

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Streamlining FCC Review of Applications )  
Relating to Mergers )  
 )

**COMMENTS OF THE COMPETITION POLICY INSTITUTE**

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## COMMENTS OF THE COMPETITION POLICY INSTITUTE

The Competition Policy Institute (“CPI”) submits these comments pursuant to the Commission’s public notice<sup>1</sup> and the Transaction Team’s presentation at the March 1, 2000 public forum. CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

### INTRODUCTION AND SUMMARY

Since enactment of the Telecommunications Act of 1996, the telecommunications industry has undergone a structural transformation of seismic proportion. This transformation has witnessed not only the birth of new companies seeking to pry open monopoly markets, but also numerous mergers and increased concentration as competitors and incumbents combine to seek access to broader markets and more customers.

Telecommunications mergers can either hold great promise for consumers or threaten great harm to their interest. Some mergers can actually spur competition by combining industry players with the complementary resources needed to break into markets dominated by entrenched incumbents. On the other hand, some mergers can hurt consumers by retarding the development of competition in telecommunications markets. This happens when mergers strengthen the existing fortresses of some dominant incumbent providers and remove would-be competitors from the field. It is no exaggeration to say that the FCC’s decisions about mergers determine whether consumers see the promise of competition in local telecommunications service.

The large number of merger-related transactions the FCC has had to review since 1996 has generated concern in Congress, with the result that legislation has been proposed to modify the FCC’s authority to review merger related transactions. CPI testified before congressional committees in support of legislation that would require the Commission to shorten the time

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<sup>1</sup> Public Notice, Transaction Team Seeks Public Comment on Issues Memorandum, Procedures and Processing

employed in such merger reviews. A copy of our most recent testimony on the subject is attached to these comments. As explained more fully in that testimony, we believe that the demands of the changing telecommunications industry require the FCC to speed up merger reviews.

Accordingly, we support the effort by the Commission to examine its merger review process with an eye towards making it more transparent and efficient. CPI commends the FCC for establishing the Transaction Team and for seeking additional comment on its proposed transaction review timeline. In these comments we support the basic framework established by the Transaction Team. We highlight several aspects of the timeline that move towards the goal of improving the Commission's review of merger-related transactions. We discuss proposals for improving the formal pleading process, expanding use of public fora and electronic filing. Lastly, we recommend that the FCC make the process of developing conditions to merger approvals more consistent and transparent.

#### **I. THE PROPOSED 180 DAY TIMELINE IS REASONABLE**

The Transaction Team describes a comprehensive proposal for a 180-day period within which the FCC would review transactions related to mergers. The proposal sets out the events that occur in each stage of the review and how long parties can generally expect each stage to last. CPI believes this proposal is a reasonable way for the Commission to make its merger review process more predictable and transparent.

We believe fundamentally that both applicants and consumers deserve a timely answer from the FCC on whether a merger will be permitted to proceed. To accommodate an increasingly dynamic marketplace, regulators must accelerate the decision-making process so that it assists and does not hinder the progress of competition. Adoption of a published timeframe is

an important step in that direction. We think the 180-day timeline gives the FCC flexibility to address both complex and simple mergers under the same general framework. Further, we agree that the timeline should have sufficient flexibility to allow applicants to amend their proposed transaction, an opportunity that is valuable to the applicant even if it prolongs the review process in a given case.

**A. Formal Pleadings Process**

The Issues Paper suggests the Transaction Team will seek further input in order to develop best practices to encourage applicants to provide as much information as possible at the initial stage of the review. CPI believes this is preferable to a system in which applicants wait for comments, reply comments, *ex parte* meetings, or FCC requests, before offering substantive evidence on critical issues that may affect the outcome of the FCC's review.

This proposal is a critical element of the timeline and we think it will facilitate the Commission's decision-making process in two ways. Obviously, Commissioners and staff benefit when the filed application contains all the relevant information they need to evaluate the merits of the application. Second, other parties that do not participate fully in the comment cycle or the *ex parte* meeting stage can comment on a comprehensive record. These two effects actually reinforce each other, since the Commission and staff will benefit from parties' analysis of relevant evidence at the early stages of a merger proceeding.

**B. Use of Public Fora and En Banc Meetings**

The Transaction Team's proposal suggests the FCC will consider using public fora or *en banc* meetings more frequently in its review of transactions related to telecommunications mergers. CPI generally supports greater public involvement in FCC decisions. Such public fora and *en banc* meetings offer the opportunity for a type of debate among parties that will foster a

broad discussion of the important issues. In these settings, parties must often narrow the scope of their arguments and discard arguments that are not effective. This will allow the Commission to focus its analysis on those issues which are described in, and survive, the public fora.

