A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner’s Perspective

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Many headline-grabbing transactions in recent years have involved communications companies, such as Charter’s acquisition of Time Warner Cable and Bright House Networks (2016), AT&T’s acquisition of DIRECTV (2015), Comcast’s abandoned attempt to acquire Time Warner Cable (2015), AT&T’s abandoned attempt to acquire T-Mobile (2011), or Sirius’s merger with XM Radio (2008). These transactions, both successful and unsuccessful, have drawn attention to the process by which the U.S. government approves or blocks mergers and acquisitions in the communications and broadband Internet industries.

Typically, before a transaction in those sectors may proceed, at least two federal agencies must clear it: the Federal Communications Commission and an antitrust agency, commonly the Department of Justice.1 Review by these agencies differs in several key categories: (1) their standards for evaluating transactions, including who bears the burden of proof; (2) their procedures; and (3) the types of remedies that each agency is likely to pursue as a condition to approval. In addition, many other subtle differences can affect the merger review process, such as the methods of discovery employed by each agency. Understanding the similarities and differences between the agencies can help practitioners representing communications companies better navigate the review process and guide clients to a favorable outcome.

Different Standards for Merger Review

One of the more noteworthy differences between the agency review processes is the standard by which each agency analyzes the proposed merger. The DOJ focuses on the competitive effects of a transaction; the FCC, by contrast, applies a broader “public interest” standard that looks beyond competitive effects. The burden of proof for satisfying each agency’s standard is different, too. The DOJ bears the burden of proof to establish why a transaction should be blocked, while the merging parties bear the burden of proof to establish why the FCC should approve the transaction.

DOJ Review. Section 7 of the Clayton Act prohibits mergers “the effect of which . . . may be substantially to lessen competition, or tend to create a monopoly.”2 Section 15 of the Clayton Act

1 This article does not address the transaction review processes of any applicable state agencies.
2 15 U.S.C. § 18. In principle, both the DOJ and Federal Trade Commission have jurisdiction over all sectors of the economy. However, these agencies typically divide industries between them, with the FTC often handling media and broadcast cases and the DOJ focusing on telephony, broadband Internet, and cable and satellite television. See, e.g., Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), https://www.justice.gov/atr/memorandum-agreement-between-federal-trade-commission-and-antitrust-division-united-states. The FTC’s lack of jurisdiction over common carriers, which includes providers of “telecommunications services,” in part explains why the agencies have made this division, but that is beyond the scope of this article. For convenience, this article describes DOJ’s processes and refers to the agencies collectively as the DOJ.
authorizes the DOJ to seek an injunction to block an acquisition. The burden is on the DOJ to demonstrate by a preponderance of the evidence that the merger will violate the antitrust laws. To establish a violation, the DOJ must establish that the transaction is reasonably likely to cause anticompetitive effects.

For horizontal mergers (between actual or potential competitors), the DOJ in conjunction with the Federal Trade Commission has established enforcement guidelines that provide that such mergers “should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.” The DOJ focuses on whether the transaction may lead to lessened competition through unilateral effects (i.e., exercise of single-firm dominance) or coordinated effects (i.e., collusion). That analysis often but not always entails the DOJ defining relevant product and geographic markets, calculating market shares for the parties and all other current producers/sellers (including firms that could easily and quickly enter without incurring sunk costs), and then assessing whether a transaction will lessen competition.

The DOJ will also consider whether any risk of lessened competition may be diminished due to new entry into the market that is timely (within two years), likely (given minimum viable scale and potential for profitability at pre-transaction prices), and sufficient to deter anticompetitive dominance or collusion. Thereafter, the DOJ will consider whether any remaining potential for anticompetitive effects is outweighed by cognizable and verifiable transaction-specific efficiencies.

For a vertical merger (e.g., between a supplier and a downstream customer), the DOJ’s primary concern is whether a transaction could allow the combined company to foreclose competition from its competitors by denying access to necessary suppliers or customers. To determine the risk posed by a vertical transaction, the DOJ looks at many of the same facts as in a horizontal merger: the number of suppliers and customers; concentration in the defined markets; and the ease of entry and exit into those markets. The DOJ is not likely to pursue an enforcement action when there are adequate numbers of suppliers and customers in a post-transaction market.

