC seeks to preserve a public forum in which proposed mergers can be evaluated and responded to in a flexible way that is most appropriate in a rapidly evolving marketplace, and that makes most efficient use of the combined resources of federal agencies.

Thank you again for the opportunity to submit this testimony and for your attention to these important issues.

Mr. TAUZIN. Now, I am pleased to welcome the Honorable Michael Powell, FCC Commission. Mr. Powell.

STATEMENT OF HON. MICHAEL K. POWELL

Mr. POWELL. Good morning, Chairman Tauzin and Mr. Pickering. It is always a pleasure to have the opportunity to appear before you, particularly on this subject which I think is rightly the subject of various reform efforts. It is the topic of several pending bills in the House and Senate. It also now has been mentioned as the focus of an FCC transaction team.

Reforming the FCC's role in mergers is timely as the blinding pace of strategic consolidations in telecommunications and media markets continues unabated. I will offer some general background

¹The special 60-day treatment is questionable, both because it is based on competition issues, which the bill seeks to keep at other agencies, and because it is based on national market share, when local market share seems much more relevant.

on FCC review and compare briefly the distinctions between that process and the antitrust authorities. I will then offer some broad areas of consideration which I think would deserve the most focused attention by this committee and the Congress.

First of all, the Commission over time has come to interpret its obligation, which it has in the statute, of making an affirmative finding that a license transfer is in the public interest as a fairly broad mandate to shift the public interest burden to the applicants and to review the benefits and harm of the entire transaction. In selected transactions, this includes comprehensive merger analysis.

Let me briefly contrast the distinctions between the FCC's review and that of the antitrust authorities. The FCC review is not formally rooted in the antitrust statutes. It is not bound by judicial precedents in that area. In fact, the courts have held the Commission's decision that a license transfer is, "in the public interest" is entitled to "substantial judicial deference." And while the antitrust authorities must sue companies to block a merger, the FCC may block a merger or condition one on its own, with limited, if any, judicial review. The antitrust authorities must prove their case by a preponderance of the evidence to block a merger, whereas the FCC places the burden on the applicants to affirmatively prove the transaction is "procompetitive."

In most cases, the FCC's review follows the same line of analysis as that found in the antitrust merger guidelines. There are no actual, meaningful differences in most cases in the analysis than one finds with the antitrust authorities. For example, we define product markets, we define geographic markets, we make HHI assessments of concentrations in those markets. We make judgments about whether that market power results in anticompetitive effects. These are fundamentally the classic benchmarks of antitrust analysis applied by the antitrust authorities as well.

While many of the distinctions I outline below are often cited by opponents of duplicative FCC review, point in fact is that, in large measure, the reviews follow the same course of evaluation as is undertaken by the antitrust authorities.

It is hard to say there is no role necessarily for the expert agency on communications functions. There are certainly communications policies that may be implicated by a license transfer that are not encompassed in the antitrust statutes and given little consideration by the antitrust authorities.

The classic example in this area of concern is that of, for example, "diversity of voices" in media mergers. Congress has often chosen to protect such values in the statute, even where concentration would not rise to anticompetitive levels, for example in the cable horizontal ownership rules.

Thus, the Commission's review, in my opinion, could be effectively limited to matters that violate the statute and to policies that are not fairly encompassed within the Clayton and Sherman Acts. I would ask that my full testimony be submitted to the record where I proffer a number of reform options in each of these areas for your consideration, and I will only list them briefly here.

Mr. TAUZIN. Without objection, all the written statements of the witnesses are made a part of the record.

Mr. POWELL. Thank you, Mr. Chairman.

For example, with respect to duplicity, one thing that the committee would have to consider is the repeal of FCC authority under the Clayton Act. While the FCC has rarely, and to my knowledge never, invoked the Clayton Act for basis of review, under that statute it expressly has conferred authority to conduct merger reviews under that provision. Any attempt to reform the process that leaves that element in place would leave the Commission vested with full merger analysis authority.

Second, I believe requiring deference to the antitrust authorities' competitive analysis is warranted. There are other ways in which the Commission can express its views. For example, permitting the FCC to file comments with antitrust authorities in communications transactions would be one example.

Finally, I would limit FCC review to questions about whether the combined company would be in compliance with the Communication Act or, again, matters that are not fairly encompassed within the Clayton and Sherman Acts.

The second broad area of concern I would point to would be in the area of review standards and conditions. I believe that despite the emphasis in this debate on timeliness and process, that the real failings of FCC review stem from the standards and burdens applied in the mergers that do have some plausible statutory bases. In fact, with one or two unfortunate exceptions, most mergers are actually completed in a fairly expeditious amount of time, at least as antitrust analysis goes. How long a merger may take is certainly a source of uncertainty, but that uncertainty exists with the antitrust authorities as well and thus short FCC deadlines alone may only have a marginal effect on that uncertainty.

The uncertainty really stems from the result of not knowing exactly what the FCC will focus on, or what the FCC will require in order for it to deem a merger "procompetitive" under the public interest standard. The public interest standard clearly lacks guiding principles that can more predictably govern Commission decisions.

Whatever the merits of the standard in some context, and I do believe there are some, its applications to merger analysis is flawed. For one, I believe the most significant flaw of our standard is that it demands that the applicants prove a merger is procompetitive, rather than placing the burden on the government to prove that it is harmful. Indeed, under this standard the courts have even required that the Commission articulate a strong basis for actually allowing a merger to go through. Thus, the Commission's process necessarily invites a vague and open-ended scramble for the applicants to prove procompetitive benefits and also invites an equal torrent of parties demanding all kinds of concessions to get over the procompetitive hurdle.

Under the Administrative Procedures Act, the Commission ends up by law having to consider and respond to any and all of these showings, which results in a lot of the uncertainty and delay that concerns us.

I would note this is in stark contrast to antitrust authority, which places the obligation on the government to prove that the merger is harmful, not that it is beneficial. If we have faith in markets and deregulation, I believe that the government should always bear the burden of stopping a combination, rather than market

participants proving it would be good to the satisfaction of regulators. Moreover, I believe focusing on harms and measures to remedy those harms is a more focused and disciplined endeavor, than a subjective and undisciplined search for procompetitiveness.

I have other problems with this standard as it is applied as a simple balancing test. I am uncomfortable with a standard that simply places harms on one side of the scale and then collects and places any hodgepodge of conditions, no matter how ill-suited to remedying those identified harms, on the other side of the scale.

The balancing approach leads to a number of problems. First, it creates a great temptation to load up the benefits side of the scale with a big wish list of conditions that are nongermane to the merger's harmful effects; that is, a pebble of harm could result in a mountain of conditions to demonstrate procompetitiveness.

Second, it makes it easier for identified harms, even significant ones, to be visited upon the public in exchange for other benefits.

Let me elaborate on this point with a humorous example. You might come up to me and ask if it is all right to beat my dog, if you give my dog a squeaky toy in exchange. The dog may appreciate the addition to his collection of squeaky toys but not necessarily enjoy the beating nonetheless.

When conditions are procompetitive but don't necessarily do anything to remediate the harms identified, they nonetheless will be visited on the public irrespective of the benefits that are identified on the condition side.

My third concern with the conditions is that they are sought more often as surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded in a rulemaking. There is absolutely nothing voluntary about the regulator-regulatee relationship, and the suggestion that anybody proffers out of the goodness of their heart a condition in the context of a merger is pure fantasy. It is more disturbing when one considers that, by virtue of the conditions being deemed voluntary, they are probably insulated from judicial review.

I assure you the Commission would be heard to say in court that the issue is moot because the parties had agreed to those conditions and that no Commission action caused them to come into being.

Possible suggestions in the reform area. Establish standards or thresholds for determining which, if any, license transfers should be subject to more comprehensive review as Commissioner Furchtgott-Roth has identified.

Second, which I think is the critical crux of the matter, place the burden back on the Commission to demonstrate the transfer would not be in the public interest, rather than the other way around. And also require any conditions to actually be related to or cure a violation of the statute or clearly identified public harms.

Finally, I would say a word about process, which has been a chief concern among parties contemplating merger transactions. This is especially concerning to a competitive, technology-focused industry that is running on Internet time. I do, too, applaud the Commission's self-initiated efforts in this area, though much work remains to be done. I, too, would emphasize that, while it does something

to increase the procedural process, it does nothing to address the fundamental standards.

Some of the pending legislative initiatives that have been offered would require the Commission to grant or deny the merger applications within a set period. I believe that time constraints are wise, but I do caution they should not necessarily be completely rigid or unbending. Mergers are fact-intensive reviews that are not always easily boxed into particular time windows. They may be fine if you accept the presumption that the merger is procompetitive.

But in those cases when they may actually visit substantial harm on the public, we would want the Commission, or whatever authority, to engage in as fulsome and thorough review of that as possible.

I believe that the best approach may be to create temporal benchmarks in which the Commission is obligated to take action and only upon full authorization of the Commission be permitted to proceed with the further aspects of the investigation and only for very confined and limited periods of time.

In my written statement, I offer just a strawman of a possible procedural outline, including some benchmarks that I think are also consistent and faithful, to what Congress is trying to achieve and would provide some suggested frameworks for doing so.

With that, I thank you for the opportunity to be here, as always; and, moreover, I offer my personal commitment and assistance on a going-forward basis as you work through this important and difficult issue.

[The prepared statement of Hon. Michael K. Powell follows:]

PREPARED STATEMENT OF HON. MICHAEL K. POWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and other distinguished members of the House Subcommittee on Telecommunications, Trade and Consumer Protection. Thank you for inviting me here to testify on the "Telecommunications Merger Review Act of 2000."

The FCC's "merger" review process is rightly the subject of various reform efforts. It is the topic of several pending bills in the House and Senate, and is now the focus of an FCC Team. Reforming the FCC's role in mergers is timely, as the blinding pace of strategic consolidations in telecommunications and media markets continues unabated. I appreciate this opportunity to offer my views about the fundamentals of a sound and more efficient merger review process. After providing some background, I will discuss three broad areas where reform should be considered: (1) the duplication of merger review between the FCC and U.S. antitrust authorities; (2) the standards applied by the FCC to mergers and the selection of conditions; and (3) the FCC's review process, including its timeliness. Although I know that there is a specific proposal that is the subject of this legislative hearing today, my remarks will focus on these broad areas of concern and offer several reform options for each area.

I. BACKGROUND

The FCC's authority to review license transfers derives principally from various sections of Title III of the Communications Act of 1934 (entitled "Provisions Relating to Radio") that direct the Commission to review applications to transfer licenses and determine "whether the public interest, convenience, and necessity will be served by the granting of such application..."¹ If the Commission so finds, it must grant the application. Section 214 of the Act is the source of authority for approving applica-

¹ 47 U.S.C. § 309(a); *id.* §§ 308, 310(d). Though we do have some express antitrust authority under the Clayton Act, to my knowledge the FCC has rarely (if ever) invoked such authority as the basis for reviewing a merger merger. *See* 15 U.S.C. § 21(a).

tions for the acquisition and transfer of lines by common carriers.² Thus, strictly speaking, the precipitating event for our review is a request to transfer licenses and lines from one company to another. We are not, it should be emphasized, specifically directed by Congress to review the potential anticompetitive effects of the underlying transaction itself.

Nonetheless, the Commission, over time, has come to interpret its obligation to make an affirmative finding that a license transfer is in the public interest as a fairly broad mandate to shift the public interest burden to the applicants and to review the benefits and harms of the transaction itself.³ In selected transactions, this has come to include comprehensive merger analysis. That is, an evaluation of the *competitive* benefits and harms of the entire transaction rather than a more limited determination that the lines and licenses would be put to valued public use.

It is useful to contrast FCC review with that of the federal antitrust authorities (Department of Justice and the Federal Trade Commission). The FCC's review is not formally rooted in the antitrust statutes and thus is not bound by judicial precedents in that area. In fact, the courts have held that the Commission's decision that a license transfer is "in the public interest" is entitled to "substantial judicial deference."⁴ Additionally, while the antitrust authorities must sue companies in court to block a merger they believe is harmful, the FCC may block a merger (technically a license transfer) on its own, with limited, if any, judicial review. Moreover, this difference affects the burden of proof. The antitrust authorities must prove their case by a preponderance of the evidence to block a merger, whereas the FCC places the burden on the applicants to affirmatively prove the transaction is "pro-competitive," a fairly recent pronouncement.⁵

II. DUPLICATION OF MERGER REVIEW FUNCTIONS

Proponents of FCC review in defending the duplicative merger review process often cite the distinctions I have just outlined. However, the actual differences in analysis and outcome when one examines actual cases are substantially less. In most cases, the FCC's review follows the same line of analysis as that found in the merger guidelines employed by the antitrust authorities. We define product and geographic markets, we evaluate market power in those markets, we propound on the anticompetitive effects of the combination, and we consider efficiencies and barriers to entry to mitigate those effects. In the main, there are no meaningful differences in the analysis among the agencies. Thus, despite the different foundations, procedures and standards among the respective authorities, the evaluations by the FCC and the antitrust authorities are largely duplicative.⁶ This imposes significant costs

²See 47 U.S.C. § 214(a)-(d).

