

Regulatory Roundup: Tips for Antitrust Lawyers Cross-Reporting to the FCC

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This past summer, Tribune Media Company ended protracted efforts to combine with Sinclair Broadcast Group, Inc. However, unlike many mergers subject to regulatory review and terminated in advanced stages, antitrust concerns did not lead to the deal's demise. Rather, Tribune called it off at the last minute because of Sinclair's alleged aggressive, "belligerent" conduct before the reviewing agencies. A key concern was Sinclair's dealings with the FCC, where it allegedly misrepresented or omitted material facts to that agency, conduct severe enough to subject Sinclair to FCC administrative hearings. According to Tribune, Sinclair's conduct violated the merger agreements' best efforts provision. The companies are now embroiled in a post-termination \$1 billion breach of contract suit, and the merger has sparked both government investigation and private class actions over price-fixing within the industry.²

The FCC is back in the news with another high-profile merger proposal between Sprint and T-Mobile.³ Sprint recently made presentations to the FCC in which it painted a grim picture of the company's current operations, and described the impending deal as necessary to compete with the likes of AT&T and Verizon.⁴

The veracity of Sprint's representations will undoubtedly be determined by the FCC and Department of Justice Antitrust Division. But with several recent mega-deals being scrutinized by both agencies – other recent examples include AT&T/DirectTV and Charter/Time Warner/Brighthouse – a primer on what it takes to walk a matter through the FCC is timely. Most antitrust practitioners understand and appreciate clearing matters through the federal antitrust agencies - the Commission meetings, the Front Office meetings, meetings with staff, investigational hearings, white papers, etc. Client candor and conduct are only a portion of what it takes to gain approval. But what about with mergers before the FCC?

Much like mergers and acquisitions are to be reported in accordance with the Hart-Scott-Rodino Act ("HSR Act"), deals in the telecommunications rubric also require FCC review, governed by Section 310(d) of the Communications Act of 1934 (the "Act"). This Section requires that proposed transfers of an FCC license or licenses (i.e. mergers) undergo rigorous review to determine if the transfer would serve the "public interest, convenience and necessity." While the exact meaning of "public interest, convenience and necessity" is a bit ambiguous, the gist is a weighing of factors to determine if, on balance, a proposed transfer is in the best interests of consumers and competition, and not just the parties seeking transfer.

The Act is technically triggered every time a license changes hands, and the vast majority of transfers are unopposed and processed quickly. Mergers between telecommunications companies, however, are always reviewed. Those transactions that present more complex issues and are subject to

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² MoginRubin represents a client in one of the class cases.

³ This deal is also being reviewed by the federal antitrust authorities, much like the Tribune/Sinclair deal.

⁴ See *Why Sprint is Painting a Grim Picture of its Business to Regulators*, Forbes.com, Oct. 1, 2018.

more rigorous review. For these reasons, a more thorough process is used to determine if the proposed transaction is in the public interest.

Under the FCC's rules, the party interested in obtaining the license (the acquiring entity) and the party wishing to transfer it (the seller) start the review process in a manner similar to reporting under the HSR Act - by filing a form application. The parties must describe the specifics of the transaction's structure, such as a description of the resulting license ownership and how it compares to existing ownership (if applicable), as well as the public benefits of the proposed transfer, such as preserving or enhancing competition in relevant markets, creating economic efficiencies, encouraging investment, or benefits to consumers. The application may also include discussion regarding any potential harms that the parties foresee and suggested remedies that the FCC may adopt in order to mitigate those harms. While this second piece is not required, it is in the parties' interest to disclose these issues upfront to avoid additional scrutiny that may delay the transfer review process.

Similar to an antitrust filing, the size of the deal dictates both the level of detail in the application and anticipated scrutiny. For example, large mergers that are likely to draw public attention, affect numerous consumers, or require complex rule review are expected to be more thorough than applications for more simple transfers (i.e. one license in one market). Experienced FCC practitioners understand that it is better to be thorough in an application for a large merger in an effort to avoid outright rejection of an application or delay resulting from requests for additional information. While simple transfer applications may consist of no more than a few sentences to describe the transaction submitted within the online application system, major mergers often also include extensive merger descriptions and analysis. The Sinclair/ Tribune application, for example, included a 115 page "Agreement and Plan of Merger" document.

