Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications of Comcast Corp. and Time Warner Cable, Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations	)	MB Docket No. 14-57

COMMENTS OF
THE FREE STATE FOUNDATION [*]

I. Introduction and Summary

These comments are filed in response to the Commission's request for comments concerning the agency's review of the transfer of control of licenses in connection with the proposed acquisition of Time Warner Cable, Inc., by Comcast Corp. These comments do not endorse or oppose the proposed merger. Rather, their purpose is to set out basic principles and an analytical framework by which the Commission should analyze this as well as other mergers.

Aside from the straightforward matter of ensuring compliance with FCC licensing provisions and existing rules, the Commission's primary consideration in reviewing mergers should be to assess the overall potential effects on consumer welfare. Principled economic analysis should be employed in determining whether the proposed

[*] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow at the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, free market-oriented think tank. We gratefully acknowledge the assistance of FSF Research Associate Michael J. Horney in the preparation of these comments.

Comcast/TWC merger would either potentially benefit consumers or likely result in consumer harm.

Our summary review indicates that Comcast/TWC poses a number of likely consumer welfare-enhancing benefits. In particular, the merger has the potential to:

- Accelerate the transition from analog to digital for cable video transmission to more broadband Internet consumers;
- Enable faster deployment of DOCSIS 3.1 to more retail video subscription consumers;
- Improve the competitiveness of the market for broadband services to business enterprise customers, including nationwide and inter-regional business customers; *and*
- Increase efficiency as well as expand the supply and geographic scope for wireless backhaul infrastructure services needed to transmit wireless data.

It is possible (but not likely) that further economic examination of the proposed merger could uncover potential anticompetitive conduct concerns. But before the Commission should even consider prohibiting a proposed merger or subjecting it to regulatory conditions, the agency should require convincing evidence of actual or likely consumer harm in light of these general considerations:

- In free markets, mergers and acquisitions are a critical component of the entrepreneurial, competitive process.
- Bureaucratic decision-making lacking clear evidence of market power or potential consumer harm risks unnecessary displacement of business judgments by competitors possessing critical knowledge about market opportunities and evolving consumer demand.
- As recognized by Commission precedents, most mergers either enhance consumer welfare by creating efficiencies, or else are competitively benign.
- When proposed mergers take place in markets characterized by continuous innovation and ongoing competition, it is less likely that such mergers will harm consumers.
- Requiring convincing evidence provides an important safeguard against manipulation of the review process by non-merging competitors who seek to impose regulatory restraints on merging parties.

Critically important to the Commission's analysis of this particular proposed merger is this fact: Comcast/TWC is *not* a "horizontal" integration. In other words, the

merging parties do not compete head-to-head in providing broadband Internet access services or multichannel video programming distributor (MVPD) services. Should the deal be approved, no consumers of broadband services or video services lose a choice among providers. This fact is not in dispute.

Indeed, the video services market continues to become increasingly competitive. Entry by two nationwide direct broadcast satellite providers (DBS) in the 1990s offered consumers important new competitive outlets and presaged further competitive and technological developments that have enhanced consumer welfare. According to data in the *Fifteenth Video Competition Report*, by the end of 2013, cable providers held only 55.7% of MVPD subscribers. Telephone MVPD entrants and DBS providers claimed about 8.4% and 33.6% of MVPD subscribers, respectively. At the end of 2011, 98.6% of subscribers or 130.7 million households had access to at least three MVPDs. And 35.3% or 46.8 million households had access to at least four MVPDs. The number of households with access to three or four MVPDs likely has grown even further since then.

Internet-delivered video and wireless broadband services offer additional alternatives to consumers. More than 90% of the population is also served by at least three wireless broadband providers. Data speed and capacity capabilities enabled by next-generation wireless networks have made mobile TV applications increasingly attractive to a rapidly growing number of consumers.

Moreover, as Commission precedents recognize, “vertical” integration effects often enhance consumer welfare. In this case, even vertical aspects of the merger are minimal and, on their face, do not appear likely to pose prospective harms outweighing prospective benefits.

Time Warner Cable lacks majority ownership of any nationwide cable video programming network or nationwide TV broadcasting network. Comcast's 2012 sale of 17 video networks means that post-merger with Time Warner Cable, Comcast will have fewer affiliated programming networks than it did upon the Commission's approval of its merger with NBC-U in 2011. For that matter, the D.C. Circuit twice has ruled that a 30% cap on MVPD subscribership nationwide is arbitrary and capricious in light of the existing competition in the MVPD marketplace – and MVPD competition has only increased further since those court decisions. In any event, Comcast has committed to divesting assets post-merger, thereby leaving the combined entity serving at or below 30% of MVPD market subscribers. Therefore, there is no convincing basis for concluding that the merged entity's market share threatens consumer welfare. And there is no convincing basis for concluding that video programmers would suffer anticompetitive harm as a result of the merger.