**FCC Review.** Under the Communications Act of 1934, as amended, the FCC is required to review all mergers or transactions involving the assignment or transfer of control of FCC licenses or authorizations. The FCC’s review thus is limited to transactions involving FCC licenses or authorizations, and is mandatory for the agency; the DOJ, by contrast, often has more discretion in its review, such as whether to pursue a second request or to investigate a transaction for which no HSR filing was required.

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7 See id. § 4.
8 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 343ff (7th ed. 2012). The DOJ may elect not to challenge an otherwise problematic transaction that involves a failing firm or division whose assets would exit the market absent the proposed transaction, but this exception is very narrow.
9 See 1 ANTITRUST LAW DEVELOPMENTS, supra note 8, at 350–60.
10 See id. at 377ff.
In evaluating whether the transaction serves the public interest, the FCC’s analysis is “informed by, but not limited to, traditional antitrust principles.” The FCC, like the DOJ, evaluates the competitive effects of the merger, but its analysis takes into account a number of considerations that the DOJ’s competitive analysis might not. The FCC considers among other things whether a transaction would promote “the broad aims of the Communications Act,” an assessment which has included, among other things, evaluating whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, increase the availability of children’s programming and Public, Educational, and Government programming.

For example, the FCC has required merging entities to offer standalone, discounted Internet services for low-income customers, without finding that bundled services would violate the antitrust laws or that Internet prices would rise absent the condition. The FCC also regularly states that one difference between its standard and that of the DOJ is that it will consider “whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.” This may be a difference more of description than substance, as the FCC has not challenged a transaction on the ground that it merely preserved but did not enhance competition.

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14 See, e.g., AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9140, ¶ 20; SoftBank-Sprint Order, supra note 13, 28 FCC Rcd. at 9651, ¶ 25.

15 See, e.g., AT&T-DIRECTV Order, supra note 13, 9141 ¶ 21 (“[T]he DOJ review is . . . limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.”); In the Matter of Applications of Comcast Corp., General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, 26 FCC Rcd. 4238, 4248, ¶ 23 (2011) [hereinafter Comcast-NBCU Order]; Sirius-XM Order, supra note 13, 23 FCC Rcd. at 12364, ¶ 31. Despite the FCC’s articulation of its standard as different from the DOJ’s, some of the supposed differences, such as a focus on improved service quality or diversity of information sources, may also be part of the DOJ’s evaluation, for example, as potential efficiencies. Thus, in practice, the standards may overlap significantly. As discussed in more detail below, perhaps the most notable difference is that the FCC may impose conditions on transactions more frequently than does the DOJ, and in doing so it often points to its desire to promote the goals of the Communications Act.


17 AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9141, ¶ 21.
Despite the different standards of review between the FCC and DOJ, disagreement between the agencies is rare. Close coordination between the agencies during the review process typically avoids any overt disagreement. Nonetheless, the FCC’s public interest standard, of which antitrust analysis is only one component, could allow it to reach a different conclusion from the antitrust agencies.¹⁸

Agency Process and Timing

The DOJ and FCC review transactions in parallel, but each agency follows its own procedures. Among the most notable differences is that, while parties to a proposed merger may publicly disclose that the deal is subject to DOJ review, the review process itself is conducted largely behind closed doors,¹⁹ unless and until the DOJ files a lawsuit seeking to block a transaction. By contrast, the FCC reviews major transactions via a publicly docketed proceeding and invites the public to participate, although the proceedings are subject to protective orders that limit access to confidential information. In addition, there are a variety of other differences in the agencies’ procedures. Understanding some of the key differences can facilitate the review process.

Initial Submissions

DOJ Filings. The Hart-Scott-Rodino (HSR) Act requires parties to notify the DOJ and FTC before closing on certain acquisitions of voting securities, non-corporate interests, and assets.²⁰ Generally, these premerger filings are triggered when the parties have revenues or assets in the United States of a certain size, and the value of the transaction exceeds a certain U.S. dollar threshold, subject to statutory exemptions.²¹ The filing describes the key terms of the transaction and contains basic data on each party’s U.S. revenues, subsidiaries, minority holdings, overlapping products or services (where applicable), and documents discussing competition-related aspects of the transaction. The filing triggers a 30-day statutory waiting period (15 days in the case of cash tender offers or acquisitions in bankruptcy) that must lapse before the parties close the transaction. Parties may also request “early termination” of the waiting period.

