

# The FCC Public Interest Test Problem

Imagine the growth and consumer benefit that could result if communications companies could efficiently transform their businesses and buy the resources they need to keep pace with rapid changes in technology and consumer demand — as quickly and easily as other industries can? Only communications companies must endure the FCC's public interest test (the PIT), an amorphous FCC approval standard that only applies to communications-related mergers and spectrum acquisitions. □ Companies subjected to the FCC's PIT face a big multi-faceted problem, because the process is arbitrary, unpredictable, obsolete, discriminatory, and extortionate. It's an unnecessary impediment holding broadband communications back from fulfilling customers' rapidly changing needs, demands and expectations.

**Arbitrary:** The PIT's utter amorphousness makes it inherently arbitrary. With no formal guidelines or limitations, the PIT has been described as an “empty vessel” and a Rorschach test, because in practice, it has devolved into whatever three unelected FCC commissioners define it to be at any given time. How can a company strategically plan when faced with such a powerful fickle gatekeeper? Late last year the FCC arbitrarily blocked the pending AT&T-T-Mobile merger in an unprecedented manner. FTC staff released a factually-biased draft [analysis](#) opposing the merger that completely [ignored](#) the Internet's impact on wireless competition. Since the analysis was never officially approved by the FCC, the companies had no due process opportunity to appeal for fair treatment.

**Unpredictable:** With no objective guidelines or binding precedents, the PIT routinely degenerates into an unpredictable ad-hoc, political-free-for-all that begs capricious manipulation by special interests and competitors seeking regulatory advantages. The Bell Atlantic-GTE merger took two years for the FCC to approve and then came with micro-regulatory conditions that exceeded the detail of industry-wide rulemakings. While this near-interminable review prompted the FCC to adopt a non-binding 180-day “shot clock” for transaction reviews, the FCC routinely extends this already-too-long faux deadline.

**Obsolete:** The PIT was originally a 1880s railroad utility regulation concept that the Government applied to radio broadcast licenses in the 1920s, and then automatically to all technological variations of wireless licenses since. The PIT now rests on three obsolete assumptions. First, the PIT approach incorrectly assumed technological innovation could not create competitive alternatives (when cars, trucks and planes became alternatives to railroads, and TVs, computers and the Internet became alternatives to radios). Second, the PIT approach assumed new technologies are natural monopolies requiring regulation, and that facilities-based competition was not possible (when cell phones, cable-telephony, and VoIP became competitors to voice, and when cable, wireless, and satellite became competitors to dial-up Internet service.)

Third, the PIT assumed spectrum would remain government property, when Congress changed the law so wireless licenses could be private property that companies could buy and sell.

**Discriminatory:** The PIT review is unfair because it applies only to transactions, not fairly to all similar situations. Only companies that seek to adapt, grow, and transform via acquisition are subject to one-off regulation via condition. Moreover, it only applies to companies using licensed spectrum, not those who do the same thing via unlicensed spectrum. A telling example of an exceptionally discriminatory FCC merger condition was the mandate that Comcast-NBCU must abide by the FCC's net neutrality regulations even if they are found illegal and other companies do not have to abide by them.

The DOJ or FTC already ably review all potentially anti-competitive communications transactions, and afford companies a fair process, reasonable timetable, and the due process of appeal to a court of law. The discriminatory FCC PIT does none of that and is redundant, unnecessary and wasteful.

**Extortionate:** The inherently arbitrary, discriminatory and political nature of the PIT process makes it exceptionally prone to abuse. Special interest groups and competitors routinely ambush companies in the FCC's PIT process because they know the PIT turns companies into proverbial "sitting ducks." The PIT provides leverage to extort regulatory concessions that could never be achieved in a fair industry-wide rulemaking subject to the rule of law. To add insult to injury, the FCC represents these conditions as "voluntary," when everyone involved knows they're coercive.

In sum, the FCC's public interest test undermines Congress' goals of promoting communications competition and efficient secondary wireless markets. Sadly, this process has degenerated into a counter-productive and high-risk pit that growth-oriented companies are thrown into and must fight their way out of in order to grow and adapt to technological change, consumer demand, and competition. Congress must fix this irrational, uneconomic, and unfair process that's slow to modernize and hostile to communications change, investment, and growth.

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