Pursuing a merger review policy based on principled economic analysis has further implications. It means the Commission must disregard pleas for it to reject Comcast/TWC out of hand based on appeals to emotional incredulity or irrelevant "big is bad" sloganeering. The Commission must also stand firm against calls made – under the guise of protecting competition – to impose conditions on the merger in order to protect market rivals from the competitive process. Further, the Commission must reject dragging out its review process and thereby making itself even more susceptible to political pressures having little or nothing to with the potential consumer welfare benefits of the proposed transaction. And finally, the Commission must avoid the imposition of

any conditions on the merger unrelated to demonstrable concerns over market power and anticompetitive conduct.

Whatever the Commission's ultimate conclusion regarding its review of the proposed Comcast/TWC merger, the review process should stick to rigorous economic analysis. The Commission should stay focused on the potential consumer welfare-enhancing benefits that the Comcast/TWC merger would bring.

II. The Dynamism of the Market Should Inform the Commission's Merger Analysis

The dynamism that characterizes the video market should inform the Commission's analysis of the proposed merger's competitive effects. A dynamic market analysis involves a forward-looking evaluation of the market's underlying competitive conditions and processes for delivering new generations of products and services. That is, the analysis should emphasize the critical role of market conditions most conducive to continuing investment and innovation rather than static considerations such as snapshot market share estimates.

The critical backdrop to the proposed Comcast/TWC merger is the dynamic video and advanced telecommunications marketplace. Simply put, the early 1990s bottleneck assumptions regarding cable services have long since passed into oblivion. Whereas the typical video viewing experience for consumers in the early 1990s included a lone cable operator supplying one-way analog cable channels, today's video viewing experience is drastically different.

Heavy entrepreneurial investment, innovative breakthroughs in transmission and viewing technologies, new market entrants relying on rival service platforms, disruptive

business models, and changing consumer habits have reshaped the video market's landscape.

For instance, today's video market is characterized by the ongoing replacement of analog systems with digital, rapid expansion of high-definition broadcasting and TV ownership, multi-casting, digital video recorder (DVR) options, video-on-demand functions, as well as TV-Everywhere and other mobility capabilities. This includes across-the-board increases in deployment, functionality, and adoption of such advanced video technologies. For instance, according to data collected in the Commission's *Fifteenth Video Competition Report*, as of 2012, more than 74% of households have sets capable of receiving digital signals, including HD signals.[1] Nearly 44% of households have DVRs.[2] More than 5% of MVPD subscribers qualifying for TV-Everywhere access used it to view content in the month of September 2012.[3] By year's end 2012, more than half the geographic footprints of the top eight cable operators had transitioned to all-digital video.[4]

Meanwhile, innovative new platforms for consumer access to video services have emerged, including online video distributors (OVDs). Subscription services are available through OVDs such as Hulu, Amazon Prime, and Netflix. *A la carte* video content purchase and viewing options are readily available through Apple's iTunes, Amazon.com, Google's Play store, and more. Widely available "smart TVs" are capable of downloading video content directly from the Internet. And the video marketplace now

[1] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, MB Docket No. 12-203, at 5, ¶ 7 (released July 22, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.
[2] *Id.* at 5, ¶ 7.
[3] *Id.* at 4 ¶ 4.
[4] *Id.* at 4, ¶ 5.

offers consumers a wide range of devices to access video content, such as IP-connected MVPD-provided set-top boxes, multi-room DVR and home networking solutions, Wi-Fi connected tablet devices, gaming consoles, Internet-connected smart phones and table computers, and home monitoring systems that act as extensions of cable MVPD networks. Roku, Boxee, and Apple TV offer content delivery services through their respective new devices. Broadband-connected video game consoles such as Sony PlayStation 4 and Xbox One are also increasingly popular devices for obtaining video programming.