For the significant majority of transactions before the DOJ, the HSR waiting period lapses without further inquiry, or early termination is granted, and the parties have the antitrust approval necessary to close their transaction. In some cases, the DOJ may conduct limited inquiries into the relevant products or services affected by the transaction, and may request voluntary submissions of documents to provide background information during the initial waiting period. The parties may also proactively engage with DOJ staff to address any initial questions or concerns. The DOJ may also contact each party’s competitors and customers for interviews and other information.

At the conclusion of the HSR waiting period, the DOJ must determine whether to close its investigation and allow the parties to proceed with closing the transaction. If the DOJ has not resolved

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¹⁸ As a practical matter, the agencies have the ability to avoid public disagreement were they ever to reach different conclusions about a transaction’s merits. For example, in the unlikely event that the DOJ wanted to challenge a transaction over which the FCC had no concerns, the FCC could delay taking action on the pending FCC application. Conversely, the DOJ need not take any public action if it approves a transaction. In all events, the coordination between agencies makes these scenarios more theoretical than realistic.

¹⁹ See 18 U.S.C. § 18a(h).

²⁰ 15 U.S.C. § 18a. The DOJ can (and sometimes does) investigate the competitive effects of transactions that do not require the submission of an HSR filing.

²¹ The relevant values and thresholds are adjusted annually. As of February 2016, a premerger filing may be required in transactions valued at more than $312.6 million without regard to the parties’ sales or assets in the United States. For transactions valued between $78.2 million and $312.6 million, both parties must also satisfy the “size of person” test, which requires one party to have more than $156.3 in sales or assets and the other party to have sales or assets of at least $15.6 million.
its concerns with the transaction through dialogue with the parties, it will issue a Request for Additional Information, commonly known as a “Second Request.” A Second Request results in an extensive, time consuming, and costly discovery process.

If parties believe that the DOJ’s investigation may require more than 30 days, but perhaps could be resolved without a Second Request, they have the option to “pull and refile” their HSR submissions, which effectively extends the waiting period by an additional 30 days.

**FCC Filings.** Entities seeking the transfer or assignment of FCC licenses or authorizations must seek FCC approval prior to consummating the transaction. Formally, these entities are required to submit written applications on various FCC forms specific to the licenses or authorizations to be assigned or transferred. The FCC forms are accompanied by a narrative public interest statement by the parties that describes the parties (including detailed ownership information), the mechanics of the transaction (e.g., whether it is an asset sale or stock transaction), the public interest justifications, and the competitive impact (including satisfaction of any applicable FCC-specific competition analysis). For large transactions, the FCC application narrative is likely to consist of a much more significant submission than the initial HSR filing. It is not uncommon for applicants to include an economist’s analysis with the application, whereas that would usually come later in the DOJ process.

After receipt of the applications and verification that all necessary administrative documents have been submitted (including the adequacy of the parties’ public interest statement), the FCC will issue a public notice announcing the receipt of the applications and the opening of a public docket.22 For major transactions, the FCC typically issues a public notice several weeks after the application is filed that establishes a public, docketed proceeding with an informal 180-day “shot clock.”23 The public notice also will set forth the ex parte rules that will apply to the proceeding; for major transactions, the FCC typically designates the proceeding as “permit-but-disclose,” meaning that the applicants and interested parties may make presentations to decision-making personnel at the FCC, so long as the presentations are disclosed by filing a letter in the record describing the substance of the meeting and naming the participants).24

Although the FCC tries to complete its review within the 180-day period, it is not required to do so, and the FCC frequently stops the clock. There are a variety of reasons it does so, including non-timely responses to information requests, extension of notice/comment filing periods, delay resulting from issues pending before other agencies or law enforcement, and receipt of new information or a substantial amendment to the application. Some complex or controversial transactions have taken a year or more to resolve. For example, in the Sirius-XM transaction, the FCC issued its public notice initiating the transaction review in March 2007, but did not vote to approve the transaction until late July 2008.

**Third Party Participation in Merger Proceedings**

**DOJ.** For public transactions, the DOJ is likely to receive unsolicited information from third parties, including the parties’ competitors and customers, and industry interest groups, such as trade associations. While the information supplied by these contacts may be beneficial, the DOJ

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22 In many cases, entities engage with FCC staff informally prior to the submission of the applications, both to provide advance notice and to gauge the initial responses of FCC staff. There are typically no public records of such meetings or discussions, and nothing stated in those meetings by the FCC is binding.

