

POLICY STRATEGY AND FCC PROCESS:
How to File a Petition to Deny with the FCC

If you want to make a difference at the FCC, the best thing to do is participate in its proceedings. For example, if there's a merger you think should be stopped, you should file a "Petition to Deny." This has a lot more weight than just making a phone call, or writing a letter.

You don't have to be a lawyer to file comments or petitions with the FCC--but to get taken seriously, you do want your filings to look professional. Plus, lawyer or not, there are certain formatting and filing requirements your filings must meet. If you don't meet these requirements, no matter how good your filing is, there's a chance it will simply be ignored. For instance, if you file a petition to deny a merger that is longer than ten pages, and you forget to include a table of contents, FCC staff can act like you never filed anything at all. Even if they seem silly to you, make sure you meet all the formatting and other requirements, or you're just wasting your time.

Note: This document will mention some of the big "gotchas" that people miss. But there's no substitute for reading the rules, and the actual item (e.g. Public Notice) you are commenting on. It will have not just the timeline that spells out when your filings are due. It might also have special requirements that are unique to just a particular proceeding, which you might not notice just by reading the rules.

Background: How Agencies Make Decisions

A lot of the business of government happens not in Congress, the courts, or the White House, but in expert government agencies.

Congress might know that it wants to protect clean water, or worker safety. But the give-and-take of politics is not suited to coming up with answers to questions about things like how much of a particular chemical can be in drinking water until it's dangerous, or how many hours a truck driver can drive before taking a break. So Congress sometimes passes laws that state a general policy, and leaves the details to agencies to fill in. The rules that agencies come up with to implement Congressional statutes are known as "regulations."

There's a danger here. Congress and the President are accountable to voters. But no one elects the staff of agencies, so how can we make sure they actually are working on behalf of the people? One way is through the "Administrative Procedures Act." This law, among other things, requires agencies to accept public input on their plans, and to take it into account. An agency--unlike Congress--actually has to spell out why it wants to do something. If its explanation is inadequate, or if it fails to account for the evidence that members of the public put in its record, it can be challenged in court. While agencies are considered to be experts and are given a great deal of deference by courts, they must account for the public record and give good explanations for why they're doing one thing rather than another--and they must obey Congressional statutes. Thus, while federal agencies are not a part of the "checks and

balances" process you learn about in grade school, public input provides an important check on their power.

Agencies do more than just pass regulations, of course. Some of them, like the Federal Communications Commission, issue licenses. You need an FCC license to be a broadcaster, for instance. The FCC also decides whether license transfers should take place--just because one company has a license, that doesn't mean it can simply sell it. The FCC only allows a license transfer to go through if it finds that the transfer would benefit the public. Usually, when two communications companies want to merge, this means that licenses of some kind need to change hands. Licenses from one company might go to the other, or both companies' licenses might go to some new company. But when the FCC is deciding whether to allow a license transfer to go through, it's really deciding whether the merger that the license transfer is part of serves the public interest. Like when it's deciding what regulations to issue, the FCC must accept, and take into account, public input when it is deciding whether or not to grant a particular license transfer.

*Policymaking and Process at the Federal Communications Commission
 (And How You Can Affect It!)*

When the FCC is deciding whether to grant a license transfer or to adopt a new set of rules, it first puts out a "notice" of some kind -- which might be called a "Notice of Proposed Rulemaking," or simply a "Public Notice." In the case of a merger, it usually puts out a Public Notice. The Public Notice will give you a docket number, which is important for filing and finding documents relevant to the transaction.

And that's where you come in. The single best way to influence the direction of the FCC is to file in its various proceedings, making sure that your evidence and arguments are part of the official public record that the FCC must take into account. In many proceedings, it's enough to just write up your views, follow a few basic formatting guidelines, and file them into the right docket on the FCC's website. But with license transfers/mergers, that's not quite enough. You have to file something called a "Petition to Deny" instead. But it's really not that hard--there are a few more boxes you need to check off, and a bit more paperwork to do. You also need to frame your arguments in a particular way. But by filing a "Petition to Deny" you greatly increase the chance that your voice will make a difference.