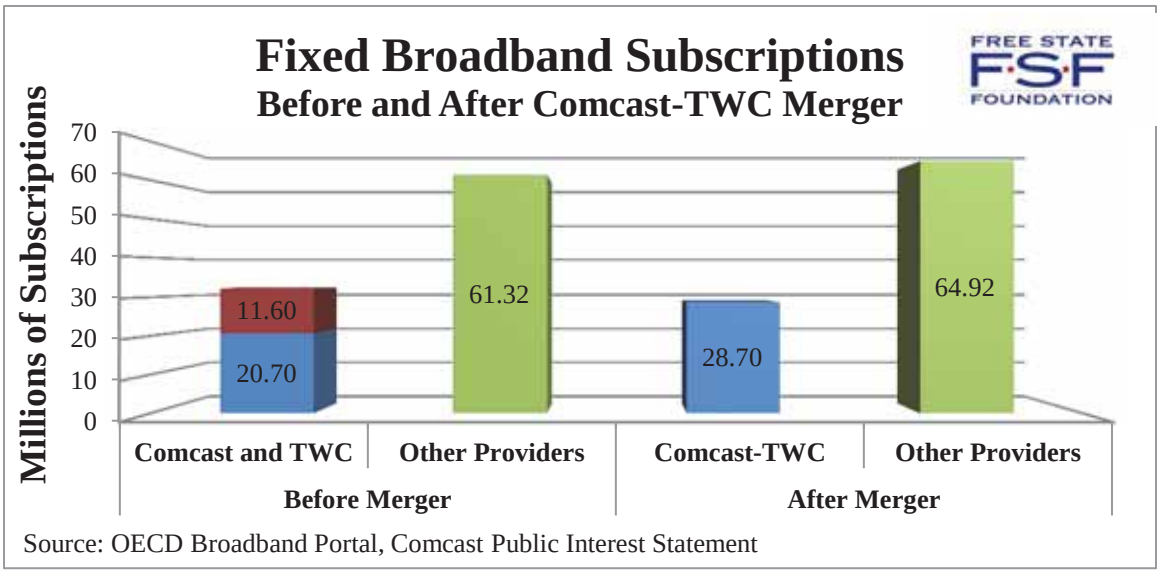
Competitive entry in the 1990s by two nationwide direct broadcast satellite providers (DBS) offered consumers important new competitive outlets and presaged further competitive and technological developments that have enhanced consumer welfare. According to data in the *Fifteenth Report*, by the end of 2013, cable providers only held 55.7% of MVPD subscribers.[5] Telephone MVPD entrants and DBS providers claimed about 8.4% and 33.6% of MVPD subscribers, respectively.[6] At the end of 2011, 98.6% of subscribers or 130.7 million households had access to at least three MVPDs.[7] And 35.3% or 46.8 million households had access to at least four MVPDs.[8]

Market share data can easily be overemphasized as an indicator of competitiveness, especially where markets are driven by rapid changes in technology, services, and consumer behavior. Yet, even in terms of market share, data cited in the *Fifteenth Report* reinforces the video market's competitiveness.

---

[5] *Id.* at 4, ¶ 3.
[6] *Id.* at 12, ¶ 27.
[7] *Id.* at 18, ¶ 36
[8] *Id.* at 18, ¶ 36.

Finally, no consumer in any geographic region will suffer a reduction in choice for broadband Internet access providers. Comcast has made commitments to make post-merger divestments of MVPD subscribers to keep its subscriber base at or below 30% nationwide.[9] As the graph below shows, post-merger the combined entity will have a slightly lower market share of wireline broadband Internet subscribers than pre-merger: [10]



