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# D.C. Circuit Casts Doubt on FCC's Authority to Impose Merger Conditions

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In a recent decision reversing FCC-imposed conditions on Charter Communications' 2016 acquisition of Time Warner Cable, a three-judge panel of the D.C. Circuit Court of Appeals raised significant questions about the FCC's authority to adopt conditions on mergers governing future business practices. While the court stopped short of finding that the FCC lacks authority to impose such conditions, it did leave that issue open for future challenges, and the two judges in the majority signaled a willingness to consider such arguments. This decision should interest parties involved in mergers subject to FCC review.

*Competitive Enterprises Institute, et al. v. FCC* arose from a challenge to several of the FCC's conditions on the Charter/Time Warner merger brought by consumers and the Competitive Enterprises Institute, a conservative public interest group. The consumers argued that the conditions harmed them by leading to higher prices and that the FCC had no authority to impose the conditions in the first place. The conditions at issue prohibited Charter from (1) charging edge content providers for access to broadband subscribers and (2) charging usage-based prices for broadband service; they also required Charter to (3) offer steeply discounted broadband service to poor subscribers and (4) substantially expand the geographic footprint of its broadband services.

Much of the court's decision is consumed by an arcane legal discussion of whether the consumers should be permitted to challenge the FCC's conditions and, in particular, whether they resulted in direct harm that would be remedied by removing the condition. The consumers argued that each of the conditions harmed them by raising their prices for cable and broadband services. The court found that the consumers met the injury requirement with respect to the prohibition on charging edge providers for access to customers and the requirement of providing low-cost services to poor households. The court dismissed the consumers' challenges to the other two conditions, finding that Charter was unlikely to offer usage-based pricing regardless of the condition and that the costs of the required infrastructure expansion had already been spent and that no injury could be redressed by removing the condition now.

In an unusual twist, even though the FCC argued that the consumers' challenges should be dismissed because they had not suffered a legally cognizable injury as a result of the conditions, it declined to defend the legality of the conditions themselves. That meant that once the court found that the consumers had demonstrated standing, the court was bound to overturn the undefended conditions. Thus, the court took the extremely rare step of annulling conditions that the FCC imposed on a major merger.

## Court discusses FCC authority on merger conditions

Potentially more important, however, was the court's discussion of the FCC authority to impose these merger conditions in the first place. The court noted the consumers' argument that the conditions went far beyond any authority the commission might have to review the transfer of the telecommunications and wireless licenses involved in the Charter/Time Warner merger. The court also noted that the FCC arguably oversteps its authority when it converts its review of such license transfers into a review of the entire merger. Next, the court pointed out that the discounted service requirement did not address any merger-related harm or provide any merger-related benefit. The court found this problematic, quoting past precedent and FCC commissioner statements describing such conditions as akin to government extortion.

The court decided that it did not need to resolve these issues because the FCC declined to defend the merits of the conditions, but this discussion raises significant questions about the FCC's authority to impose behavioral conditions in future merger proceedings. While such conditions have become commonplace in FCC merger approvals, the court's discussion of the FCC's authority provides a roadmap for resisting these conditions when seeking FCC approval of a merger. Moreover, while parties to a merger approval typically cannot challenge merger conditions because the FCC characterizes them as "voluntary" undertakings offered to secure merger approval, the court's decision nonetheless shows that such conditions may be vulnerable to attack by affected

third parties. This could be a valuable fact to point out in merger discussions with the FCC.

Future cases will have to grapple with the issues that the D.C. Circuit left unresolved in *Competitive Enterprises Institute, et al. v. FCC*, but the FCC's authority to impose and enforce merger conditions is somewhat less secure today than it was prior to the decision.

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