³See, e.g. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999); Applications For Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TeleCommunications, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 98178, *Memorandum Opinion and Order*, 14 FCC Rcd 3160 (1999); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Rcd 18025 (1998); Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985 (1997).

⁴*SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995), quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

⁵See Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 19994, 20061, ¶16, 153 (1997). *But see also* Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, Report No. LB-96-32, *Memorandum Opinion and Order*, 12 FCC Rcd 2624 (1997). Eight months before the Bell Atlantic/Nynex decision, the Commission concluded in the SBC/PacTel proceeding that "the proposed transfer will result in procompetitive effects, efficiencies, and other public interest benefits that could be real but, if they occur, will not likely be dramatic. We emphasize that it is not these benefits of the proposed transfer, but rather its lack of any significant and foreseeable anticompetitive effects, that has led us to approve it." *Id.* at 2661 ¶84 (emphasis added).

⁶I would call the Committee's attention to a recent report issued by the Department of Justice's International Competition Policy Advisory Committee, which specifically addresses the overlapping merger-related functions of the U.S. antitrust authorities, sectoral regulators like the FCC, and the states. See Final Report, Justice's International Competition Policy Advisory

on a transaction. The costs to the parties include greater uncertainty of result, increased legal costs to defend a proposed transaction before multiple agencies, and greater uncertainty of time before closure. The government bears a cost as well with the duplicative expenditure of resources inherent in concurrent jurisdiction. In the FCC's case, scarce resources are diverted from other critical activities, for example section 271 applications.⁷

This is not to say, however, that there is no role for the expert agency in some transactions. There are communications policies that may be implicated by a license transfer that are not encompassed in antitrust statutes and, thus, given little consideration by the antitrust authorities. The classic example is the impact on "diversity of voices," when media licensees merge. Congress has often chosen to protect such values, even where a consolidation might not raise classic concentration concerns.⁸ In these cases, the FCC's review does not duplicate that of the antitrust authorities.

In sum, while today's duplicative merger process within the federal government needs to be reformed, I believe that there is room to preserve a role for the FCC that is more complimentary or supplementary. The Commission should be constrained to consider only issues such as whether the merger would violate an express provision of the Communications Act or the Commission's rules. In addition, it is appropriate for it to consider the merger's impact on other communications policies such as media diversity and universal service that are not appropriately considered by antitrust authorities. However, I believe that the Commission should be required to defer to the antitrust authorities' competitive analysis and leave it up to them (and the courts) to address specific competitive harms that they identify.

Finally, a full-blown merger review is not the only way for the FCC's expertise to come to bear. The Commission could file comments with the appropriate antitrust authority reviewing a merger or issue an advisory opinion on a given merger.

Reform Options

- Require deference to antitrust authorities' competitive analysis. Permit FCC to file comments with antitrust authorities in communications transaction.
- Limit FCC review to questions about whether the combined company would be in compliance with the Communications Act, and matters that are not fairly encompassed in the Clayton and Sherman Acts.

III. REVIEW STANDARDS AND CONDITIONS

There are two areas in which standards come into play. First, there is a serious question about what standards the Commission employs for determining which license transfers receive extensive merger evaluation. Commissioner Furchtgott-Roth has spoken extensively about this problem and I will not repeat his criticism, but I do agree that the Commission's process on this point is vulnerable to challenge as arbitrary. The second standard issue involves the standard under which we review mergers: the public interest standard.

The "public interest" standard has been a part of the law since the inception of the Federal Radio Commission and, its successor, the FCC. This standard was introduced to communications regulation in a time when scholars and Congress believed in the supremacy of regulators in ordering economic relationships. But we are now in an era just after the pro-competitive, deregulatory 1996 Act in which Congress sought to remove decisions from the "enlightened regulator" to the market. It is hard to imagine a member of Congress today expressing the view articulated by Senator Clarence Dill, in the 1927 Radio Act debates, that the public interest standard would gain meaning by the staffing of the Commission with "men of big abilities and big vision."

I am substantially less comfortable than Senator Dill with a standard that depends heavily on the quality and "vision" of those who happen to occupy a Commission seat at any given time. The standard clearly lacks guiding principles that can more predictably govern Commission decisions. Whatever the merits of the standard in some contexts (and there are some), I believe its application to merger analysis is flawed. Particularly, since its has been employed as a simple "balancing process" that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits.

Committee to the Attorney General and Assistant Attorney General for Antitrust at 142-154 and Annex 3-B.

⁷It is important to note that the FCC has substantially fewer people trained in competitive analysis to review mergers than does DOJ or the FTC.

⁸See, e.g., 47 U.S.C. § 533 (Cable Television Ownership Restrictions) and Pub. L. No. 104-104, § 202 (Broadcast Ownership).

Consistent with my long-standing concerns regarding our license transfer process, I have fundamental difficulties with the public interest standard as developed and applied in the Commission's merger reviews. Simply put, I am very uncomfortable with a standard that places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale. This balancing approach leads to a number of problems: *First*, the approach creates a great temptation to load up the benefits side of the scale with a big wish list of conditions that are non-germane to the merger's harmful effects. *Second*, the approach makes it easier for identified harms, even significant ones, to be visited upon the public in exchange for other benefits. *Third*, the conditions that are sought are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking.⁹

A. The Problem of the Mountain and the Pebble—To conceptualize the problems with the public interest standard when reviewing a license transfer (*i.e.*, a merger), consider a simple balancing scale of the “see-saw” variety. On the left side of the scale are public interest harms and, on the right, public interest benefits. The balancing approach requires that the benefits outweigh the harms. If the harms weigh but an ounce more than the proposed benefits, the standard (if faithfully applied as articulated) would require us to block the merger. This approach is troubling on one level, for if the government were neutral with respect to the asserted benefits, it still could be compelled to stop a merger based on essentially negligible harms. This has led me to believe that perhaps the FCC should bear the burden of demonstrating a basis for blocking or conditioning a merger (much as the antitrust authorities do) rather than placing an affirmative duty on applicants to show their combination is pro-competitive.

The more serious problem arises with the public interest “scale,” however, when the Commission, rather than weighing the harms against the *proffered* benefits, attempts to tip the balance by adding weight to the benefits “platter” with conditions. The public interest standard, as the Commission applies it, does not require that the conditions cure or remedy the identified harms. The conditions need only outweigh the harms. Thus, the Commission is free to compensate for a pebble of harm on one side of the public interest scale by throwing a mountain of purportedly beneficial conditions on the other side of the scale. In other words, when conditions are not calibrated to remedy harms, there is no constraint on how voluminous or unrelated they might be. The consequence of this approach is that the slightest harm opens up a quarry of “would-be-nice-to-haves” that can be piled on the scale. Moreover, the coercive effect of having the applicants over a barrel hoping to gain merger approval dramatically improves the chances that the companies will “agree” to abide by the conditions. Thus, the temptation and the enticement to stack the scale with precious gems is irresistible to competing companies, interest groups and the Commission itself.

B. “Poor Joshua!”¹⁰—The second difficulty I have with the Commission's merger standard is that in theory, it will allow a merger to go forward that it finds will harm the public, as long as the public gets something good in return. In the humorous extreme, one could analogize this to allowing a stranger to beat your dog as long as he commits to giving the dog a bone and some fun squeaky toys. No doubt, the “ol’ boy” has been quite anxious to get a bone and add to his saliva-laden collection of playmates, but not at the expense of a beating. Of course, this analogy is perhaps less humorous if one assumes that the public interest is entitled to better treatment than your dog.

Jests aside, the point is that when merger conditions are not designed to remedy harms, all the unrelated benefits in the world will not cure the loss to the public. If one is convinced of the significance of a proposed merger's harms, it is unsettling that the merger would proceed without significantly mitigating those harmful effects with remedial conditions.

C. Wither Thoughtful Deliberation?—I think it a profound mistake to use license transfer proceedings as a way to advance policies of general applicability that

⁹ A fuller recitation of my critique of standards and conditions can be found in my separate statement, dissenting in part, in the SBC/Ameritech merger Order.

¹⁰ This famous refrain is drawn from *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (J. Blackmun, dissenting) (holding that state had no constitutional duty to protect Joshua, a child, from his father after receiving reports of possible abuse). In *DeShaney*, Justice Blackmun wrote: “Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . dutifully record[] these incidents in [their] files.” *Id.* at 213.

are otherwise, and more appropriately, the subject of rulemakings. My reasons are three:

First, no matter how much we try to include other parties, a merger review is primarily an intimate, bilateral dance between the government and the applicants. The nature of this dance is one of negotiation. Where there are some harms and the question is finding a set of conditions that will allow the merger to proceed, the tango proceeds until there is a meeting of the minds between the government and its suitor. The parties inevitably go back and forth in an effort to find a compromise where the government gets a satisfactory list of conditions, but not so many that the applicants walk away from the deal. Thus, the process is not sufficiently fulsome to broach broader policy questions. The point also shows the importance of requiring conditions to be merger specific.

Second, by importing parts of rulemakings and transforming them into merger conditions, we risk substantially confusing both the industry and state commissions with respect to rules previously adopted. The conditions often overlap significantly with many of our ongoing proceedings to implement the Telecommunications Act of 1996. In tackling these other proceedings, the Commission must consider more than the interests of the merging parties. Relying on conditions that overlap with more general proceedings will require us to distinguish carefully this conditioning exercise from our broader duties under the Act.

Third, I personally am uncomfortable essentially promulgating rules without the deliberative process of notice and comment normally afforded in a comprehensive rulemaking. Moreover, I think it unacceptable to pursue matters as conditions where they are insulated from judicial review. In a classic rulemaking, parties have the right to petition for review in court. But when a merger is approved with conditions, the applicants are unlikely to pursue a challenge to terms that regulators will claim they acceded to “voluntarily” as the price for gaining favorable approval.

Finally, I do not subscribe to an essential assumption of this process, that is, the idea that a regulated entity can “voluntarily” offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship. And, even if there were, I do not believe that the guiding structures of the regulatory process (either rulemaking or adjudication) should be supplanted by a unilateral offer from a license transfer applicant.

Reform Options

- Establish standards or thresholds for determining which, if any, license transfers should be subject to more comprehensive review.
- Establish guiding principles to curtail the breadth of the public interest standard.
- Require conditions to either cure a violation of the statute, or remedy clearly identified public harms.
- Place the burden on the Commission to demonstrate that a license transfer would not be in the public interest.

III. PROCESS

This brings me to my last area of consideration, the process of reviewing mergers at the FCC. Chief among the concerns of parties contemplating merger transactions is how long will it take to get through all of the regulatory hurdles. This is especially concerning to a competitive, technology-focused industry that is now running on Internet time. I believe that reform in the substantive areas I have already discussed could alleviate much of the delay of major transactions caused by monkeying with competitive issues that are not within our core expertise, inviting and addressing all sorts of non-germane challenges and negotiating “voluntary” conditions. But the process itself also needs examination.

The FCC Office of General Counsel’s “Transactions Team” has recently proposed a 180-day timeline for completing our review of major transactions. Under the staff’s proposal, the clock would start at the release of the FCC staff’s “Public Notice” announcing the applications underlying the transaction have been accepted for filing and inviting the filing of petitions and comments. I applaud the Commission’s self-initiated efforts in this area, though much work remains to be done.

Some of the pending legislative initiatives that have been offered, including the measure that is the subject of this hearing today, would require the Commission grant or deny the merger applications within a set period (*e.g.*, 90 days) from the date the application is filed. I believe the current statute itself offers some guidance as to how to structure the chronology of review. I would note that section 5(d) of the Communications Act, added by Congress in the early 50s, provides for a non-binding “objective” of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date

of the hearing in all hearing cases. In addition, Section 309 of the Act, especially subsections (d) and (e), provide a well-understood process of handling all Title III applications and oppositions thereto.