Source: OECD Broadband Portal, Comcast Public Interest Statement

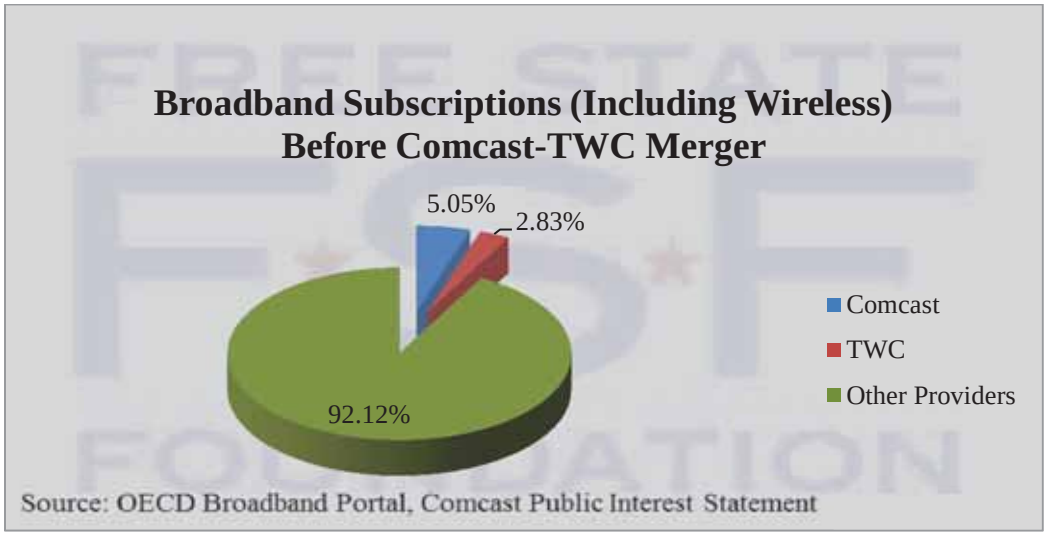
Post-merger, consumers will have continued access to high-capacity wireless broadband services that increasingly are used to stream video content. According to the FCC's *Sixteenth Wireless Competition Report* (2013), as of October 2012, 97.8% of the population is served by 2 or more wireless broadband providers, 91.6% by 3 or more, and

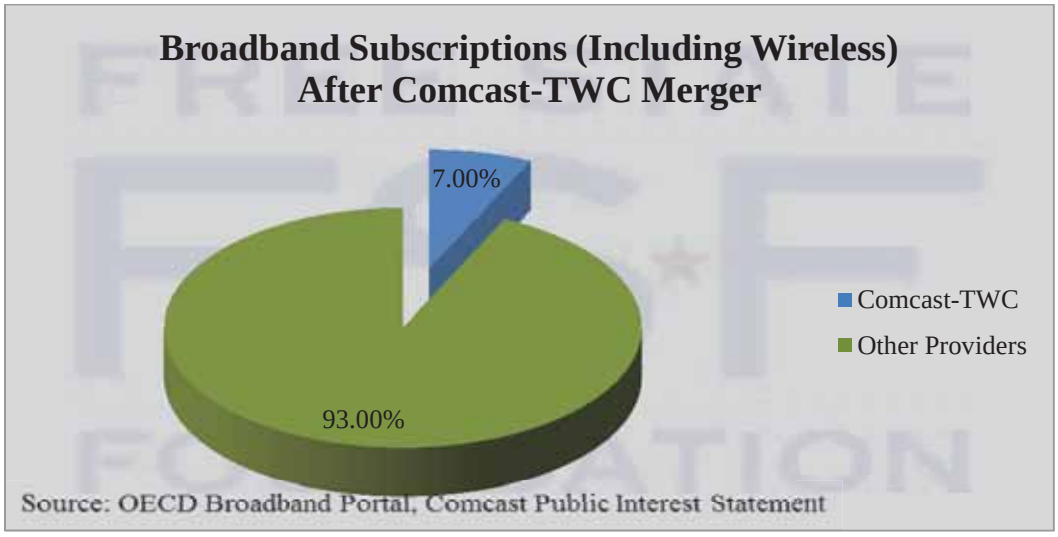
[9] See *Comcast Corp. v. FCC*, 579 F.3d 1, 6-8 (D.C. Cir. 2009) and *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001) where the D.C. Circuit twice invalidated as arbitrary and capricious the Commission's horizontal ownership cap set at 30%. *See* note 34 *infra* and accompanying text.

[10] Charts contained in these comments rely in part on OECD data that is more recent than Commission-gathered data referred to in *Ex Parte* Letter of Kathryn A. Zachem, Comcast Corporation, MB Docket No. 14-57, at 2 (August 13, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521759474. Thus, figures in our charts show Comcast/TWC market shares post-merger even lower than Comcast's *ex parte* letter. Either way, the market shares do not pose market power concerns in the context of the overall broadband market.

82% by 4 or more.[11] This access will be unaltered by the merger. Thus, the relevant market is not really the fixed broadband market but the market that includes wireless services as well.

When wireless broadband connections are considered, then the Comcast/TWC share of broadband subscriptions shrinks even further to below 10%. See the charts below showing the share of broadband subscriptions pre- and post-merger:





[11] Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Services, Including Commercial Mobile Services, *Sixteenth Report*, WT Docket No. 11-186, at 210, ¶ 332 (released March 21, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.