23 See https://www.fcc.gov/reports-research/guides/review-of-significant-transactions. Non-major transactions may not have a shot clock but generally are acted on in due course and within 180 days.

24 See 47 C.F.R. § 1.1206.
may view complaints by competitors with a degree of skepticism, since the interests of competitors may diverge from the interests of consumers.25

Third parties also continue to play a role before and during a Second Request. Not wanting to rely solely on the parties’ representations about the competitive dynamics in their relevant markets, the DOJ often receives additional information and testimony through voluntary requests and compulsory process from private parties, especially customers and competitors. Private parties may also proactively reach out to the DOJ to complain about a transaction or advocate for a proposed remedy. For transactions with localized market effects, state attorneys general may conduct investigations in parallel with the DOJ. In addition, for cross-border transactions, the DOJ will coordinate with foreign competition authorities also investigating the transaction.

FCC. Unlike the DOJ process, the FCC review is conducted in a public, docketed proceeding, and anyone is permitted to review filings and submit comments, subject to protective orders that limit access to confidential information. The FCC’s public notice inviting comments typically sets out a three-stage comment cycle: (1) initial comments or petitions to deny; (2) opposition by the applicants to the initial comments or petitions; and (3) reply comments. Commenters become formal parties to the proceeding, which typically entitles them to appeal an adverse decision and to gain access to some or all documents filed in the proceeding. Commenters may file a petition to deny the transaction or simply file comments expressing their views on the transaction, which may include proposals for conditions that the FCC should impose before approving the transaction. In major transactions, comments are commonly filed by competitors and customers of the merging parties, trade organizations, and public interest organizations. Increasingly, major transactions also draw comments from individual members of the public. For example, in the Comcast-Time Warner Cable proceeding, more than 100,000 comments were filed by members of the public, although many of the filings were very brief and/or non-substantive.

Document and Data Discovery Procedures

DOJ Second Request. If the DOJ has not resolved its concerns with the transaction through discussion with the parties, it will issue a Second Request. Compliance with a Second Request can be burdensome, requiring a significant expenditure of time and resources to address, and typically can take 3–6 months or more to comply. Parties frequently produce hundreds of thousands of documents related not only to the transaction but also other relevant areas of the parties’ businesses, and prepare narrative responses to a variety of questions concerning the relevant product and geographic markets that cause the DOJ concern. The DOJ staff may also depose company executives during this time, as well as continue to interview and collect statements from third-party competitors and customers.

Document requests either require a search of certain employees’ files for all documents relating to specific topics or require the parties to locate and produce specific documents, such as a copy of promotional materials. Document requests also commonly include requests for the company’s organizational charts, promotional materials and marketing plans, strategic plans and financial projections, pricing documents, documents analyzing competitors and competition, competitive analyses, and all documents related specifically to the transaction. Parties often negotiate with the DOJ staff regarding the number and identity of document custodians and search parameters for the document production.

25 See Horizontal Merger Guidelines, supra note 6, at 5–6. One example that the agencies note is that “customers normally lose, but rival firms gain, if the merged entity raises its prices.” Id. at 5.
Interrogatories require the parties to answer questions in writing and often are used by the DOJ to obtain specific information without having to sift through thousands of documents. Typical interrogatory requests include a description of the relevant product/service as defined by the DOJ, aggregated sales information, detailed sales/revenue data, bidding data or win-loss reports, a description of competitors and their market shares, a list of recent and potential entrants into the relevant market and a detailed description of the costs and time for entry, and a description (and quantification) of the merger-specific efficiencies and benefits that will flow from the transaction. Parties often hire an economist to aid in the preparation of these submissions.

FCC. Throughout the FCC process, but often after the comment cycle is completed, the agency may issue information requests to the applicants, as well as to competitors and industry stakeholders. FCC information requests in major transactions typically are issued well after the DOJ has issued its Second Requests. Parties receiving requests for information from the FCC typically have two to three weeks to respond, although full compliance with large information requests may take longer. The requests often raise many of the same procedural issues as in a Second Request, such as the number and identity of custodians and search parameters for any requested document production. Like the DOJ requests, these may be negotiated with the agency, and the greater the consistency between search parameters, such as the custodians and time frames for review, the more efficient the review process is likely to be.