I believe that time constraints are wise, but must not be completely rigid or unbending. Mergers are fact intensive reviews that are not always easily boxed into particular time windows. Moreover, short time frames may be fine for pro-competitive mergers, but in the face of real public harm, it is important for the government to act thoroughly and decisively. Short time frames may also allow the parties to game the process to deny the Commission the information it needs to make an informed judgment in order to run out the clock. I think the more prudent approach is to set clear temporal benchmarks and require the full Commission to authorize any further review, and then only for limited blocks of time. Let me offer an example:

- (1) **Filing and Quick-look:** Once an application is filed, the appropriate Bureau will give the application a “quick-look” to ensure the application is complete. If so, the application is accepted and placed on public notice (within 5 to 10 business days).
- (2) **Comment Period:** For 30 days, parties in interest have an opportunity to petition to deny the application under section 309, and the applicant will be afforded the opportunity to file a reply.
- (3) **Stage 1 Review:** After the comment period ends the bureau will review the application to determine if the transfer would result in public harms (45 to 60 days).
- (4) **Commission Review:** At the end of stage 1 review, the Commission by formal action must either:
 - (a) Grant the application (and denying the petitions to deny) with or without conditions;
 - (b) Authorize further investigation by the staff for a defined interval (*e.g.*, 60 days), triggering stage 2 review, with perhaps additional comment; or
 - (c) Designate the application for administrative hearing in accordance with section 309 of the Communications Act and applicable provisions of the Administrative Procedures Act. (Congress could authorize a less onerous paper hearing, than a hearing on the record.)
- (5) **Decision:** The vast majority of cases should take no longer than 60 to 90 days. In the most complex cases, where significant and germane public harms have been identified in the Stage 1 review, our final decision should be rendered within six to nine months from the filing of the application.

IV. CONCLUSION

I look forward to continuing to work with Members of Congress and with my colleagues on the scores of transactions that are likely to come before us and the initiatives to reform this process.

Thank you for your attention. I will be happy to answer any questions you may have.

Mr. TAUZIN. Thank you.

Let me thank you both for some very instructive testimony, and it is exactly what we were hoping we would receive today, some ideas and thoughts about how we might put our arms around this thing and solve it. I thank you very much.

We are pleased to welcome Mr. Bruce Ryan, a partner of Paul, Hastings, Janofsky & Walker here in Washington, substituting for Mr. Richard Weening of Cumulus Media. Mr. Ryan.

STATEMENT OF BRUCE D. RYAN

Mr. RYAN. Thank you, Mr. Chairman and members of the subcommittee. I am outside counsel to Cumulus Media and have represented them in connection with matters before both the Department of Justice Antitrust Division and the Federal Communications Commission.

I thank you for the opportunity to appear before you today in connection with the consideration of the Telecommunications Merger Review Act of 2000.

Richard Weening, the Executive Chairman of Cumulus, apologizes very much for not being able to attend this morning due to an unavoidable and last-minute complication, but we do thank you for allowing me to substitute for him.

Cumulus Media is a radio broadcasting company based in Milwaukee, Wisconsin, which is focused on the acquisition, operation, and development of radio stations in mid-sized cities throughout the United States. Including acquisitions somewhere in the FCC approval process, Cumulus now owns, operates or has agreed to acquire over 300 radio stations in over 60 cities in the U.S.

By number of stations, Cumulus is now the second largest radio station owner in the United States, assuming that the proposed merger between Clear Channel Communications and AM/FM is completed as planned.

In the Telecommunications Act of 1996, Congress changed the rule as to the number of radio stations that one person or company could own or control in a city of a given size. The former two-station duopoly rule was replaced in Section 202(b) of the Telecom Act with a new set of ownership limits that specified the exact number of commercial radio stations that any one party may own, operate or control.

The statute set from five to eight stations, depending on the total number of stations providing service in that location. These revised ownership limits in the statute were designed to help radio operators create clusters of multiple radio stations that could operate for less through cost savings and other efficiencies, while delivering more to listeners and advertisers within their service areas.

The result of this congressional plan, we believe, has been to revitalize radio, enabling it to better compete with newspapers, television, and other advertising media and to become generally a much more viable business.

Although the FCC has incorporated Section 202(b)'s ownership limits into its own regulations, the FCC also currently engages in detailed competitive reviews of radio mergers and acquisitions as part of the license transfer approval process. The FCC does this pursuant to authority it claims under the public interest standard of Section 310(d) of the Communications Act.

Cumulus, Mr. Chairman, has three primary concerns with this approach. First, we believe strongly that the FCC cannot lawfully shrink the ownership limits of the Telecom Act. Since Section 202(b) already delineates with precision the number of radio stations that a single party may own in a local market of a given size, we believe that the FCC does not have a proper role to play in formulating a different policy based on its general views of the public interest.

Second, we believe it imposes an unnecessary burden and simply is not a sensible use of government resources for the FCC to review acquisitions based on the same type of market concentration concerns that the Department of Justice already considers, and this appears to be what the FCC is doing in the case of radio, as Commissioner Powell described this morning.

To date, the FCC has not articulated any justification for imposing this additional layer of competitive evaluation on radio mergers and acquisitions, and the FCC has not articulated any clear stand-

ards to govern its evaluation. The proper course is to leave such review where it belongs, with the expert agencies charged with enforcing the antitrust laws.

Third, the unusual combination of the small size of many radio transactions, especially in the smaller and mid-sized media markets, and the need to obtain FCC approval of the acquisitions often means that the Hart-Scott-Rodino Act effectively has been stood on its head. Not only does the government, through two agencies, have the power to investigate small radio acquisitions, but it faces no time deadline in doing so. The result is that the parties to these relatively small deals have sometimes had to endure costly and duplicative competitive reviews, even for periods of time beyond those applicable to much larger transactions, and we mention a few of them in the prepared testimony.

In our testimony, we describe some of Cumulus' experience under the current regulatory system and the reasons why we believe that the proposed bill may bring about helpful change. While most of Cumulus' radio license transfers have been processed very efficiently and promptly by the FCC staff and we believe the staff deserves credit for its diligent efforts to keep up with a sharply increased workload since the Telecom Act, some applications unfortunately have been sidetracked by subjective case-by-case assessment of competitive issues that are wholly outside the FCC's written rules.

Delays and unnecessary regulatory burdens of this sort often threaten to disrupt small radio transactions and other transactions and can cause serious financial hardship to parties. We believe this legislation would help by shortening the FCC's merger review process by requiring action to be completed on most license transfer applications within 90 days. It also would help clarify the role of the FCC by eliminating duplicative competitive reviews and by requiring that denials or conditional approvals of applications be based solely on the requirements of existing FCC rules and regulations.

Mr. Chairman, that concludes my testimony. I thank you, again, for the opportunity to appear today; and I would be happy to answer any questions the subcommittee may have.

[The prepared statement of Richard Weening follows, as presented by Mr. Ryan:]

PREPARED STATEMENT OF RICHARD WEENING, EXECUTIVE CHAIRMAN, CUMULUS MEDIA INC.

Good Morning, Mr. Chairman and Members of the Subcommittee. I am Richard Weening, Executive Chairman of Cumulus Media Inc. Thank you for inviting my testimony. While the bill that is the subject of this hearing may primarily be focused on the regulatory approval process for large telephone company mergers and major multi-media transactions like AOL-Time Warner, based on Cumulus's experience with radio station license transfers since the passage of the Telecommunications Act of 1996, we also are keenly interested in the subject matter of the "Telecommunications Merger Review Act of 2000".

Cumulus Media Inc. is a radio broadcasting company based in Milwaukee, Wisconsin. We are focused on the acquisition, operation and development of radio stations in mid-sized U.S. cities. Arbitron ranks markets by size from 1 to 275. We generally focus on markets ranked 50 or smaller. Including acquisitions somewhere in the FCC approval process, we now own, operate or have agreed to acquire over 300 radio stations serving over 60 cities across the United States. By number of stations, Cumulus is now the second largest radio station owner in the U.S, assuming the Clear Channel-AM/FM merger is completed as planned.

This morning I would like to describe for the Subcommittee some of the experiences of my own Company and how those experiences may illustrate the need for the type of legislative action you are considering.

BACKGROUND

The Telecommunications Act of 1996 and Its Positive Impact on Radio

In Section 202(b) of the Telecommunications Act of 1996, Congress changed the rules as to the number of radio stations that one person or company could own or control in a city of a given size. The two-station “duopoly” limit was replaced with a new rule that allows ownership of five to eight stations depending on the total number of stations providing service to the city. In making the new rules, Congress attempted to balance the urgent economic and competitive realities that dictated multiple-station ownership with the avoidance of undue concentration of control. To achieve this balance, the revised ownership limits were designed to help owners create “clusters” of multiple radio stations that could operate for less—while delivering more to listeners and advertisers within their service areas—and, at the same time, become or remain viable businesses.

Subsequent experience under the Act has confirmed the wisdom of Congress’s judgment on this issue. Our experience shows that five or more stations operated as a cluster not only is critical to achieving operating economies of scale, but is essential to making radio competitive with other media. These multiple radio station clusters can afford to operate live and local programming on each station, while sharing facilities and support personnel to reduce operating costs. More importantly, multiple radio clusters can offer advertisers a range of choice and flexibility in demographic targeting that was previously only available from newspapers and television.

Competing with newspapers and television is a major sea change for radio. Here’s why: Radio has always had a disproportionately small, 10% share of the total advertising pie. I say “disproportionately” because radio actually commands over 40% of the total time consumers spend with media. The conventional wisdom is that this anomaly is due in part to the fact that any single radio station format is targeted to reach only a single demographic target, while the sections of a newspaper and different television programs offer advertisers the choice of many targets. In short, for many advertisers, television and newspaper offered more flexibility and was simply easier to buy.

Under the Telecommunications Act, multiple-station clusters can now offer different stations like the sections of a newspaper—putting radio on a level playing field with entrenched newspaper monopolies and broadcast television. And to the extent that these new multiple-station clusters can access a share of the relatively much larger budgets historically allocated to newspaper and television, the radio business model becomes viable and everyone wins. The advertiser gets a real alternative to newspaper and TV. The listener gets a better programming product with live and local on-air personalities. The community gets a viable business.

In the mid-size markets we serve, the economic problems of radio were typically more severe, and the positive impact of the Telecommunications Act is even more plainly evident. In the mid-size markets, multiple-station ownership is driving a renaissance for local radio, giving small communities greater choice and diversity in music and sources of information. Local advertisers also stand to benefit from the diverse formats and broad reach of the stations, and the ability to negotiate competitively priced advertising buys.

I did a little research into whether the members of Congress who framed the Telecommunications Act understood the unique economics of radio in the mid-size and smaller markets. In fact, they did. They appreciated the special challenges facing radio in the smaller markets and addressed these needs with structured tiers in the statutory ownership limits to permit consolidation of station ownership in both smaller and larger markets. As Senator Burns observed when considering that legislation, radio ownership restrictions in mid-size and smaller markets “handcuff broadcasters and prevent them from providing the best possible service to listeners in all of our States.” 144 Cong. Rec. 92, S7904 (June 7, 1995). Similarly, Senator Pressler noted that, following earlier FCC liberalization of radio ownership restrictions, “economies of scale kicked in, stations gained financial strength in consolidation, and competition for advertising improved.” 141 Cong. Rec. 94, S8076 (June 9, 1995). The legislation’s proponents thus accurately foresaw an “immense resurgence and burst of energy from new companies” following the further ownership deregulation in the Telecommunications Act. 141 Cong. Rec. 95, S8198 (June 12, 1995) (statement of Senator Pressler).

The Telecommunications Act has had exactly the effect intended by Congress. In virtually all markets, but particularly where help is needed the most—the smaller markets—radio is undergoing a renaissance characterized by more live and local programming, more advertisers, more revenue and more service to the community. This has resulted in significant new competition for newspapers and television.

The Cumulus Model

The Cumulus business strategy is exactly what the Act envisions. We acquire independently owned radio stations and combine them into a cluster to share infrastructure resources like engineering, accounting, physical facilities and the like. This allows us to reduce operating costs, and then use the cost savings and efficiencies gained through consolidation to help fund increased investments in research, programming and sales. Our primary approach is to enhance the quality of radio for listeners, which in turn strengthens the power and utility of the radio medium for advertisers. The result is a revitalized group of radio stations capable of increasing market share against newspaper, television and other media by delivering more choice to advertisers and a better product to listeners.

Typically, we replace satellite-delivered programming (which often was all that the individual small station owner could afford) with locally-originated content and live on-air personalities, thus dramatically improving the quality of each station's programming. We also employ sophisticated research techniques to ensure that each station is delivering the product the listeners want, "brand" each station as a separate entity, and substantially upgrade and expand the sales organization. Each station also has its own programming director to manage the product and its own sales manager to coordinate the sales team, as we increase employment opportunities on the programming and sales side by hiring many people without prior radio experience. In addition, an information technology infrastructure is being employed that allows Cumulus stations in one market to benefit from innovations developed by Cumulus stations in other markets.

We also know that, contrary to the understandable fears and expectations expressed by some FCC Commissioners, consolidation in radio means *more* not less, localism and *more*, not less, diversity in programming. I am pleased to say that we are making this happen every day in over 60 cities across the nation.