Next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitive alternative – indeed, even a potential substitute for – wireline broadband. For most major wireless broadband providers, average LTE speeds range between 30 and 40 MBps,[12] enabling a wide range of video viewing functionalities. With regard to video, it is estimated that half of all broadband consumers access mobile TV apps each month, 17% use mobile TV apps weekly, and 16% use mobile TV apps daily.[13] These numbers are certain to increase, as wireless broadband providers are unveiling new technologies that will enhance wireless video viewing capabilities. For instance, Verizon is set to launch its LTE multicast video service in the near future. "LTE Multicast" can deliver live TV signals wirelessly to mobile devices more efficiently than unicast delivery because multiple users can watch the same multicast stream being delivered from a cell site.[14] Sprint is deploying its enhanced LTE service, with peak download speeds of 60 MBps.[15] In light of these developments, the Commission simply cannot ignore the fact that Comcast and TWC, before and after the proposed merger, compete in a broadband market in which wireless providers play an increasingly significant role as competitors.

---

[12] *See, e.g.*, Lynn La, "4G LTE Showdown: How Fast is Your Carrier?" *CNet* (August 5, 2014), available at: http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/.

[13] TGD, Press Release: "Half of Adult Broadband Users Now Engage Mobile Video Apps at Least Once a Month" (July 23, 2014), available at: http://tdgresearch.com/tdg-half-of-adult-broadband-users-now-engage-mobile-video-apps-at-least-once-a-month/; *Id*. ("39% of adult broadband users engage mobile video apps on a portable computer, compared to 30% who do so using a tablet, and 22% that do so using a smart phone").

[14] Jeff Baumgartner, "Verizon CFO: LTE Multicast'Pivotal' to Mobility," *CNet* (August 12, 2014), available at: http://www.multichannel.com/news/technology/verizon-eyes-2015-lte-multicast-video/382678.

[15] Sprint, Press Release: "Sprint Spark" (June 24, 2014), available at: http://newsroom.sprint.com/presskits/sprint-spark.htm.

III. Policy Imperatives Require the Commission to Base Any Regulatory Intrusions on Compelling Evidence of Actual or Likely Harm

Important policy considerations demand that the Commission find compelling evidence of harm before it prohibits or imposes any conditions on proposed mergers.

First, mergers and acquisitions are competitive entrepreneurial activities. In free market economies, mergers are acts of calculated risk-taking undertaken by acquiring entities in a market process in which they seek to improve their competitive position. Efficiency-creating mergers typically are proposed in efforts to seize unrealized (or at least hoped-for) market opportunities. Profits resulting from such mergers are thereby won through competition. Government intrusion into this facet of competition therefore requires compelling justification. Otherwise, freedom to pursue entrepreneurial opportunities through mergers becomes too easily undermined.

Second, when the Commission withholds its approval of a proposed merger or imposes conditions on that approval it means a government institution is substituting its own judgment for the judgment of market actors. Bureaucratic decision-making lacking clear evidence of market power or potential consumer harm risks unnecessary displacement of marketplace business judgments by competitors possessing critical knowledge about market opportunities and consumer preferences. The Commission's substitution of its judgment for that of market actors can be justified only if there are specifically identified harms demonstrated by compelling evidence. And, in that instance, the Commission must target narrowly any remedies designed to address such harms.

Third, according to former Federal Trade Commission Chairman Christine Varney, "the vast majority of mergers are either procompetitive and enhance consumer

welfare or are competitively benign."[16] Accordingly, the production of compelling evidence is necessary to support any Commission finding that the proposed merger would produce a contrary outcome. Of course, the Commission's own precedents also recognize that "efficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products."[17]

In this regard, the Commission's precedents recognize a number of potential public interest benefits that result from mergers involving MVPD providers with vertical integration aspects. Among the "efficiencies and other benefits that might be gained through increased ownership or control," the Commission has recognized: (1) reduction of "barriers and friction that exist when unaffiliated content providers and distributors negotiate to reach agreements";[18] (2) "the 'elimination of double marginalization' through vertical integration encourages lower downstream prices and increased output than would otherwise be achieved";[19] and (3) "synergies and economies of scale and scope in the areas of programming, advertising, and cross-promotion."[20] The Commission's precedents also recognize the public benefits of facilitating broadband goals by spurring "greater broadband demand, deployment and adoption."[21] And the

---

[16] Christine A. Varney, "Merger Guideline Workshops," Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.pdf.

[17] In the Matter of Applications of For Adelphia Communications Corporation, Time Warner Cable, Inc. and Comcast Corporation, For Consent to Assignment and/or Transfer of Control of Licenses, *Memorandum Opinion and Order* ("*Adelphia Order*"), MB Docket No. 05-19, at 107, ¶ 243 (released July 21, 2006), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-105A1.pdf.

