

IMPACT OF THE TRUMP ADMINISTRATION ON MERGER DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Christopher J. Wright
Harris, Wiltshire & Grannis LLP
January 19, 2017

QUICK OVERVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION

- ▶ The FCC is a five-member Commission.
- ▶ The President nominates and the Senate confirms commissioners.
- ▶ Each commissioner has a five-year term, with one commissioner's term expiring each year.
- ▶ When fully staffed, three commissioners (including the Chair) will be Republicans and two will be Democrats.
- ▶ The FCC is an “independent” agency, which means the commissioners cannot be fired without good cause.
 - ▶ Senator Hollings: “Not independent of Congress!”

The FCC's Role in Mergers

- ▶ Sections 214(a) and 310(d) of the Communications Act require the FCC to approve all transfers of licenses issued by the Commission.
- ▶ All broadcasters, cable companies, satellite operators, wireless companies, and telecommunications carriers rely on FCC licenses.
- ▶ The FCC has a “public interest” mandate that gives it broader latitude than the provisions governing merger review by the Antitrust Division and the Federal Trade Commission.
 - ▶ FCC GC Sallet: “Fundamental is the fact that applicants have the burden of demonstrating on the public record that their proposed transaction is in the public interest.”

The FCC's Merger Process

- ▶ The FCC's procedures require applicants to make a filing explaining why their merger will serve the public interest, followed by public comment and ex parte meetings.
- ▶ The FCC created a "transactions team" in 2000, when it also adopted a 180-day "shot clock" and created a more formal process for reviewing mergers.
- ▶ See <https://transition.fcc.gov/Speeches/misc/statements/wright030100.html>

The Trump FCC: Radical, Populist, Dealmaker, or Traditionally Republican?

▶ Radical?

- ▶ Members of the Trump Administration's transition team have called for dismantling the FCC.
- ▶ Over the years, many have argued that FCC merger review is not needed in addition to DOJ or FTC review.
- ▶ In a recent article, House Subcommittee Chair Walden (R-OR) criticized FCC merger practices, but did not call for eliminating the FCC's role.

The Trump FCC: Radical, Populist, Dealmaker, or Traditionally Republican?

▶ Populist?

- ▶ “AT&T is buying Time Warner and thus CNN, a deal we will not approve in our administration because it’s too much concentration of power in the hands of too few.”
- ▶ This is a vertical merger a traditional Republican administration would likely approve quickly.
- ▶ A Democratic FCC might attempt to extract “voluntary commitments.”
- ▶ Using the FCC to punish critics would not be entirely new.

The Trump FCC: Radical, Populist, Dealmaker, or Traditionally Republican?

► Dealmaker?

- FCC GC Sallet noted the conventional wisdom that, with respect to mergers, “the answer is always ‘yes,’ and the path to ‘yes’ is by bargaining with the agency.”
- Christopher Yoo analyzed and criticized the Commission’s extraction of “voluntary commitments” from Comcast in order for it to obtain approval of its acquisition of NBC.
- Congressman Walden criticized the FCC’s practice of effectively subjecting merging parties to regulations that don’t apply generally.
- The FCC has not limited itself to imposing merger-specific conditions or commitments—which has been almost universally criticized.
- But ...

The Trump FCC: Radical, Populist, Dealmaker, or Traditionally Republican?

- ▶ Traditionally Republican?
 - ▶ Gibson Dunn predicts Trump Administration merger policy “may roughly track the approaches of recent Republican administrations.”
 - ▶ How would a traditionally Republican FCC view the AT&T/T-Mobile deal?
 - ▶ What would be “unthinkable?”