FCC and DOJ Reviews of Radio Transactions

In the initial period following passage of the Telecommunications Act, most radio consolidation occurred in the larger markets, and the FCC did not play a particularly active role in reviewing market concentration. The Department of Justice ("DOJ") reviewed many of these transactions under the Hart-Scott-Rodino ("HSR") Act because they were generally large mergers involving multiple markets that met the HSR size thresholds. The HSR statute required advance notice to the DOJ, but also required the DOJ to conduct its review promptly, within the specified statutory time periods. In a number of these large merger cases where DOJ had competitive concerns, the parties agreed to spin-off several stations in one or more cities to satisfy those concerns. At the same time, the FCC would generally grant the license transfer applications in a timely manner.

As the Telecom Act moved into its second and third years (1997 and 1998), radio consolidation moved to mid-size markets, with Cumulus and several other companies leading the way. Cumulus began making its acquisitions in mid-1997, and we accelerated our activity rapidly over the next two years. Initially, the DOJ was not active in investigating mid-size market transactions, as most were not reportable under the HSR Act. The FCC also acted fairly promptly on license transfer applications.

Beginning in about late 1998, however, FCC applications for a number of transactions, including some filed by Cumulus, began to slow down considerably. We understand that was due, at least in part, to internal agency debate regarding the appropriate role of the FCC in reviewing these transactions for market concentration concerns and the standards it should use in such reviews. Cumulus and other firms maintained that the Act had already specified the number of radio stations that could be owned in any one market, and thus that the FCC did not have a proper role to play in formulating a different policy. The FCC has not agreed with this position.

What eventually developed is the current FCC practice of issuing "special" public notices regarding certain license transfer applications, based primarily on publicly reported levels of radio advertising revenue shares, even where the license transfer applications fully comply with the numerical station limits set forth in the Telecom Act. These notices generally invite public comment on market concentration issues whenever a license transfer application would result in the buyer's acquiring 50%

or more, or the buyer and another radio owner acquiring 70% or more, of the radio advertising revenues in a local Arbitron Metro (as measured by the standard industry revenue estimates compiled by BIA Research, Inc.). To date, however, the FCC has not issued any rule or formal policy statement on this practice, and the FCC has not articulated precisely what policy objective it is trying to achieve or what standards it employs in this process.

As the Subcommittee is aware, the DOJ has been active in investigating radio acquisitions in markets of all sizes. Cumulus alone has responded to DOJ inquiries concerning radio station acquisitions in at least seven different markets. All but one of these transactions fell below the reporting thresholds of the HSR Act; some of these transactions were as small as \$1.5 million and occurred in radio advertising markets as small as \$5 million in total revenues. In each transaction, Cumulus has fully cooperated with the DOJ in providing information to address any questions or competitive concerns that the DOJ has had.

The FCC has stated that its policy is not to act on license transfer applications while a DOJ investigation is pending, regardless of whether or not the DOJ files comments in response to one of the FCC's "special" public notices. The current administrative process thus effectively postpones FCC action on a license transfer application until the DOJ completes any separate antitrust review, which in the case of smaller transactions below the applicable HSR thresholds are not subject to any mandatory timetables. At the same time, the FCC reserves the right to revisit a competitive analysis of the transaction in acting on the license transfer application after the DOJ is finished with its work. The FCC may then come to the same, or a different, conclusion based on its own analysis of the market and "other relevant economic criteria." *Great Empire Broadcasting, Inc.*, FCC 99-142 (June 11, 1999), at 4-5, ¶10).

PROBLEMS WITH THE CURRENT REGULATORY PROCESS

Cumulus has three primary concerns with the way in which these types of applications for transfers of radio licenses are currently being handled by the FCC.

Conflict with Congressional Directives and Lack of Clear Standards

First, we and many other radio firms believe that the Telecommunications Act already specifies the number of radio stations that may be owned in any one market, and thus that the FCC does not have a proper role to play in formulating a different policy that would shrink the ownership limits of the Act. When the FCC begins to decide, on a case-by-case basis, that particular applications will not be approved on the ground that the number of stations results in too much market concentration, the FCC is second guessing the policy judgment that Congress has already made. No matter how well-intentioned the FCC's policy initiatives in this area may be, we do not think the FCC's authority to implement the "public interest" standard allows the FCC to substitute its judgment for that of Congress on a subject specifically dealt with in the statute.

Nor has the FCC offered any concrete criteria for deciding how, when or under what circumstances the public interest should dictate that approval of a particular acquisition should not be granted because of undue market concentration, even if it is within the numerical limits specified by Congress. This type of case-by-case review, without clear standards, invites administrative delays and procedural confusion. In addition, competitors seeking to block lawful and pro-competitive radio consolidation transactions often are encouraged by this process to file groundless petitions, which only adds to the delays because the FCC must then address these complaints in compliance with its rules and procedures governing restricted, adjudicatory proceedings. Cumulus continues to have a number of its license transfer applications mired in this unnecessary administrative process.

Duplication of DOJ's Antitrust Function

Second, it simply is not a sensible use of government resources for the FCC to review acquisitions based on the same market concentration and antitrust concerns that the DOJ or the Federal Trade Commission ("FTC") already considers. As Commissioner Powell has stated in previous testimony before this Subcommittee, the FCC's review of mergers and acquisitions "should be generally limited to those areas in which [the FCC] can claim primary expertise." (Opening Statement of Michael K. Powell, Commissioner, FCC, Oct. 26, 1999, at 8). However, when one looks at recent FCC decisions evaluating the competitive implications of radio station transactions, it is striking how much the FCC's "competitive analysis" seems to duplicate the role of the Department of Justice. The FCC appears to examine many of the same factors that are set forth in the *Horizontal Merger Guidelines* adopted by the DOJ and FTC, as well as the levels of revenue shares permitted by the DOJ in pre-

vious consent decrees. See, e.g., *Great Empire Broadcasting, Inc.*, at pp. 4-8. This largely duplicative approach is also reflected in FCC staff requests for detailed competitive information in connection with a number of license transfer applications.

We believe that it would make more sense for the FCC to defer to the primary expertise of the antitrust enforcement agencies, as it has in other situations where allegations of competitive harm are raised against broadcast licensees. With all due respect to the FCC's hard working staff, I agree with Commissioner Powell that the FCC simply does not possess the same personnel, experience and process as the DOJ in terms of antitrust and competitive economics, and thus is not as well positioned as the DOJ to conduct meaningful competitive reviews of mergers and acquisitions in the communications industry on a consistent basis. Moreover, even in those situations where the FCC is permitted to consider competitive factors, the courts have emphasized that competition measures adopted under the FCC's general "public interest" authority must relate to the agency's specific statutory charge. What this means to me is that—assuming any competitive inquiry at all is permissible in light of the express Telecommunications Act provisions on radio station ownership—the FCC's inquiry must be carefully focused on how competition affects the interest of the public in receiving quality service from the particular FCC-licensed communications facility at issue.

Thus, I very much agree with Commissioner Powell's admonition that, if the FCC is to have any complementary role in the review of mergers as part of its license transfer authority, it needs to have some "disciplined procedures and limiting principles to ensure the rapid processing of such transactions, to preserve the rights of the parties and to avoid duplication with other authorities." (Statement of Commissioner Powell, Oct. 26, 1999, at 9). In our segment of the industry, Cumulus strongly believes that service to radio *listeners*—which should be the primary concern of the FCC—in fact is adversely affected by the blocking or delaying of efficient consolidation transactions. Indeed, one clear sign that such transactions actually serve to *increase*, not decrease, competition is the fact that every single petition that has been filed against a Cumulus license transfer to date has been filed by a *competing* radio owner, rather than by a consumer (*i.e.*, a listener or advertiser).

The Anomalous Situation of Small Transactions

Third, the unusual combination of the small size of the typical Cumulus radio acquisition and the need to obtain FCC approval for the acquisition means that the Hart-Scott-Rodino Act can effectively be turned on its head: Not only does the Government (through two separate agencies) now investigate small radio acquisitions, but it faces no time deadline in doing so. Let me explain what I mean.

The Hart-Scott-Rodino Act suggested that acquisitions below the "radar screen" of the statute, by virtue of their size, were not of sufficient antitrust concern to warrant pre-merger notification. The HSR Act imposes time limits for large acquisitions by which the DOJ or the FTC must take certain steps or request additional information if either agency intends to challenge a merger before it is consummated. But no acquisition of a radio station, no matter how small, can be consummated without the approval of the FCC. And no time limits constrain the DOJ in radio acquisitions that are not subject to the HSR limits.

The peculiar arrangement between the FCC and the DOJ that I outlined above—whereby the FCC will first await the outcome of a DOJ investigation and then proceed with its own second-level review—combined with the inapplicability of the HSR time deadlines, means that either agency can take as long as it chooses to investigate whatever it wants regarding a pending transaction. The result is that the parties to these relatively small transactions sometimes must endure very lengthy and costly regulatory reviews that are not applicable to much larger transactions, without clear standards or certainty of outcome.

While we see these significant problems, Mr. Chairman, Cumulus has not experienced the problem that the sponsors of the Telecommunications Merger Review Act of 2000 have raised, involving the attachment of conditions on the FCC's approval of license transfers. In addition, I want to thank Chairman Kennard for reaching out to try to work with us on these issues and to try to expedite the FCC staff's review of license transfer applications through measures such as his newly created "Transactions Team". I also have no doubt that the FCC Commissioners and staff involved in these efforts have acted diligently and in good faith, consistent with their available resources and their view of what the FCC's proper role should be. In fact, Cumulus alone has completed over 90 radio acquisition transactions, and by and large the FCC's Mass Media Bureau staff has processed these very efficiently and promptly. I believe the FCC staff should be commended for its diligent efforts to keep up with a sharply increased workload in this area.

At the same time, we respectfully disagree with the FCC that it should be engaged in detailed competitive reviews of radio mergers and acquisitions as part of its license transfer approvals. We believe that this adds a duplicative layer of anti-trust review that is inconsistent with the specific terms of the Telecommunications Act. And we believe that this problem is made worse by the fact that no time deadline applies and that no clear rules or standards appear to exist.

CUMULUS'S EXPERIENCES

A few examples of Cumulus transactions that have been caught up in this uncertain regulatory process for extended periods of time may help illustrate the problem to this Subcommittee.

1. One case involved the consolidation of several small radio stations in Florence, South Carolina and surrounding areas that had not been viable on their own. Cumulus filed license transfer applications with the FCC beginning in February 1998 to acquire the stations. None of these applications was contested before the FCC by any listener or advertiser, or any other party for that matter; the applications complied fully with Section 202(b) of the Telecommunications Act; and grant of these applications did not require a waiver of any existing FCC rule. Nevertheless, the FCC staff informed Cumulus that action upon the license transfer applications was being deferred due to potential concerns relating to the percentage of radio advertising revenues involved, and because the DOJ had opened an investigation into the proposed acquisitions. Persistent efforts for more than a year to obtain FCC action on the applications were unsuccessful.

Ultimately, the DOJ closed its investigation and informed the FCC that it had done so in February 1999. About a month and a half later, the FCC finally granted the license transfer applications, with no explanatory statement. This was over 13 months after the first application had been filed (in February 1998), and nearly 10 months after the last of the three applications had been filed (in June 1998).

2. In another case, Cumulus proposed to acquire one FM station and two small AM stations to combine with an existing group of three stations in Grand Junction, Colorado. This FCC license transfer application was also filed in February 1998. Two competing radio operators in the market filed petitions against the application, requesting the FCC to conduct a competitive evaluation and to deny the application based on market concentration grounds, even though the application complied with the Telecommunications Act. The FCC took no action on the application for almost *two years*. The DOJ conducted its own competitive review for over a year. Finally, several months after the DOJ's inquiry had been resolved and Cumulus had dismissed its application for one of the two AM stations, the FCC issued its decision denying the petitions and granting the license transfers on January 13, 2000.

3. In several more recent license transfer applications, the FCC requested detailed competitive information concerning uncontested Cumulus radio station acquisitions in three small markets. In each case, there was no petition or objection by any listener or advertiser, and no pending DOJ investigation. Nevertheless, the applications were "red flagged" by the FCC for "additional analysis of the ownership concentration in the relevant market," and the FCC staff thereafter requested economic and financial data concerning efficiencies, competitive rivalry for advertisers and related factors that one would ordinarily expect to see evaluated (if at all) by the anti-trust enforcement agencies.