[18] In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, at 96, ¶ 231 (January 20, 2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

[19] *Id.* at 98, ¶ 237.

[20] *Id.* at 200, ¶ 242.

[21] *Id.* at 96, ¶ 233.

Commission has recognized that combinations can increase deployment of next-generation technologies and can make other products and services upgrades more readily and widely available.[22]

Given the rapidly changing video market landscape, the Commission must not freeze specific pricing options, programming content or lineup decisions, offering of various features and functions, or other business judgments into place through regulatory conditions imposed on proposed mergers. And the Commission should not brush aside the likely consumer welfare-enhancing benefits of mergers as non-transaction specific simply because competitors or new entrants conceivably could benefit from additional infrastructure. The Commission cannot cavalierly disregard the economic benefits of mergers proposed by parties that actually bear the risks of failure. Nor do hypotheticals in which competitors or new entrants are conceived to be able to offer possibly superior outcomes provide basis for finding likely anticompetitive harm.

Fourth, where a proposed merger will take place within the context of a market characterized by ongoing competition, the less likely it is that a proposed merger will undermine consumer welfare. As indicated in Section II, the video market is dynamic and vibrant. The presence of competitive choices, including cross-platform facilities-based alternatives, makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

---

[22] In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc., For Consent To Transfer of Control of Licenses and Authorizations, *Memorandum Opinion and Order and Declaratory Ruling*, WT Docket No. 12-301, at 27, ¶ 74 (released March 12, 2013) (finding T-Mobile's merger with MetroPCS "would provide for a broader, deeper, and faster LTE deployment than either company could accomplish on its own,") available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-13-384A1.pdf.

Fifth, requiring compelling evidence of actual or likely consumer harm resulting from market power and anticompetitive conduct ensures a more disciplined analytical and policy approach to competition. Demanding clear evidence of harm provides a safeguard against market competitors seeking to opportunistically manipulate or unduly influence the merger review process. In the name of defending competition, market rivals may seek to use the merger process to gain competitive advantage by urging the Commission to saddle merging parties with regulatory constraints. A rigorous economic analysis based on actual evidence from the market offers a crucial check-and-balance against protectionism.

IV. The Merger Presents Consumer Welfare-Enhancing Benefits

Comcast/TWC presents a number of likely consumer welfare-enhancing benefits. Among those likely benefits:

First, the proposed merger would likely accelerate the transition from analog to digital for cable video transmission. This will give more consumers access to technologically superior video program viewing capabilities sooner than would be the case absent the merger. Comcast's MVPD footprint is already transitioned to all-digital.[23] However, only 17% of Time Warner Cable's MVPD footprint has transitioned. Apparently, Time Warner Cable's plans call for just 75% of its footprint to be converted to all-digital by the end of 2016. The merger would make available all-digital cable video services to more consumers more quickly.

Second, the merger likely would accelerate upgrades to broadband services. Comcast's plans to upgrade its broadband Internet infrastructure by deploying next-

[23] Estimates and information referenced in this paragraph are drawn from Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement*, MB Docket No. 14-57 (filed April 8, 2014), available at: http://apps.fcc.gov/ecfs/document/view?id=7521122731.

generation DOCSIS 3.1 technology would also encompass Time Warner Cable's footprint. Thus, the proposed merger will potentially enable faster deployment of DOCSIS 3.1 than Time Warner Cable would have enabled had it remained separate. DOCSIS 3.1 "enables greater capacity and speed, with support for up to 50 percent more data throughput over the same spectrum," with capabilities of delivering "up to 10 Gbit/s speeds in the downstream and 1 to 2 Gbit/s in the upstream."[24]

Third, the merger likely would enhance the competitiveness of the market for broadband services to business enterprises. Geographic boundaries of both Comcast and Time Warner Cable inhibit their ability to offer attractive, uniform services across large regions or to nationwide businesses. For businesses operating super-regionally or nationwide, this requires them to undertake the time and expense of negotiating for broadband services with multiple providers. Or else it requires competing providers to undertake the time and expense of working out arrangements in order to serve business customers. Aside from the direct financial costs and customer disruptions and inconveniences, those kinds of arrangements also can pose technological difficulties due to the interfacing of different types of network infrastructure and software.