*What to Include in A Petition to Deny
 and How To Make Sure the Agency Sees It*

Who. Who are you? You must explain why the proposed transfer would harm you or your organization or its members specifically. While it's ok to talk about broader harms in your petition, for example harms to the public or to competition, you first need to identify harms specific to you, the petitioner.

For example: “We are an organization that represents the interests of our members, who are rural veterans. They would be harmed if this transaction went through, since they would have to pay higher prices for wireless telephone service, and would suffer worse service.”

What. You need to spell out all the problems that the transaction would cause you, your organization, or your members, as well as any broader harms. Mention **everything!** -- even arguments you might think aren't as strong as others. If an argument is not in your initial petition to deny, it might be ignored if you bring it up later.

This is both the hardest and the easiest part of your filing. It's the easiest since there are no rules. Just spell out the problems as you see them as convincingly as you can (and back it up with an affidavit). While legal arguments help here, your arguments can be solely based on economics, social policy, and so on. But this is also the hardest part of your filing, since your arguments here are what will sway--or fail to sway--FCC staff.

How?

1. Creating the document

The FCC has some specific rules about how documents are formatted. You can read them yourself at 47 CFR § 1.49. The big things to watch out for: Documents must be double-spaced, and the smallest typeface you can use (including for footnotes) is 12 point. Filings over ten pages have to have a table of contents with page references (which means you need to use section headings that can be in the table of contents), and filings over ten pages likewise have to contain a brief “summary of the argument” section.

Petitions to deny also *must* have an affidavit section, where someone declares legally that the contents of the petition are true.

2. Filing the document

You file documents with the FCC using something called the “Electronic Comment Filing System,” or ECFS.

With a petition to deny, in addition to filing it with the FCC, you need to file it with the attorneys who represent the companies who are applying for the license transfer, and a few specific people within the FCC as well. Part of your Petition will be a “Certificate of Service,” where you confirm that you have served all the relevant parties. In most cases, this means nothing more than emailing them a PDF of your document after you've filed it with ECFS. The instructions of how to file with the FCC will be contained in the Public Notice for the transaction--you need to read that notice carefully, because the details change each time.

Signatures

All you need to do to “sign” a document is write an “/s” next to your name. Don’t worry about printing anything out, adding a signature graphic, etc. Look at the examples! (See page 5, below.)

What are “conditions” and should I ask for them? Why or Why Not?

The FCC can try to fix a specific harm that a transaction would cause with "conditions." This means that it only grants a license transfer subject to the company or companies agreeing to do some public service, sell off some assets, or some other thing that is supposed to counteract the negative effects the merger otherwise might cause. Whether to specifically ask the FCC for conditions is one of the strategic decisions you'll have to make as a petitioner. Conditions don't always work out as they're intended to, and you might not get the conditions that you want.

Asking for conditions, in a way, signals your resignation that a merger is probably going to happen. If you put in a set of conditions, the companies can paint your position as the most that can be asked for, meaning that any conditions that do get adopted might be less than what you wanted. If, instead, you argue for a merger to be blocked and refuse to discuss conditions, you have the ability, in a later filing, to argue for strong conditions, and have *that* position look like the compromise.

On the other hand, refusing to discuss conditions from the beginning might mark you as unreasonable. There is simply no right answer, across the board, whether in a particular merger proceeding it makes sense to hold out for it to be blocked, or to ask for (even negotiate for) conditions.

What is a “protective order”, and do I need one?

If you sign what's known as a “protective order,” you can have access to confidential information that you can use in your arguments. You have to take special care, however: You are obligated to keep any confidential documents you receive secure, and you have to avoid disclosing any information you learn, or using it anywhere outside the specific proceeding. You have to coordinate with the companies who are trying to merge to get access to the unredacted versions of their filings, that contain confidential information. If you use any confidential information in your filings, you have to file, and serve, both a redacted, public version, and an unredacted, confidential one. It can be useful to use confidential information in your filings, but it's not necessary for everyone to do so, and you should only even consider signing a protective order if you have a specific need to do so.