- In one of these cases, Cumulus proposed to acquire a single AM radio station in Midland-Odessa, Texas that derived less than \$50,000 in advertising revenues in 1998. This station was very poorly operated out of dilapidated facilities and was fraught with technical problems, including a collapsed tower. Not surprisingly, the DOJ never raised any competitive concern regarding this transaction. The FCC's desire to explore in depth non-existent competitive issues not only imposed an undue burden on the applicants, but was hard for Cumulus to understand given that Cumulus intended to invest its resources to upgrade the station and thereby enhance service to listeners, which should be the FCC's primary concern. Ultimately, the FCC granted this application following Cumulus's submission of the required information.

- In the other two cases "involving stations in Toledo, Ohio and Augusta-Waterville, Maine" the FCC requested similar detailed competitive information concerning acquisitions that were specifically reviewed and not challenged by the DOJ months earlier. The Toledo application was ultimately granted, while the Augusta-Waterville application remains pending almost one year after the DOJ completed its competitive review and closed its investigation without challenging the transaction.

All told, the FCC has now "red flagged" literally hundreds of proposed license transfers. By my calculation, Cumulus alone has had over 75 license transfers

flagged or otherwise subjected to competitive reviews. Typically, the FCC issues public notices that merely state, in general terms, that the FCC intends to conduct additional analyses of competition issues, citing its authority to review such applications under the largely undefined “public interest” standard. If Cumulus’s past experience holds true, we may continue to see such notices and/or requests for detailed competitive information in future cases, regardless of whether the DOJ raises any competitive concerns under the antitrust laws, and regardless of whether any advertisers or listeners complain.

Delays and unnecessary regulatory burdens of this sort often threaten to disrupt small radio transactions and cause serious financial hardship to the parties, especially to the independent operators who are trying to sell their stations and realize a return on their many years of hard work and investment. In addition, in some case, such delays can end up causing further deterioration of the radio stations, due to the extended period of uncertainty regarding who will own the stations and employ the professionals working in these stations, and due to FCC rules prohibiting buyers from prematurely acquiring control of the stations.

THE TELECOMMUNICATIONS MERGER REVIEW ACT OF 2000

The Telecommunications Merger Review Act of 2000 proposes to create a new Section 417 of the Communications Act, which would require that the FCC’s denial or conditional approval of a license transfer application be based only on a determination of what is required under existing FCC rules and regulations. In the case of radio station acquisitions, this would require that license transfer applications comply with the station ownership limitations specified in Section 202(b) of the Telecommunications Act of 1996 and the FCC’s multiple-ownership rules implementing those limits. But it would prevent such license transfer proceedings from becoming sidetracked by subjective, case-by-case determinations of whether the consolidation permitted by Congress is in the “public interest” in the view of a majority of the FCC’s Commissioners.

I support the objectives of this legislation since it appears to be designed to solve many of the problems that I have described—by shortening the FCC merger review process, eliminating some of the present regulatory uncertainty, and ensuring that the FCC’s actions on license transfer applications do not duplicate the competitive reviews conducted by the DOJ or the Federal Trade Commission. I believe this would clarify the respective roles of the FCC and the antitrust enforcement agencies and provide greater predictability for business persons entering into transactions in the radio industry. It also would prevent limited FCC resources from being diverted to unnecessary competitive analyses prompted by a myriad of complaints by competitors whose real agenda is to block or delay radio consolidation transactions that will improve service to listeners and benefit consumers.

I thank you again for the opportunity to testify at today’s hearing.

Mr. TAUZIN. Thank you very much, Mr. Ryan.

The Chair will recognize himself for the appropriate time and members in order.

Let me first thank you, Mr. Ryan and your company, for coming to testify to tell us of your experiences. Indeed, I would guess you would congratulate the FCC when it has processed your applications expeditiously.

But you cite some fairly egregious exceptions to that process. You cite one in particular dealing with Toledo, an application—Augusta-Waterville, where an application remains pending almost a year after DOJ completed its competitive review, closed its investigation, without challenging the transaction. In other words, you have been sitting now for a year waiting for the FCC to act on a station transfer, a year after DOJ has not found any problems with the acquisition; is that correct?

Mr. RYAN. That is correct, Mr. Chairman.

Mr. TAUZIN. Let me turn to the Commission. Why does that happen? Why does that occur? Why does an application like that get red-flagged by the Commission, unopposed by the DOJ or any other party, sit there for a year while its employees and the financial—the people who are putting up the money behind the purchase and

the sale wait for something to happen? I am sure you are right, it damages a lot of things both for the communities served by the radio station, employees and professionals who want to work for it. Why does a year go by without any action on petitions like that? Either one of you. Give us an idea of what goes on there.

Mr. FURCHTGOTT-ROTH. Mr. Chairman, the Commission receives tens of thousands of license transfer applications every year—tens of thousands. The vast majority are processed in a very routine basis. We do not have written rules that have been formally adopted by the Commission that provide the public with any guidance to know whether their license application or license transfer application will be processed in a timely manner along with tens of thousands of others or whether they are going to be unfortunate and put in a different line.

Mr. TAUZIN. Mr. Commissioner, who red-flags these things? Is it done at the bureau? Somebody down at the bureau decided to red-flag his application? And who un-red-flags them? Who is responsible for acting on that Augusta-Waterville application?

Mr. FURCHTGOTT-ROTH. It is down in the bureau.

Mr. TAUZIN. It is down in the bureau? Mr. Powell?

Mr. POWELL. Mr. Chairman, I would point out a number of other unique things in the context of media mergers, in particular radio, in light of the changes that Congress made in the statute. There has been in the early phases some fairly serious debate as to whether, when Congress modified the ownership restrictions and allowed companies to own a certain number of stations, whether they intended that to be absolute.

For example, the community of industry argued that if it was allowed to own eight under the statute, for example, that should preclude any competitive analysis. For example, DOJ ultimately took the view that, no, that was not their view because Congress didn't expressly repeal the Clayton and Sherman antitrust—

Mr. TAUZIN. But once DOJ does that review, why the year?

Mr. POWELL. Because the other area, as we talked at the outset, is that there are the objectives of "diversity of voices" that are not competitive concerns that are largely, I would submit, what gets these things snared at the FCC.

Mr. TAUZIN. Let me tell you what happens, Mike. What happens is that—this is not your company, so you are not on the spot here. But I get visited by people like you, Mr. Ryan, who tell me I have been sitting there for 2 years, and on a weekly basis somebody visits me with a message that they can get it unstuck for me over there if I just hire them and make a donation to their cause. That is what happens to people in the real world who sit around waiting for subjective action on their petition who don't know why they are being held up, who never—were never told why they are being held up.

And in one case, Mr. Powell, it is a black-owned broadcaster. I mean, that is pretty sad. It is not a diversity of voice issue. He is just sitting there waiting for action and gets visited.

What I am saying is that the problems Mr. Ryan poses are not only problems of process at the Commission. They create effects out there that are damaging to the businesses that are trying to conduct broadcasting in America and simply trying to transfer licenses

that fall within the ownership numbers that are presented and do not necessarily involve any diversity of voice questions.

I mean, the problem is there are no standards we don't know. They don't know. And I don't know what to tell people who come to me with those kind of stories, and I don't know what to say to them other than the fact that we have got to somehow change the rules so that it does not happen to them anymore. So that Mr. Ryan has a real answer to give to the parties involved in this transaction as to why it cannot go forward, why it is just hung up. That is what disturbs me.

I want to talk about the SBC thing. And you mentioned it, the 26 voluntary conditions. Both of you have spoken to that as the way voluntary conditions do not necessarily address the perceived harm, the way they do not even necessarily have anything to do with the burden of proof problem, even though I agree with you, Mr. Powell, I think that is an excellent place for us to look at reform.

In the SBC case, Commissioner Roth, you indicated that one of those conditions required SBC to violate the law. What were you referring to?

Mr. FURCHTGOTT-ROTH. A couple of aspects, if I can recall from memory. It is at my web site of my separate statement. And let me be quick to note, these are just the written voluntary requirements. SBC commits, and I don't know whether they in fact wanted this or not, to provide fairly steep discounts for any platform that would be limited in number to a certain number of customers in any State, which I think would violate the nondiscrimination provisions of section 251 and 202.

Mr. TAUZIN. So your suggestion is that they have voluntarily agreed to do something which is violative of that section?

Mr. FURCHTGOTT-ROTH. It also violates the pick-and-choose provisions of Section 252. And, look, who knows what went on behind closed doors when there were these negotiations?

Mr. TAUZIN. You make this point. Chairman Kennard in his written statement said if we set some limits on the duration of these reviews that the public is somehow going to be out of the process. But right now these deals are being done behind closed doors, and voluntary conditions are being worked out behind closed doors in secret meetings with only some people present at those meetings. Who is present in those meetings?

Mr. FURCHTGOTT-ROTH. Not me, not you, no one in the public. No transcripts.

Mr. TAUZIN. Who is there?

Mr. FURCHTGOTT-ROTH. If we knew, they would not be secret.

Mr. TAUZIN. That may be the best testimony I have heard in a long time. You are the master of the obvious.

Let me point out, Commissioner Powell, that while it is true the 1996 Act didn't amend the antitrust laws of the Justice Department, it did amend the communication laws of America which covered diversity, which did say we have got some new limits on ownership. I want to emphasize that. I think Mr. Ryan's point is awfully good. That the Commission cannot and should not think that it can set new numbers through the use of other considerations.

When the Congress very specifically amended the communication law and said these are the new ownership cap numbers.

Mr. POWELL. Just to expound and clarify that point, first of all, in my own view as a legal interpretive matter, I believe that when Congress set a number, that it, itself, had made some judgment about the appropriate number of voices for the diversity concern. That is not shared necessarily among all of my colleagues, but that's my view. I do think that with respect to those who are properly empowered to tender the antitrust statutes that Joel Klein could seek to block a merger short of the number that is authorized in the Communications Act citing the antitrust statute, but we do not have that authority.

Where it gets confusing, which has been a fascinatingly difficult area, is that we dress things up often in competitive speak that are real about public interest concerns, about voice and media diversity, which are not illegitimate concerns, but they also are not the subject of HHI indexes. The problem is people are hungry for some sort of analytical tool that says well, you might be able to own 8, but at 6, diversity is too impugned or impaired. And I don't think that can fully be crafted, but people have tried. But it is a red herring, in my opinion, to be concerned about one subject, which even may be a legitimate course of concern and inquiry, and pretend that it is about concentration, because that confuses the analysis in a way that I think is really disturbing and troubling and causes us to make some very significant mistakes in those markets.

Mr. TAUZIN. An excellent observation. Let me also commend you. I think clearly time is important and I am concerned about your benchmark plan, because if the FCC fails to meet one of those benchmarks, I can see it dragging the process out. We have to be careful there. But while time is important and while the bill needs to address time, I think you put your finger on it when you talked about the fact that these conditions, not even related necessarily nor germane to the so-called harm that may be connected to a merger, these conditions are agreed, therefore, not even subject to judicial review. That they substitute for policy the Commission ought to be making, or we ought to be making for the community at large instead of being imposed upon voluntarily a single merged entity in a competitive marketplace. They create unfairness, that they create policy for a single entity, and they create unreviewable policy for single entities. And they open the door for the kind of arrogance that Mr. Dingell spoke to where an agency can write its own law for an individual citizen of this country. That to me is the most disturbing, and if we could address that and address the burden of proof issues, I think we would go a long way toward ending some of that business, and I thank you for those contributions.

Mr. POWELL. If I could make one more point, Mr. Chairman. Off the top of my head, I am not so sure whether I believe the SBC-Ameritech conditions were illegal, but putting that aside, they are still problematic without being nefarious because what the conditions ultimately stem from is subjects and concerns that are usually the subject of ongoing rulemakings or other express statutory provisions. And what tends to happen is there is a danger that you are going to create an alternate document that is covering the

same basic subject matter and same basic pronouncements that are being simultaneously pursued in some general rulemaking.

The danger for conflict and misinterpretation is enormous. And just to be fair here, it is not just the Commission or its arrogance that gets away with something. Make no mistakes. So do the companies. Ed Whitacre didn't agree to the terms of these conditions out of the goodness of his heart, because they would hurt real bad. They make calculated judgments, and in the intimacy of developing the conditions, the Commission also is over a barrel in the sense that it wants a solution and it needs the company to accede to those conditions.

Mr. TAUZIN. Do you know who was in that room when those conditions were made?

Mr. POWELL. I rarely know who is in that room.

Mr. TAUZIN. My understanding is that SBC ended up making contributions of nearly \$50 million to various groups and associations in connection with that merger. Was that part of the conditions?

Mr. POWELL. Not that I am aware of.

Mr. TAUZIN. That was just outside the room somewhere? The Commission had no knowledge of that? No interaction with that?

Mr. POWELL. Mr. Chairman, I can only speak for myself and my office. Those kinds of activities, if they exist and the things that you have pointed as being severely disturbing, I personally have no specific knowledge.