Further, public meetings open the FCC's merger review process to public scrutiny, answering any criticism that its reviews of mergers are conducted behind closed doors. These public meetings may also facilitate broader involvement from parties not armed with scores of lawyers and lobbyists. Of course, our support for increased use of public meetings in the transaction review process depends on such meetings not delaying the FCC's consideration of the application.

### **C. Electronic Filing**

The Transaction Team proposes several steps to facilitate improved access to documents filed in merger proceedings. To enhance parties' ability to access documents in merger-related proceedings, the Transaction Team established a separate page on the FCC's website that will provide a link to merger related documents posted in the ECFS. Although this is a good first step, we believe the Commission needs to do more here.

As a further improvement, CPI believes the Commission should require merger applicants to submit their applications in electronic format. Likewise, parties that file comments longer than five pages should be required to file electronically, except in circumstances where such requirement would cause an undue hardship to an organization or individual without such capacities. When parties file electronically, the documents are easier for the ECFS staff to upload into the system and vastly easier and less time consuming for parties to download.<sup>2</sup>

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<sup>2</sup> In a related matter, we think the FCC should work to improve the speed with which files are posted to the ECFS, and improve its performance. The system's current sluggish performance impedes the goal of providing timely access to filed comments and limits parties' ability to effectively participate in Commission proceedings. This is

We recognize that parties often submit a broad range of documents in support of their application, including printed materials such as court orders and transcripts from state commission hearings. We understand that some of these documents can be costly or cumbersome to transfer to an electronic format. CPI suggests that the FCC staff can determine which documents an applicant must file electronically. At a minimum, however, applicants should be required to submit documents they develop, such as briefs, affidavits, and exhibits, in an electronic format that supports fast upload to and download from the ECFS. This will be an effective way to facilitate greater public involvement in the FCC's consideration of merger-related transactions.

## **II. THE COMMISSION SHOULD OPEN THE CONDITIONS PROCESS TO PUBLIC SCRUTINY**

Much of the criticism of the FCC's process for reviewing merger-related transactions seems to have been triggered by the FCC's increased use of voluntary conditions to ameliorate potential harms in certain transactions. Although CPI supports the FCC's authority to use voluntary conditions in the transaction approval process, we recommend greater public involvement in the development of those conditions. Moreover, CPI believes there should be some consistency and transparency to the process of developing conditions. Without consistency, the parties seeking approval cannot predict how the FCC will treat their application or proposed conditions. Likewise, without transparency, opponents of the merger and the public may lack confidence that the Commission's process is fair and adequately considers their point of view.

CPI also suggests that, to make the conditions process more consistent, it is important that the FCC's view of merger-related transactions not devolve into a process where parties are

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especially problematic in proceedings where the parties face an expedited pleading cycle, including merger-related proceedings where the Commission is trying to stay within a specified timeframe.

allowed to ask for unrelated concessions from applicants as the price of approval. Instead, the FCC should impose conditions on merger-related transactions only when those conditions can effectively eliminate or mitigate a discrete harm to the public interest. The FCC should avoid imposing conditions that bear no relationship to the specified harm, merely to add more weight to the positive side of the FCC's public interest equation. In other words, when no possible conditions specifically resolve the FCC's concerns, the FCC should reject the merger outright, rather than attach conditions that do not mitigate discrete damages from the merger.

### **III. CONCLUSION**

As the telecommunications industry continues to experience structural upheaval, the FCC must design its merger review process so that it protects the public interest while providing an expeditious answer to merger applicants. CPI believes that the 180-day timeline is a reasonable framework to guide the FCC's review of transactions related to mergers. The specific proposals for focusing on the formal pleading stage, increasing the use of public meetings, and improving access to electronically filed merger documents are meaningful improvements. We look forward to the FCC developing similar improvements to its process for attaching conditions to merger approvals.

CPI encourages the Commission to develop a more consistent and transparent process for developing and adopting voluntary merger conditions. We think more public involvement is a key ingredient. While we support the FCC's continued flexibility to place conditions on mergers, those conditions should be germane and should ameliorate specific harm to competition and consumers that the Commission has identified. The Commission should not attempt to use merger conditions to fix mergers that cannot be fixed; such merger proposals should simply be rejected.

Respectfully submitted,

/s/ Joshua M. Bobeck

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