I've filed my petition - What's next?

The companies that are trying to get their transaction through will file “oppositions” to your petition--don't be scared if they serve you with a paper copy of their opposition. You can then file a reply to their opposition--the timetable for all of this will be in the Public Notice for your proceeding.

If you have time, it makes sense to meet with FCC staff in person (including the staff of different Commissioners) to make your case in person. After each meeting, you must file a letter describing what you talked about. Meetings with FCC staff during a proceeding are known as “ex parte” meetings, and the letter you file describing what you talked about is known as a “notice of ex parte.” Important note: in some proceedings, ex parte communications are not allowed--meaning that all communication must happen through the public docket. Read the Public Notice for your proceeding carefully to make sure ex parte meetings are allowed.

Some Examples

EXAMPLES:

Public Knowledge - Comcast/NBCU Petition to Deny -
<http://apps.fcc.gov/ecfs/document/view?id=7020510361>

Public Knowledge and Future of Music Coalition ATT/TMobile Petition to Deny-
http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf

Public Knowledge and WGAW Petition to Deny ATT/Leap
<http://apps.fcc.gov/ecfs/document/view?id=7520945881>

Appendix: Statutory Basis for Petition to Deny

Sections 214(a) and 310(d) of the Communications Act, as amended, require the Commission to determine “whether the Applicants have demonstrated that the proposed transfer of control of licenses . . . will serve the public interest, convenience, and necessity.”¹ In making this determination, the Commission “employ[s] a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.² This evaluation “encompasses the broad aims of the Communications Act”³ and includes a competitive analysis that is “informed by, but not limited to, traditional antitrust principles.⁴ The Applicants bear the burden of “proving, by a preponderance of the evidence, that the proposed transaction . . . will serve the public interest.”⁵

¹ Applications of Deutsche Telekom AG, T-Mobile USA, Inc. and MetroPCS Communications, Inc. for Consent to Transfer Control of Licenses and Authorization, WT Docket No. 12-301, Memorandum Opinion and Order, DA 13- 384, ¶ 14 (Wireless Telecommunications Bur., rel. March 12, 2013) (“T-Mobile-MetroPCS Order”); see also 47 U.S.C. §§ 214(a), 310(d).

² T-Mobile-MetroPCS Order at ¶ 14.

³ Id. at ¶15 (quotation omitted).

⁴ Id.at ¶16.

⁵ Id.at ¶14

Section 309(d)(1) of the Communications Act and Section 1.939 of the Commission’s Rules allow any “party in interest” to file a petition to deny any application.⁶ To establish party-in-interest standing, “a petitioner must allege facts sufficient to demonstrate that grant of the application would cause it direct injury.”⁷ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.⁸ An organization may meet these standards in its own right or may demonstrate that one or more of its members meets these requirements,⁹ and the Commission routinely permits groups representing the public interest to participate in proceedings as “parties in interest.”¹⁰

⁶ 47 U.S.C. § 309(d)(1); 47 C.F.R. §§ 1.45, 1.939.

⁷ Applications of AT&T Inc. and Deutsche Telecom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, Memorandum Opinion and Order, 27 FCC Rcd 4423, 4425 (2012).

⁸ Id.

⁹ Id.

¹⁰ See, e.g., Applications Granted for the Transfer of Control of the Operating Subsidiaries of Securus Technologies Holdings, Inc. to Securus Investment Holdings, LLC, WT Docket No. 13-79, Public Notice, 28 FCC Rcd. 5720, 5722 n.20 (2013) (noting that the Petitioners—which included Public Knowledge—had standing to oppose a transfer of control “as representatives of consumers of the relevant services”); Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses; Applications of Verizon Wireless and Leap to Exchange Lower 700 MHz, AWS-1 and PCS Licenses; Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses, WT Docket No. 12- 175, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95 (2012) (considering a Petition to Deny filed by Free Press); Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations, WT Docket No. 11-18, Order, FCC-188 (2011) (considering a Petition to Deny filed by Free Press et al.) (“AT&T-Qualcomm Order”).