Mr. TAUZIN. You wouldn't have any way of knowing what is going on there, while merger review was under process; right? Those things are done, not even in the secret meetings of the FCC. Those things are done totally outside the FCC?

Mr. FURCHTGOTT-ROTH. Mr. Chairman, if I might add, private parties make lots of decisions all the time outside of the involvement of the FCC, and that is the way it ought to be. But there should be some public record, some public accountability when private parties do things at the behest of the FCC, or with some suspicion that this is going to influence the FCC in some way.

The other point is the FCC is not over a barrel. We have very simple statutory guidelines of what we ought to do, and they are in section 5(d), and both Commissioner Powell and I note this in our written testimony. There is no mystery about how long these things should go on. It is 3 months for a standard application and standard license transfer. If there is a problem, send it to hearing.

Then it goes on for a bit longer. But this idea that a license application or an application—under 214 or 310 lingers for more than 90 days is not consistent with the statute. Not consistent with statutory directives, and no amount of unwritten rules at the Commission and no amount of even formal rules being adopted by the Commission to extend that deadline can bring that into compliance with the statute as it is already written.

Mr. TAUZIN. Thank you. My time has expired. The gentleman from Maryland, Mr. Wynn is recognized.

Mr. WYNN. Thank you very much, Mr. Chairman. I too want to comment to the witnesses the testimony that which I heard was very informative, and I want to mention to Commissioner Powell

that I thought he made an excellent speech at the Georgetown luncheon, it was quite informative.

I have a question relating to this secret meeting line of inquiry. If people were not there, didn't know about it, I am not sure they even know that the meetings occurred. So to start throwing around this notion that there were all these secret meetings that no one can document is, I think, somewhat unfair and cast an aspersion when people cannot even say that, in fact, anything occurred.

The other question relates to—I don't want to say an aspersion, but somewhat of an aspersion about SBC that they have actually broken the law, and if that is true, I want to know who has brought charges. What agency, body, entity has charged SBC with violating the law? Or is this an interpretation that actions by SBC may be in violation of the law? Because I think that is very serious, and we ought not be saying, at least in my opinion, that people have violated the law unless someone is prepared to bring charges, or has in fact brought charges.

Commissioner Roth, I guess I have to refer that to.

Mr. FURCHTGOTT-ROTH. Mr. Wynn, thank you. When I came to the Commission, I had a fairly consistent standard that would provoke a dissent from me, which is, I would vote for something as long as it was consistent with the statute. And I have had to dissent quite a lot. And I think that it is documented in my dissent on the SBC Ameritech license transfer exactly how I think the conditions violated the statute.

Now, those are conditions that were imposed by the Commission upon SBC.

Mr. WYNN. I thought you said they were voluntary conditions that the SBC accepted?

Mr. FURCHTGOTT-ROTH. Mr. Wynn, that is precisely the whole problem here is the distinction between what SBC "volunteers" after months of secret meetings.

Mr. WYNN. That we do not know actually occurred?

Mr. FURCHTGOTT-ROTH. Well, they were strange secret meetings in the following sense that Chairman Kennard publicly announced that there would be secret meetings.

Mr. WYNN. Those we do know occurred.

Mr. FURCHTGOTT-ROTH. Right, there were FCC staff assigned to conduct these meetings. The public was not invited, members of the public asked me specifically if they could participate in these secret meetings.

Mr. WYNN. Were you privy to the staff who participated in these secret meetings?

Mr. FURCHTGOTT-ROTH. There were staff who came to report to my office with summaries of them, yes. But I was not privy to go to the meetings, no.

Mr. WYNN. But you were able to find out what occurred?

Mr. FURCHTGOTT-ROTH. I—well, no. I mean, I was able to get summaries of what happened.

Mr. WYNN. I am not going to go quibble over that one, go ahead.

Mr. FURCHTGOTT-ROTH. But Mr. Wynn, there is a situation, and I don't know where the conditions reflect volunteering by SBC to balance off alleged harms with some set of goods that Commis-

sioner Powell refers to. But there are a lot of conditions there and some of them, I think are fairly clearly outside of the law.

Mr. WYNN. Well, perhaps someone will prosecute on that basis. To date, they have not.

I am concerned though, that conditions, agreements, settlements have traditionally been part of our culture, our way of doing business. And now they are somehow being indicted because they are "voluntary," but not really. And I am uncomfortable with this notion. If companies who come before government entities regularly agree to conditions for whatever their reasons may be, if they say they are voluntary, we have to accept them as such. I do not interrupt that as being policymaking, nor do I interrupt that as being nefarious in any way. We accept them in the legal community as conditions agreements and settlements. Now, all of a sudden, they are being indicted. I am concerned about that.

Let me move on because I don't want to belabor this particular point. Commissioner Powell indicated that many times, these conditions do not cure the harm. And I can appreciate what you are saying. It seems to me that they are designed to ameliorate the harm or to offset or balance the scales in some way. If you do not use the vehicle of conditions and you find, in fact, harm, do you have any other options? And I guess the second point I would make is yeah, the dog got beat, but he is better off with the toy after the beating than without.

Mr. POWELL. I am not sure about that.

Mr. WYNN. The toys remain. What would you do if you did not use conditions and you, in fact, saw competitive harm, but you did not believe it rose to the level that should bar the merger, but yet you knew the public was being harmed to some significant degree?

Mr. POWELL. I think for me the short answer is, if they are really serious, you block it. I mean, one of the problems with this is I am equally as forceful about our obligation to stop things as I am to let things go.

The problem here is with the conditions. I agree with you, conditions are absolutely legitimate vehicles potentially for the settlement of government investigatory activity, but when they are rooted to what is the prerequisite, identifiable harm. No. 1, they lack a lot of discipline, there is a lot of amorphousness about what you are putting on the scale because it is not rooted in something that is identifiable. Another thing that worries me is that they could become a shortcut. The Commission lacks the courage to get to the bottom of the transaction, and conditions become a very convenient way for everybody to just wrap it up, a way for us to get out of—

Mr. WYNN. It seems to be prevalent here, which is an objective which seems to be prevalent here: Wrap it up.

Mr. POWELL. I think efficiency is prevalent, but efficiency including wrapping it up means getting to an answer quickly, and that answer should continue to be possible to be no.

In some instances, I believe that for some people's views with respect to certain mergers and conditions that did not cure the harm, it would have been a more defensible position to vote against them than it would have been to pursue a mountain of conditions that ultimately in some loose sense balance your concerns about them.

If you would not mind, I would like to say another thing about the questions you asked a minute ago, because I personally want to be clear and on the record.

I will distinguish what Chairman Tauzin is talking about outside the process. I am not sure I know what all of those are. I have heard many similar concerns, but I personally do not know anything about it. These meetings are not secret in the cloistered sense. I mean, I know who is there. The bureau is there. The professionals, the men and women who are charged with reviewing the mergers are the ones who are there. Moreover they often held, obviously, public forums in the context of SBC-Ameritech. They held open forums in the view of the public to discuss some of the proposed conditions.

Furthermore, the conditions, once they are drafted, are subject to public notice and consideration. Let's be fair about that.

But where they are still problematic is that they are the product of an intimate negotiation. They do not include very much input or evaluation by other parties that might have interest who are not necessarily permitted or privy to be part of their development. I think that is the honest and intellectual critique of what goes on.

And I think Commissioner Furchtgott-Roth is right. There is something disturbing, even to me, that we are not expected to be a full part of the formative phase. We are sort of given the opportunity to vote when it becomes crystalized and formalized. But you would be astonished the amount of work I have to do to find out in some of these cases what really happened. Not because the bureau won't come up and talk about it, but to get a fulsome explanation is a little more difficult. So I think that is the fair recitation.

Mr. GORDON. Mr. Chairman, I would like one quick question.

Mr. TAUZIN. Let me please—I have extended the time of the gentleman without objection. Mr. Pickering has been here from the start. I think we need to go to him and then I will recognize the gentleman if the gentleman will allow me.

Let me, by the way, mention to my friend, Mr. Wynn, and all of you, that our staff at O&I has the notes from those meetings, that they were surrendered in the course of discovery to SBC. And the notes of those meetings are available, and the degree to which those conditions were, in fact, voluntary or not can be read in those notes. I would invite my friend to actually visit with staff, and the notes can be made available to him and he might get a better picture of what occurred.

Mr. GORDON. Is it your understanding that a Commissioner could not attend that meeting if he asked?

Mr. FURCHTGOTT-ROTH. I could give a quick answer, the answer is no. I asked if my staff could attend and they were flat out refused.

Mr. GORDON. Your staff?

Mr. TAUZIN. The Chair will ask order again and the Chair will recognize Mr. Pickering for a round of questions.

Mr. PICKERING. Commissioner Furchtgott-Roth, let me thank you for, one, identifying the problem that we have at the FCC and defining both in its application to the law and in practice. Commissioner Powell, let me thank you for giving good instructive rec-

ommendations as we go forward in this process. Mr. Ryan, let me thank you for your profile in courage. There are many.

Mr. RYAN. Or my clients.

Mr. PICKERING. There are many in this community that have told us the horror stories that we are discussing now who may not be willing to publicly speak because they may have a merger pending at the FCC. I would say that I think your courage in testifying will probably serve your interests, and I hope help get the reform because we will be watching from the committee how you and your clients are treated.

Going back to the earlier discussion, and what Commissioner Furchtgott-Roth raised in the application of law, we are a Nation that abides by the rule of law. We do not give licenses or government favors based on what, in many places, occurs as extortion or bribery. That there is a payment and in return for a payment you get favorable government action. We try to apply the law and the process equally and fairly. And if SBC did give certain parties \$50 million, to me that meets the definition of extortion. And it has nothing to do with pro-competitive standards or regulatory standards or public interest standards, if that is any part of an agreement to have a merger approved by Regulatory Commission. And I think those are things that we do need to look at.

But getting to the issue at hand, and the discussion draft and where we go from here, if you look back at the 1996 act, Congress eliminated the FCC prior statutory role to review telecom merger by excising section 221(a) of Communications Act of 1934. And the conference report it was stated by returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws.

If we look at the FCC announcement today on the Qwest-U.S. West merger, they get it half right and half wrong, and I agree with your comments, Commissioner Roth, in that they talk about the license transfer application on section 271 compliance. They tie part of it to having full compliance with section 271, which I think is the right emphasis and the right objective of getting the incentives to make sure there is compliance with 271 and the opening of local markets. But then they go beyond that and get in conflict with what the intent of the 1996 Act was and that DOJ look at the anticompetitive or the antitrust issues, and you look at the conforming and compliance with the 1996 Act.

To that end, we, in our instruction, draft in section 417, talk about the conditions under which FCC could deny applications. And we specifically say where the applicant in 1A where the applicant is in violation of the rules and regulations in effect on the date of the application is received, and then on 2A, the language states that the FCC can condition approval only when necessary to ensure the applicant is in compliance with the rules and regulations on the date the application is approved.

Mr. Powell, you had mentioned that not only do we need to look at the time, but the standards by which we should make these ap-

provals, or the approvals should be justified. Is that the type of constraints or restraining of FCC review that you believe is appropriate?

Mr. POWELL. One observation, which I am not sure is an oversight or an intent, but the legislative draft does not refer to the statute, only to the Commission's rules and regulations. I assume it to mean the statute as well. There is a little bit of a circular risk here just to point out. Arguably, the public interest is in the statute. It is there in section 309, it is there in section 310, it is there in section 214, and if anyone were so inclined they would say they are in full compliance with your proposed legislation by doing exactly what they are doing today. That is one thing that I would suggest that we need to talk about.

I do think it could be spelled out in more detail, but the attempt to make sure that conditions bear some germaness to the identifiable provisions of which you are citing for harm which I have testified is critical. The only looseness there is you wouldn't want to say it violates this provision, but the conditions are about another provision. You would certainly want them to be—that might be the absolute letter of the law, but that is not, I don't think, what you are trying to get at.

So I do think in the main, it is the right effort, I still think that there is probably more to be said about the standard. And, again, I think if nothing was done, my own view would be if everything else stayed the same, if the burden shifted to the Commission to prove harm rather than to require benefits, so much more of this would start to fall in place.

Mr. PICKERING. If we just did two things, if we gave the time lines similar to what DOJ has under their process, and we shifted the burden away from the applicant and to the government, would that in essence correct most of the problem?