Once the application is filed, the FCC will initiate a 180-day review "shot clock," which represents the timeline in which the FCC is statutorily required to approve or deny a proposed merger. During the time, the standard progression is: The Commission will issue a public notice announcing acceptance of the application, solicit comments and petitions to deny on the application from the public and interested stakeholders, perform a rigorous review of the record provided by commenters and the applicant, and issue an order according to that review. The Commission can pause the shot clock as needed to allow parties to supplement filings/ to allow the FCC to obtain additional information. While this is generally done on the Commission's own action, requests to pause the clock are not uncommon where information is perceived as lacking from interested stakeholders to the transaction, as happened in the Sprint/T-Mobile case. The Commission has the ultimate discretion in whether to pause the clock or not.

The "rigorous review" is conducted by the assigned Commission Bureau, allocated by industry. Review is assisted by a Transactions Team within the FCC's Office of the General Counsel. Staff on the Commission Bureau and the Transactions Team review a deal for compliance with the Agency's "public interest" standard. They review factors pertinent to the proposed merger and recommends to the FCC Commissioners whether the potential benefits of a particular license transfer outweigh potential harms to the public. These factors vary depending on the specifics of the proposed merger and the type of license being transferred, but often hinge in part on whether a resulting entity would violate FCC ownership rules. In the Tribune/Sinclair matter, for example, the FCC was slated to review, among other factors, whether the merger would comply with current media ownership rules, whether the resulting ownership would balance in favor of the public interest or not, and whether divestiture of a certain

number of media outlets (e.g. television channels in various markets) would be needed in order to ensure the public interest was maintained. Similarly, in the pending Sprint/ T-Mobile transaction, the FCC will look to whether the resulting entity would exceed the FCC's "spectrum screen," which dictates how much spectrum within certain bands one entity can own. Currently, the screen is exceeded when a wireless provider holds approximately 1/3 or more of the available spectrum in a given market. This information may be used to recommend rejection of the proposed merger, spectrum divestiture in certain markets, or other public interest requirements to offset any possible harms that may result from violation of the spectrum screen limits (e.g. required uses for the excess spectrum).

The burden falls on the applicants to demonstrate on the public record that a proposed merger will serve the public interest. In addition to the initial demonstrations that must be contained in the application, this burden also includes an on-going duty to ensure that all communications with the FCC are truthful and that any information provided to the FCC is accurate and not purposefully misleading - pretty basic stuff. Communications can include ex parte meetings with FCC Commissioners and staff, supplemental information and filings either at the request of the Commission or proactively by the Parties if they believe additional information would be helpful for the Commission's review. While the FCC will grant confidential protections to some types of information that are deemed competitively sensitive, broad information regarding how the merger will affect consumers (including details regarding the resulting entity's market power, etc.) must be disseminated in publicly filed documents, for which the Commission will designate a public docket. This public docket will also be the location for all public comments, supplemental filings, protests, ex parte notices, etc. regarding the proposed merger proceeding.

If the Commission is unable to find that a proposed merger is in the public interest or believes that an Applicant has failed to provide accurate or fulsome information regarding a proposed merger, the Commissioners will recommend the matter for hearing before an Administrative Law Judge (ALJ). Traditionally, referral to an ALJ is a death knell to a proposed merger as they can entail months of discovery, legal briefs, and more that cause delay and can tack on voluminous legal costs. Generally, if a hearing is recommended, that is the point where the parties decide to cut their losses and withdraw a merger application. In the case of the Tribune/ Sinclair merger, allegations of misrepresentations to the FCC on the part of Sinclair were enough to trigger the Commission to recommend the proposed merger for hearing, which ultimately lead to the withdrawal of the application before the Commission.