Comcast and Time Warner Cable have a combined market share for small- and medium-sized business enterprise services of only 10-15%.[25] And the combined market share of the two companies in serving nationwide business enterprises of 500 or more employees is even smaller. Post-merger, the combined entity hardly can be said to possess sufficient market power to impose substantial, above-market price increases. But

---

[24] Mari Silbey, "DOCSIS 3.1 Makes Debut," *LightReading* (October 31, 2013), available at: http://www.lightreading.com/cable-video/docsis/docsis-31-makes-debut/d/d-id/706378.

[25] Estimates and information referenced in this paragraph are drawn from Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement*, MB Docket No. 14-57.

the post-merger company's improved competitive position regarding business enterprise services would put pressure on other competitors to enhance their own respective services and to keep their prices lower.

Fourth, the merger potentially would improve market competitiveness for wireless backhaul services. As the Commission described it in its *Sixteenth Wireless Competition Report* (2013), "[b]ackhaul facilities link a mobile wireless service provider's cell sites to the mobile switching centers that provide connections to the mobile wireless service provider's core network, the public switched telephone network, or the Internet, carrying wireless voice and data traffic for routing and onward transmission."[26] As the *Sixteenth Report* further explained, "[m]obile backhaul needs will keep increasing as wireless carriers continue to deploy LTE technology in their networks."[27]

Efficiency gains from expanded geographic scale and uniformity of operations likely would be achieved in providing wireless backhaul services should the merger take place. Combined, Comcast and Time Warner Cable would be better positioned to provide more geographically extensive services. And if combined, the new entity would be better able to invest more financial resources into fiber-optic backhaul infrastructure. By accelerating growth in the supply of that critical input and further increasing technological efficiencies, the proposed merger ultimately could help reduce costs of wireless data transmission to the benefit of wireless consumers.

---

[26] *Sixteenth Report*, WT Docket No. 11-186, at 210, ¶ 332.
[27] *Id*. at 210, ¶ 332.

According to the companies, Time Warner Cable now offers wireless backhaul services to approximately 14,000 cell sites.[28] Comcast serves approximately 8,500 sites. To put those numbers in perspective, by year's end 2012, more than 300,000 cell sites existed throughout the United States. And both providers possessed just under 3% of the wireless backhaul market share in 2013. From a nationwide market standpoint, this makes it extremely unlikely that the proposed merger would create a market power scenario that poses risks of consumer harm.

V. Video Market Characteristics Render Certain Claims about Consumer Harm Unlikely

On the face of things, the merger appears to pose little risk of consumer harm. Given the nature of the combination, market power concerns stemming from Comcast/TWC appear minimal. Critically, the merger is not what economists typically regard as a "horizontal" integration. In such cases, the combination of two competitors results in the elimination of one choice for products or services in the market. Horizontal mergers pose market power and anticompetitive conduct concerns where the market in question is already concentrated or offers consumers limited choices.

But cable providers typically serve distinct geographic territories. Head-to-head competition between cable providers scarcely exists. Rather, cable providers face competition in the MVPD retail market from two nationwide DBS providers as well as traditional telecom providers that recently have entered local MVPD markets with IP-enabled video services. And as observed above, consumers also have video viewing options such as broadcast TV and Internet-delivered video services.

[28] Estimates and information referenced in this paragraph are drawn from Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement*, MB Docket No. 14-57.

Comcast and Time Warner Cable do not compete against each other in any local MVPD market. The two cable providers serve separate geographic territories. A merger of the two would not reduce the number of MVPD choices for any consumer.

Agency precedents recognize that horizontal integration-related consumer harm is typically absent in cable provider mergers. As the Commission explained in its *Adelphia Order* (2006), "[s]ince there are almost no MVPD markets in which seller concentration will increase immediately as a result of the proposed transactions, traditional antitrust analysis of the effects of an immediate increase in seller market power does not apply."[29] And the Commission added: "An important prerequisite for HHI analysis, as described in the Horizontal Merger Guidelines, is that the sellers compete for customers' business in the same product and geographic market."[30]

Given the non-overlap between areas served by cable companies, it should come as little surprise that neither Cablevision's 2010 acquisition of Bresnan nor Charter Communications' subsequent acquisition of Bresnan in 2013 elicited any public comments to the FCC in opposition. Both transactions were approved by routine orders of the FCC's Media Bureau.[31]

There are "vertical" integration aspects of Comcast/TWC that must be considered. By virtue of Comcast's ownership of NBC-U, a merger would mean the integration of NBC-U's video programming content with Time Warner Cable's cable video services.