Mr. POWELL. My own view is that it corrects a substantial amount of the problem of the—just consider, for example, the differences in the burden. And some of this, to be fair, is the intersection of the Administrative Procedures Act that I think sometimes gets left out of the equation. But because the statutory standard requires an affirmative finding that it is in the public interest which we have interrupted to be procompetitive, we have to prove to them why we let a merger go through, rather than prove why it doesn't. And when you have to prove why a merger goes through, No. 1, you can see how much more time that consumes for a merger that you might be inclined to say yes. You sort of have to write it up and go through the record. Because of the Administrative Procedures Act, we have points in the process in which opposing parties can throw all kinds of things in the record about why it is not procompetitive. And you know the APA, we have to slovenly march through lots of those comments and identify on the record why we have rejected them. You can see how much time is consumed just by process.

I can tell you, there are mergers where very early on, we know they are going to be approved. They still take forever because of all of these obligations. If you look at the DC Circuit cases, they are also quite insistent that we do so. If the burden is otherwise, it seems to me, No. 1, you have invited fewer opportunities to come

in and say here is my list of goodies I want on the list. It also may deal with some of the chairman's concerns about extraneous or other side duties because they do not go to harm. Those are just going to benefit. And if they are nongermane, then I think it works.

And then temporal benchmarks I am a big believer in, so I might dispute how much flexibility you allow for some continuance. But I think those are the two cruxes of the matter, if there can be two cruxes. I don't know if there can be.

Mr. PICKERING. Mr. Chairman, if you would allow one more question.

Mr. TAUZIN. Chair has been very generous with all members. Proceed.

Mr. PICKERING. Commissioner Furchtgott-Roth, our bill, the discussion draft, looks at time lines and trying to constrain the scope, trying to establish what is the appropriate standard by which the review would be conducted.

Would you take a position that the FCC should have no role in mergers and acquisitions and they should be done solely by the DOJ?

Mr. FURCHTGOTT-ROTH. Mr. Pickering, I think the statutory authority of the Commission is quite clear. We have a responsibility to review license transfer applications and, in some cases, license transfer applications may lead to an inconsistency, either with the statute or with existing Commission rules, and in those cases, I think the Commission ought to step in. But I think is outside of the broader context of mergers. It is simply to see, are you complying with Commission rules?

Mr. PICKERING. But just on mergers, should the FCC continue to have a role in approving mergers?

Mr. FURCHTGOTT-ROTH. The only role we have now is through the Clayton Act, and that is the way that the law currently is written.

Mr. PICKERING. Should we change the law?

Mr. FURCHTGOTT-ROTH. Mr. Pickering, I have had a long-standing view of—I am not going to—I think the law can work the way it is written and I am not here to lobby for any changes.

Mr. PICKERING. Thank you very much, Mr. Chairman.

Mr. TAUZIN. I thank the gentleman.

Mr. Shimkus from Illinois is recognized.

Mr. SHIMKUS. Thank you, Mr. Chairman. Not being a lawyer, I find this debate very interesting, just from a nonlegal perspective. And so I am not going to get into the section this, section that. I mean, that is why we have other people with other skills.

But I do, and I think my colleagues on the other side were getting a little fired up about the issue of not having access to bureau meetings. And from a simple person from southern Illinois, I would ask this question: why wouldn't commissioners be ex officios or staff, be ex officios of major negotiations of hearings that are going to come before you? I mean, would you think it would be—am I missing something in is there an inappropriateness to be sitting in on negotiations before you review the license transfer? Is there some legal thing that—I don't understand why, if you wanted access to evaluate and follow the process before the completed process

was slapped on your desk for your review, and your comments and your vote, is there—am I missing something?

Mr. TAUZIN. Will the gentleman yield? Would there be any problem with having a bill that said that every Commissioner has a right to be present at any one of these negotiate sessions? Would there be anything wrong with that?

Mr. POWELL. No. There are no legal concerns with commissioners, of course, being part of the deliberative process that results in a decision. There is sometimes concerns about whether you can be said to have prejudged an issue if someone attempted to suggest that you had reached a decision outside the context of the record. I think that what the Commission would have to be very careful about, particularly with Commissioner participation is just that, which I don't think anybody should have any problem with, that you can sufficiently and fairly be said to have reached your decision about the matter on a written record that is available for public scrutiny. And said to the extent that these meetings occur with participation of commissioners, it might put a higher premium on saying that there is a full documentation, so nobody could say that Mike Powell made up at mind on something that nobody had any access to. That would be the issue and I don't think it is insurmountable.

Mr. FURCHTGOTT-ROTH. Mr. Shimkus, if I could just return to—the specific act is the SBC-Ameritech license transfer matter, not—SBC and Ameritech petitioned the Commission to transfer licenses. There was public notice, there was voluminous public comment. It was only after the Commission received public comment that there began the series of meetings.

In my view, we had sufficient information at the time the public comment cycle was completed to have rendered a decision within 90 days, or within some reasonable period of time.

I was—it was as far as I know an unprecedented process. I don't know that there were not similar situations, but what was particularly unique about this was the public announcement that there would be this series of meetings, whether you want to call them secret or private. In any case the public was not allowed to participate. The public was kept in the dark. And a lot of other people were as well.

Mr. POWELL. Mr. Shimkus, I just wanted to expand on your last question, because I forgot another one that Mr. Ryan pointed out. Under the Sunshine Act, three commissioners cannot be together and deliberate outside of a public context, so that would be another limitation. The three of us could not show up at the same meeting that was not noticed as a public forum and participate, and that is a real impediment in a lot of things that we do.

Mr. PICKERING. Mr. Shimkus, could I ask a follow-up question?

Mr. SHIMKUS. Please.

Mr. PICKERING. In any of these voluntary agreements are they published? Do they have sunshine full disclosure in any way?

Mr. Powell?

Mr. POWELL. If I understand the question, yes. I mean, they are ultimately codified. They are ultimately provided for public notice and they are appended to the final order of the Commission.

Mr. PICKERING. But are there some agreements outside these so-called secret agreements, if SBC gave \$50 million—I am not saying they did or did not—but if they did, is that part of the public record?

Mr. POWELL. Apparently not. Just to be clear, I have no idea. I mean, if such things exist, they are not part of any deliberative activity I have participated in. So I just do not know anything to shed light on that.

Mr. SHIMKUS. If I could just reclaim my time just to see if I could get an answer. Would, with respect to the sunshine applications, would making the commissioners or their representatives ex officio of some extraneous deliberative process, would that be helpful and would you be supportive of that?

Mr. FURCHTGOTT-ROTH. Mr. Shimkus, bearing in mind my view that the Commission could do——

Mr. SHIMKUS. I understand.

Mr. FURCHTGOTT-ROTH. [continuing] the whole process without changing the statute——

Mr. SHIMKUS. But obviously if I could butt in, obviously they can, but they are not.

Mr. FURCHTGOTT-ROTH. I am not certain why there needs to be the negotiations in the first instance.

Mr. SHIMKUS. Okay, but if there are.

Mr. FURCHTGOTT-ROTH. Let me note something. The negotiations go on not simply because the bureau staff on their own motion goes out and decides to do them.

Mr. SHIMKUS. You are sounding like a politician.

Mr. FURCHTGOTT-ROTH. I am not. I am just a public servant here.

Mr. SHIMKUS. Could this public servant just answer? Would that be something that you think would be helpful or harmful?

Mr. FURCHTGOTT-ROTH. Mr. Shimkus, I think that the Commission consists of five commissioners, and I think except as specifically noted in the statute, they all have equal responsibilities and equal powers. And so I would think that anything that would say that would reinforce that would be——

Mr. TAUZIN. Will the gentleman yield?

Mr. SHIMKUS. You can have my time.

Mr. TAUZIN. Let me see if you can help you. You mentioned the sunshine law would not allow any three of you to get together in a process that might be deliberative without the public being present. Does that apply to your staffs?

Mr. POWELL. No.

Mr. TAUZIN. So your staffs could attend these meetings if he were allowed to? Was your staff allowed to attend any of these meetings?

Mr. FURCHTGOTT-ROTH. No.

Mr. TAUZIN. You were told you could not come and your staff could not come?

Mr. FURCHTGOTT-ROTH. I did not request to attend but my staff was told no.

Mr. TAUZIN. Your staff was told no. So we have got a situation where a series of private meetings are announced in this case, and the commissioners and their staff are both told to stay out of it. We

are going to negotiate this on our own. The bureau is going to do it.

That is essentially what happened. And the question I think Mr. Shimkus is trying to get to is first of all, would it be good public policy for us to be legislating on how these secret meetings should be conducted? Is that sanctioning it? And would you want us to legislate your right to be there? Would you want us to do that? Or your right to have your staff there at least, if staff presence would not violate the sunshine law? And I guess Mr. Shimkus is just asking for an opinion. Do you think that is a good policy or not for us to legislate your right to be at private meetings, even those that may not be as secret as others?

Mr. POWELL. It would not hurt. But the reason it is a difficult question to answer, it is a little embarrassing to believe that it rises to the necessity of legislation.

Mr. TAUZIN. It really does.

Mr. POWELL. It is certainly superfluous. I agree with Harold we have, in the existing statute, every right. And I also believe that if I tore the house down, I could get in any meeting that I needed to. But the problem is you have to keep track of what is going on and when they are, and that is actually more the challenge than getting there.

Mr. TAUZIN. You have to know what is going on and that is the tough part.

Mr. POWELL. And you have to want to be there. These things are constant and unending.

Mr. TAUZIN. I remember a time, Commissioner Roth, when you did have to tear down the walls and go public with the fact that they would not even share information with you, the bureau. The staff that works for the Commission was refusing to share information with the Commission. Isn't that correct?

Mr. FURCHTGOTT-ROTH. Yes, sir.

Mr. TAUZIN. We have some real problems here, do we not? The answer is yes. Bottom line is that you made some good suggestions. Let me ask a couple of questions and I will yield back to any members who may want—there are several approaches, I think Mr. Pickering was trying to feel this out.

If we did shift the burden of proof to the Commission to actually find harm, could the Commission not still, or the bureau, might still have negotiating sessions where extraneous conditions were attached to the approval of a process?

Mr. POWELL. Yes, I think that now you start to get a lot further toward what I think Mr. Wynn was talking about. That is, if the Commission affirmatively finds as a prerequisite to condition exercise that there is harm sufficient to block the merger, I think you are where you would expect to be, that we can either do so or we believe that you believe could be approved conditional on certain things.

What is critical to its validity to me is first, making a decision about the harms and your willingness to act on them. And then I don't think the conditioning exercise all by itself is nefarious, but I think that you would you want procedurally to do it in a way that—

Mr. TAUZIN. But here is a problem with the other one that you cited, Commissioner Powell. If there is not a provision in our bill that specifically says the Commission has to order these conditions, then you do not have a reviewable circumstance. The poor party is caught with having voluntarily agreed. I mean, that is the essence of this problem. You pointed out in your testimony is that there are two evils involved here. One is that mountains of conditions might be voluntarily agreed to to satisfy a pebble of harm that may not be even related to the mountain of conditions that have been added to the process. That is a harm. That is bad. And you cite it correctly.

The second is that once the poor applicant has agreed to all of these things at the sacred or private meeting, whatever it was, that he is estopped from going to court to complain about it. At least, if the law requires the Commission to order those things, he might have a chance if we had a proper law written that said it has to be something required by the regulations of the Commission, by some actual statute; and two, that it had to have some relation to the harm involved. If we had a law that said that, at least that party would have a right to go to court and say that the Commission has overstepped its bounds in requiring me to do this. But that poor person is out of court if he voluntarily agrees to it.

That is the game. That is the government by consent decree that goes on in this circumstance. The parties kicking and screaming looked at these notes kicking and screaming, agree to conditions and find themselves totally out of any chance to go and ask a court to review them to see if they were illegal or extra legal. So it seems to me that simply shifting the burden of proof without affirmatively requiring the Commission to address the harm by ordering conditions on the merger creates a problem.

I am going to give you an example. I am going to give you an example of an actual case. An applicant in a merger situation in the DOJ process is told we want you to agree not to acquire this part of the advertising business in this community. We do not want you to own that much, whatever it was.

Applicant says fine. I will agree to that. Then DOJ says wait a minute, we want you to also agree that you will never acquire it. You have to sign a statement saying that you will never acquire it. And he says why do I have to sign that and they said, well, we do not want to buy a lawsuit that we cannot win. DOJ does that. That is a problem at DOJ. I wish we had jurisdiction there. I would like to go cure those problems. We are working on that, by the way. We may yet get there.

But that applicant then comes to the FCC and can go through the same process all over again. If DOJ does not catch him, the FCC can. And the condition that he can be required to voluntarily agree to becomes something he can never complain about in court, even though it was suprajudicial, even though could not have been defended in court by any action of the agency. Had it ordered as a condition to the merger.