The substance of some of the information requests often overlaps substantially with the requests of the DOJ, especially with respect to competitive analysis. But, as explained above, the FCC's inquiry is broader than the DOJ's, and accordingly it may seek answers to substantively different questions, adding to the complexity, time, and cost of the combined review processes. It is not uncommon for the FCC to seek documents from additional custodians as well. While the inquiries will not overlap completely, close coordination between outside lawyers representing clients before the DOJ and FCC on their e-discovery strategy—before the process begins—will help avoid duplication of efforts, and enable the applicants to leverage work done for one agency in order to respond to the other. Well-designed discovery protocols ideally will require custodians’ files to be searched and collected only once, and should minimize duplicative review of documents.

Confidentiality of Documents and Data

DOJ. Any information including documents submitted to the DOJ during the HSR clearance process is treated confidentially and is exempt from disclosure under the Freedom of Information Act, even from third parties who protest the transaction to the DOJ.26 The DOJ interprets the confidentiality requirements of the HSR Act to prohibit disclosure of HSR filings and other submissions to other independent federal agencies unless the filing party agrees to permit disclosure.27 If, however, DOJ sues to enjoin the merger, documents may be produced as part of the litigation, subject to appropriate protective orders.

FCC. FCC proceedings are presumptively public, but parties, including not only the applicants but also affected third parties, may seek confidential treatment for information submitted in the proceeding. To ensure that the review of sensitive information by other entities does not harm the merger applicants, the FCC has established a practice of issuing protective orders governing review of “confidential information” (typically limited to counsel and outside experts not engaged in competitive decision-making) and “highly confidential information” (typically limited to outside

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counsel and other outside consultants not involved in competitive decision-making). As a result, the general public will have relatively easy access via the FCC's website to information, such as the application, public interest statement, and exhibits including economist reports, but access to confidential business information may not be readily available, or available at all.

Resolution of Agency Proceedings

DOJ. Parties may be able to resolve the DOJ's concerns through effective advocacy and more limited data and document submissions without fully complying with a Second Request, or they can seek modifications to the Second Request to limit its scope. Once the parties have certified that they have substantially complied with the Second Request, a second 30-day waiting period begins during which the DOJ reviews the additional information received to determine whether to close its investigation or proceed to litigation.

Because the DOJ cannot adjudicate mergers itself, if the DOJ concludes that an acquisition may substantially lessen competition, the agency may seek a preliminary injunction in federal court under Section 15 of the Clayton Act that would prevent parties from consummating the transaction. This requires the DOJ to meet the four-part legal standard for preliminary injunctions by demonstrating that: (1) the plaintiff will suffer irreparable harm if the injunction does not issue; (2) this injury to the plaintiff outweighs the harm to the defendant if the injunction is granted; (3) the plaintiff has a substantial likelihood of success on the merits; and (4) the injunction comports with the public interest.

As a practical matter, the DOJ and FCC typically coordinate carefully, and any efforts to block a transaction likely will reflect that coordination, with one or the other agency taking the lead. For example, in the 2002 proposed combination of DIRECTV and DISH, the FCC initially designated the transaction for a hearing before an administrative law judge for additional fact-finding and, less than two weeks later, the DOJ filed a lawsuit to block the transaction. In the 2011 AT&T-T-Mobile proposed transaction, the DOJ initially filed a lawsuit to block the transaction, and the parties swiftly withdrew their application from the FCC; the FCC nevertheless released a “Staff Analysis and Findings” that reflected the FCC staff's draft order designating the transaction for a hearing. Parties often abandon transactions that face significant delay or where litigation becomes imminent.

As an alternative to litigation, the DOJ may use a variety of tools to reach an agreement with the merging parties that resolves its concerns. The DOJ may, for example, negotiate a settlement that contains certain conditions. The settlement agreement typically takes the form of a consent decree that is filed in court and, upon entry by the court, becomes a binding order. The DOJ also may accept a voluntary remedy proposed by the parties that allows the merger to proceed with modifications that restore or preserve competition. In the past, the DOJ has generally preferred

one-time structural remedies, such as divestitures, over ongoing behavioral requirements to avoid the costs and complexities associated with continuously monitoring a firm’s activities and ensuring compliance. However, guidelines released in 2011 by the DOJ endorse a variety of conduct remedies to address concerns in vertical mergers and, in more limited circumstances, in horizontal mergers.32