---

[29] *Adelphia Order*, MB Docket No. 05-19, at 40, ¶ 80.
[30] *Id*. at 40, ¶ 80.
[31] *See* In the Matter of Applications of Cablevision Systems, Corporation and Bresnan Communications, LLC, For Consent to Assign Licenses and Transfer Control of Licenses, *Public Notice*, MB Docket No. 10-154 (released September 21, 2010), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-10-1782A1.pdf; In the Matter of Applications of Charter Communications, Inc. and Bresnan Broadband Holdings, LLC For Consent to Assign Licenses and Transfer Control of Licenses, *Public Notice*, MB Docket No. 13-77 (released May 14, 2013), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1088A1.pdf.

But Time Warner Cable's ownership of cable video networks is limited. It is not a majority owner of any national cable video network; it only has non-controlling interests in iN Demand and MLB Network.[32] And Time Warner Cable does not have ownership interests in any national broadcast TV networks. It bears noting that Comcast sold 17 A&E video networks in 2012. Significantly, Comcast and Time Warner Cable combined would own less cable video programming than Comcast did upon the completion of its merger with NBC-U.

More importantly, and as indicated in Section III, Commission precedents recognize that vertical integration, by itself, generally is positive with respect to producing efficiencies that benefit consumers. As the *Adelphia Order* explained:

> [A]ntitrust law and economic analysis have viewed vertical transactions more favorably than horizontal transactions in part because vertical transactions, standing alone, do not directly reduce the number of competitors in either the upstream or downstream markets. In addition, vertical transactions may generate significant efficiencies.[33]

Furthermore, the lack of geographic overlap between Comcast and Time Warner Cable appears to offer no merger-specific reason for heightened concerns over the combined entity foreclosing access to OVD programming alternatives. As noted earlier, no consumers in any geographic region face a prospective reduction in the number of MVPDs offering services on account of the merger. To date, no evidence exists of MVPDs offering broadband Internet access services blocking or degrading video services supplied by OVDs. Moreover, competitive and public relations pressures exist that pose disincentives for the combined entity to engage in such conduct.

---

[32] Estimates and information referenced in this paragraph are drawn from Comcast Corporation and Time Warner Cable, Inc., *Applications and Public Interest Statement*, MB Docket No. 14-57.
[33] *Adelphia Order*, MB Docket No. 05-19, at 36, ¶ 71.

Finally, the merger poses little concern about the combined entity possessing monopsony power as a wholesale buyer of video programming. Monopsony is an exceedingly rare scenario in which the distributer or retailer is the only outlet for wholesale goods. Here, post-merger existence of monopsony power is rendered unlikely from the outset by the existence of other MVPDs providing direct competition, including two nationwide DBS providers and the telco MVPDs. The existence of an increasing number of Internet-based alternatives for delivery of video programming by OVDs makes monopsony power concerns less likely still.

Furthermore, it's hardly plausible that the combined entity would be able to actually decrease output of video programming by artificially decreasing its demand for video programming to drive down the costs of wholesale inputs. Negotiations that merely reduce costs for inputs, of course, can benefit consumer welfare. But it's highly implausible that the combined entity would be able to decrease overall demand in the wholesale video market by purchasing less video programming, given all the alternative outlets. One MVPD's decision not to make certain content available would not prohibit other distributors from making the same content available – if anything, competitors stand to gain by offering additional content choices.

Also, as Professor Christopher Yoo, a member of the Free State Foundation's Board of Academic Advisors, explained, monopsony claims would have to overcome a "potentially insuperable obstacle":

> On two occasions, the FCC attempted to institute rules prohibiting cable operators from controlling more than 30% of the nation's multichannel video subscribers in order to protect the interests of video programmers. On both occasions, the courts invalidated the rules because the FCC's rationale for imposing the 30% limit was arbitrary and capricious. In both cases, the court indicated that the available evidence suggested that cable

> operators could control much larger shares of the national market without harming video programmers, driven largely by the advent of competition from direct broadcast satellite (DBS) providers, such as DIRECTV and the Dish Network. Given that the merging parties have committed to reduce their holdings so that the resulting company will control no more than 30% of the national market, these court decisions essentially foreclose arguments that anticompetitive harms to video programmers would justify blocking the merger.[34]

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Senior Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20859
301-984-8253

August 21, 2014

[34] Testimony of Christopher S. Yoo, Hearing: "Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers," U. S. Senate Committee on the Judiciary (April 9, 2014) (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 6-8 (D.C. Cir. 2009); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001)), available at: http://www.judiciary.senate.gov/imo/media/doc/04-09-14YooTestimony.pdf.