Now, that to me is the essence of what you tell the committee today we ought to try to cure. And I think—so it really goes to the heart of the problems and the procedures. And let me say to all of you, that I think it goes a long way to curing what goes on on the

outside as well. If as a party to the process I know that I am going to get an answer on a certain date, that I am going to get an answer that I can appeal to a court if I think I have been unfairly treated; I do not have to yield to outside pressures to make donations or to hire people or to do whatever I have got to do because somebody is holding out to me that they can somehow make a difference for me somewhere. I am no longer vulnerable to those problems. And it seems to me that is where I think Mr. Pickering and Mr. Dingell and I want to go. And, again, you helped us a great deal, and I think focusing our attention on the right cures, and I thank you very much.

Let me see if any of my colleagues have any additional questions.
Mr. Pickering.

Mr. PICKERING. Mr. Chairman, I would just like to say, I look forward to working with the commissioners and the Commission, and with you as we try to find the right balance on the time lines and if we do need to build flexibility within the process, I look forward to looking at where the burden should be upon which party. And I look forward to looking at clearly establishing standards by which the FCC shall look at mergers and acquisitions and by which they can make conditions.

So I hope the discussion draft is a good place to start and look forward to working with all the members of this committee and the Commission and the community affected as we move this very important reform process forward. Because we need to keep in mind this is not about the FCC, it is not about Congress, this is about the marketplace and the applications and the technologies and the innovations and the competition and the convergence that will truly provide the public interest benefit we all hope to see.

Mr. TAUZIN. I thank the gentleman.

Mr. Wynn, do you have any final thoughts or questions?

Mr. WYNN. No, sir.

Mr. TAUZIN. Mr. Shimkus?

Mr. SHIMKUS. No.

Mr. TAUZIN. There is something that intrigues me. We are a free speech society and yet we got rid of the ICC and we deregulated trucking and we have kept the agency to regulate speech in America and we go through all this horrible process and argument about how we are regulating speech. It just makes me wonder about whether we shouldn't embark as soon as we can on some real restructuring and reform for marketplace of ideas and speech that is becoming so incredibly diverse as the Internet catches on.

At some point, I will ask your comments about that and ask you to give us some thoughts about what ought to be basic restructuring in the reform bill.

In the meantime, let me thank you. You have added measurably to our store of knowledge and advanced our processes, and the hearing stands adjourned.

[Whereupon, at 12:12 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF FLORIDA

Mr. Chairman: Thank you for holding this hearing on the FCC's merger review authority and accompanying legislation, the Telecommunications Merger Review Act

of 2000. I would like to thank Commissioners Furchtgott-Roth and Powell, as well as Mr. Weening, for appearing before the subcommittee this morning. I am, however, disappointed that Chairman Kennard's schedule could not accommodate his testifying before the subcommittee, for it is primarily because of his direction we are holding this hearing and discussing legislation.

Since passage of the Telecommunications Act of 1996, the telecommunications landscape has significantly changed shape. Changes in law and the regulatory framework, coupled with technological advancements and increased globalization, have spurred a tremendous amount of merger activity, with many telephone, long-distance, media, and cable companies either merging or forming partnerships and alliances. Many of these changes have brought consumers lower prices, innovation, and high-quality goods. However, there are mergers which hurt consumers by limiting innovation, raising prices, or reducing quality, and anti-trust laws and consumer protection provisions serve as triggers to ensure consumers and competition are not harmed.

So the purpose of today's hearing is to explore the current scope of the FCC's authority to review telecom-related mergers, as well as consider the need for legislation to limit the FCC's role in merger approvals.

Mr. Chairman, does the way the FCC currently conduct merger reviews need reform? The answer is a resounding yes. For the FCC, itself, has formed a Transactions Team to review its own merger review process and to develop procedures to streamline and accelerate the Commission's merger review process. Why wasn't this done sooner?

While I do not fault the Commission for its self-initiation in streamlining the merger review process, I remain skeptical as to whether the end result will be substantive. For nothing the Commission implements will change its duplicative jurisdiction with the Department of Justice's Antitrust Division in reviewing telecommunications mergers, and I fear the FCC will continue to apply its "public interest" test in conditioning merger approvals.

Mr. Chairman I remain skeptical as to whether the FCC even has an antitrust role in approving mergers. For Section 601(b) of the 1996 Telecom Act repealed the FCC's only specific statutory merger authority under Section 221(a) of the Communications Act, while also repealing the FCC's authority under the Clayton Act. Nonetheless, the Commission now cites other provisions of the Communications Act to direct merger review authority.

Members of this committee may also be interested in The International Competition Policy Advisory Committee's Final Report presented to Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein last month. The Final Report includes policy recommendations on international antitrust issues such as multijurisdictional merger review, anti-cartel enforcement and the interface of trade and competition policy.

Specifically, the Advisory Committee found that "the multiplicity of reviewing bodies and the use of different standards for judging mergers makes it difficult... to understand the merger review process. This may have the cumulative effect of decreasing transparency. This possibility is strongest where sectoral regulators, acting under the mandate of broad "public interest" standards, account for competition policy concerns in exercising their jurisdiction over mergers. Sectoral regulators often have authority to take into account social welfare considerations that extend beyond the traditional focus of antitrust analysis. In many instances it may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulators' decision to intervene." Furthermore, the Advisory Committee raised an additional concern that regulatory agencies, such as the FCC, are vulnerable to capture by industry and generally more susceptible to political influence compared with the DOJ.

Additionally, Commissioners Furchtgott-Roth and Powell, testifying today, have publicly expressed concerns over the seemingly duplicative jurisdiction of the Antitrust Division and the FCC during telecommunications merger reviews. For the Antitrust Division examines how the proposed merger might eliminate current competition or future potential competition in a way that harms consumers. It investigates and analyzes factors such as market concentration, potential adverse effects, ease of entry into the market at issue, and efficiencies likely to be created by the merger. Additionally, its analysis includes determining whether the merger would lessen innovation in developing new technologies. The FCC, then turns around and conducts the same analysis, thereby producing no meaningful differences in the analysis.

Mr. Chairman, I would also like to make as part of the official record Commissioner Furchtgott-Roth's November 5, 1999, op-ed piece in the Wall Street Journal, titled "The FCC Racket" in which he argues that the FCC's authority over merger

review has become too broad and without the necessary limits and standards and how the Commission's "elaborate ruse—merger authority, voluntary conditions, and public involvement—has created a self-perpetuating myth that the FCC has far-reaching authority to sanction or reject mergers in the public interest."

Thank you again Mr. Chairman. I look forward to the testimony of our witnesses.

[Friday, November 5, 1999—The Wall Street Journal]

THE FCC RACKET

By Harold Furchtgott-Roth

It's difficult to think of a large communications firm that hasn't at least discussed a merger over the past few years. In each case, companies, legislators and the media chant the mantra: This merger would require Federal Communications Commission approval.

This is simply false. Although the FCC has limited authority to review certain mergers under the Clayton Act, the agency has never invoked that authority during the recent spate of condition-laden FCC "merger approval" orders. Invoking the Clayton Act requires the commission to undertake the uncertainty and expense of winning a court case in order to block any deal. The Justice Department and the Federal Trade Commission are subject to these rigorous standards and the corresponding limitations imposed by antitrust precedent. But the FCC, extracting itself from that legal shackle, has created a merger approval "process" that is lawless, standardless and endless.

Under the law, no merger requires FCC approval. Companies are required to apply only to transfer FCC licenses, much like changing title to an automobile. The FCC routinely processes tens of thousands of license-transfer applications annually with nary a whimper. But periodically the agency singles out a few, particularly those associated with the mergers of large, heavily regulated companies, for "special" treatment.

This treatment is virtually undefinable, but inordinately powerful: It brings companies to their knees begging for "voluntary" conditions that drive up their costs of doing business. The process itself is both arbitrary and indecipherable. The commission has no consistent rules on the handling of license transfers, and it asserts this limitless authority without deadlines or accountability. Because the conditions are "voluntary" and the merger is time-sensitive, firms are virtually barred from seeking judicial review.

Consider the recent case of SBC's request to acquire Ameritech's FCC licenses. An initial review revealed no violation of federal law or FCC rules. Yet with no official written notice, one commission official publicly pronounced that the transfers were outside the public interest—without defining what the "public interest" is.

SBC and Ameritech sensed that their transaction was in peril, but they had no clear explanation why. What to do? Demand written clarification? Go to court to challenge the process? Tell Congress and the media of the mistreatment?

If recent history is any guide, none of the above. Instead, CEOs privately contact the FCC and find out the ransom price to free their licenses. They do not publicly complain too much because that would annoy the FCC, which has ultimate regulatory control over their business, both today and tomorrow. They do not go to court, out of fear that the corresponding delay will sink this and future deals. They cannot allow anything—no matter how arbitrary and demanding—to threaten their mergers.

What does the commission want? Don't expect it to be written down anywhere, because a written quid pro quo might be illegal. Commission staffers engage in months of secret negotiations without a clear written record of what is being negotiated or why. The FCC issues public pronouncements about open processes, and yet denies anyone from the public access to, or minutes from, the secret meetings. Then, remarkably, a complex and detailed set of "voluntary" promises are submitted to the FCC for approval. Like puffs of smoke from the Vatican, it is a sign: The deed is done.

Initially, of course, the merging companies had filed documents to prove that the license transfers are in the public interest without any conditions. But after a few months of private FCC meetings, these companies discover that their shareholders and the public interest will be advanced only by volunteering to a condition-laden transfer.

In the SBC/Ameritech merger, most of these conditions were neither consistent with the law nor more stringent. Some conditions require the companies to discriminate among different customers, thereby violating federal law. All these conditions

are to occur after the license transfers. They are little more than promises of future behavior, whether for good or ill. And the conditions are often not even remotely related to the actual licenses being transferred.

The “proposed” conditions are then sent out for public comment. This is often only a pro forma exercise. For example, most of the competitors of SBC/Ameritech were adamantly opposed to the conditions. They argued that they were better off to have the licenses transferred to SBC without any conditions, but with the full and unambiguous protection of the law. Yet not a single substantive change to the conditions was made after public comment.

The results can be even more disturbing than the process. For three years, SBC/Ameritech will be a regulatory Frankenstein, different from every other regulated entity in America. It will have all of the trappings of a regulated telecommunications carrier, plus FCC-blessed regulatory appendages in every shape and form. Customers and regulators can throw away their copies of the Communications Act and the commission’s regulations. The real rules are now in the FCC’s orders approving this particular transaction.

What happens if SBC/Ameritech fails to meet the conditions? Then the company could owe \$2 billion in “voluntary” payments to the federal government or to charitable institutions. These payments are not “fees,” because no government service is provided in return, nor are they “fines” or “penalties,” because no federal law or regulation would be violated. A company could not lawfully approach a member of Congress or the administration—or vice versa—and ask for favorable consideration in return for such “voluntary” contributions. Yet no one has dared to ask about the enforcement of these payments.

This elaborate ruse—merger authority, voluntary conditions, and public involvement—has created a self-perpetuating myth that the FCC has far-reaching authority to sanction or reject mergers in the public interest. In fact, the only thing that clearly emerges from the FCC’s merger review process is that the public has no interest in this sham.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you, Mr. Chairman.

The Subcommittee will consider legislation this morning that would substantially limit the FCC’s authority to review telecom-related mergers.

This is an important hearing, indeed. The telecommunications industry is in the midst of rapid consolidation.

Bell companies are combining with each other...AT&T is trying to purchase MediaOne...MCI wants to acquire Sprint...AOL looks to own Time Warner...and just yesterday, Tribune Broadcasting announced that it would be acquiring Times Mirror.

So what should the FCC’s role be in this period of industry consolidation?

This is a difficult question, to which there is no easy answer. Among other things, the answer should include a requirement that the FCC conduct itself in an open and transparent manner—not just in the way it reviews mergers...but in *any rule-making or adjudication*.

It’s true that the 1996 Act assigned the FCC important responsibilities. But Congress didn’t make the FCC a “czar.”

In recent months, no one has tried to make this point more forcefully than Chairman Tauzin. Mr. Chairman, I share your interest in establishing FCC practices and procedures that promote transparency. The American public deserves nothing less.

It is therefore an opportune time for this Subcommittee to initiate this review. I note that the draft legislation before the Subcommittee this morning would limit the amount of time the FCC can take in reviewing mergers. The legislation would also limit the FCC’s ability to make public interest considerations in the course of reviewing mergers.

I commend the drafters of this legislation for their hard work, and I look forward to the witnesses comments.

In particular, this Subcommittee needs to know whether this legislation would cure the problem. Or is it possible that the cure is worse than the disease? That is, will tight time and scope limitations only promote *more*, and not less, back-room dealing?

Again, I want to thank Chairman Tauzin for holding this hearing, and I look forward to the testimony of today’s witnesses.

I yield back the balance of my time.