In communications transactions, conditions imposed by the DOJ may also be the product of coordination with FCC staff. Thus, in the Charter-Time Warner Cable-Bright House transaction, the parties entered into a consent decree with the DOJ to prohibit Charter from entering into or enforcing contractual terms that prevent video programmers from distributing content online, a decree that the FCC described as the product of “close coordination” between the agencies.33

**FCC.** When the FCC has competitive or other concerns regarding a proposed transaction, it too can impose conditions to its approval of the transaction. Additionally, acting under its public interest authority, the FCC routinely imposes and enforces transaction-specific conditions to a grant of an application to ensure that the public interest is served. Moreover, because the parties bear the burden of demonstrating that their transaction satisfies the FCC’s public interest standard, and the FCC has no mandatory timeline for action, applicants often offer “voluntary” conditions to proactively resolve any FCC concerns and accelerate approval. FCC-imposed conditions may include forward-looking conditions relating to the merged entity’s future conduct. The FCC’s greater willingness to impose such “behavioral” conditions stems from its authority to maintain ongoing oversight of the entity, as an FCC licensee, and from its broader merger review standard, which includes promoting the policy goals underlying the Communications Act.

As an example, the Commission imposed a number of conditions in the 2015 AT&T-DIRECTV merger to address potential competitive concerns. To remedy the possibility that AT&T post-merger would have less incentive to deploy Fiber-to-the-Premises (FTTP) (i.e., fiber optic cable installed directly to the home), which could cannibalize video subscription revenues from DIRECTV, the Commission conditioned its approval on AT&T deploying FTTP to 12.5 million locations within four years.34 In the 2016 Charter-Time Warner Cable-Bright House transaction, the FCC adopted conditions that sought to prevent the merged company from discriminating against online video in favor of its own cable TV packages. The conditions, among other things, prohibited the merged entity from employing data caps or usage-based pricing, mandated a generous “settlement-free” Internet interconnection policy under which data was exchanged with many other entities at no charge, and required it to deploy high-speed broadband to 2 million additional homes.35 FCC conditions can also pertain to non-competition related considerations; in that same merger, the FCC imposed a condition requiring the combined entity to make available an affordable standalone broadband service to low-income consumers.36

If the FCC concludes that it cannot approve the proposed transaction based on the record before it, the FCC will designate the application for hearing before an administrative law judge for

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34 AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9278, ¶ 394.

35 Charter-Time Warner Cable-Bright House Order, supra note 33, 31 FCC Rcd. at 6339, ¶¶ 9–12.

36 AT&T-DIRECTV Order, supra note 13, 30 FCC Rcd. at 9279, ¶ 397.
additional fact-finding. As a practical matter, the Commission’s designating an application for hearing often leads to the applicants’ withdrawing their application, as was the case in the 2002 proposed merger of DIRECTV-EchoStar, as well as in the 2011 AT&T-T-Mobile and the 2015 Comcast-Time Warner Cable proposed transactions, in which the parties withdrew their applications upon the FCC staff’s recommendation that the transactions be designated for hearing. The reasons for withdrawing a transaction application may include the regulatory uncertainty of the hearing process, which creates costs and risks that parties may be unwilling to assume; the potentially lengthy duration of a hearing, which may not be completed within the time frame specified in a merger agreement or consistent with financing considerations; and the possibility of fighting parallel challenges from two regulatory agencies. As one former Commissioner has stated, “Mergers are never put to hearing in order to approve them. . . . they are designated for a hearing in order to kill them.”

Parties seeking merger approval should also appreciate that any adverse FCC determination will be difficult to challenge. The Supreme Court “has repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”

Conclusion

Merging parties in the communications sector must obtain approval from two federal agencies, each applying different standards that overlap in some respects but not others. The dual review has the potential to increase the burdens and costs of obtaining clearance for transactions. An appreciation of agencies’ similarities and differences, both substantive and procedural, can help make the process more efficient and promote successful outcomes.

37 See, e.g., AT&T-Plateau Wireless Order, supra note 13, 30 FCC Rcd. at 5111–12, ¶ 9.
39 See, e.g., FCC v. WCN Listeners Guild, 450 U.S. 582, 596 (1981); see also FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946)(“[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served . . . [a]nd the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter.”).