Rolling Up Video Distribution in the U.S.:
Why the Comcast-Time Warner Cable Merger Should Be Blocked

White Paper

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I. Introduction

Still fresh from its 2011 acquisition of NBC Universal's (NBCU's) cache of valuable programming content, Comcast Corporation announced on February 13, 2014 its intention to acquire Time-Warner Cable (TWC) for $45 billion.[2] The proposed merger takes Comcast-NBCU to another level. The deal would horizontally integrate Comcast's and TWC's cable television (TV) and broadband Internet service provider (ISP) assets, creating a larger video distribution footprint. The expanded footprint would raise Comcast-NBCU's shares in the national cable TV and broadband ISP markets from 23% to 36%, and 24% to 38%, respectively.[3] The merger would also pair up Comcast-NBCU's content holdings with yet another video distributor, TWC, further enhancing existing vertical integration.

While critics and analysts have examined a range of competitive issues raised by the proposed transaction, two major categories are particularly important. First, as a larger cable TV provider and broadband ISP, Comcast-TWC would become an even more powerful buyer of products and services ranging from programming content to wholesale "middle" market services. The latter are provided by the Internet backbone providers (IBPs), content delivery networks (CDNs), and peering intermediaries that interconnect upstream content with downstream ISP networks. Second, the merger could enhance

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[2] *Broadband Will Continue To Drive Growth For Time Warner Cable*, TREFIS, September 25, 2013, http://www.trefis.com/stock/twc/articles/207096/broadband-will-continue-to-drive-growth-for-time-warner-cable/2013-09-25. Statistics are for 2Q 2013.

[3] *About 295,000 Add Broadband in the Second Quarter of 2013*, Press Release, LEICHTMANRESEARCH, http://www.leichtmanresearch.com/press/082013release.html, and *Major Multi-Channel Video Providers Lost About 345,000 Subscribers in 2Q 2013*, Press Release, LEICHTMANRESEARCH, http://www.leichtmanresearch.com/press/081913release.html.

Comcast-TWC's ability and/or incentive to potentially engage in exclusionary conduct. By virtue of an enlarged video distribution footprint, Comcast-TWC could serve as a "gatekeeper," i.e., to control what rival content reaches its subscribers. Moreover, by pairing Comcast-NBCU content with TWC distribution, the merged company could exercise more control over whether its own content reaches rival multi-video programming distributors (MVPDs) and online video distributors (OVDs).

All told, the combination would grant Comcast-TWC a vast measure of economic control over whether, what, how, and when important news, opinions, sports, and entertainment video programming is delivered to tens of millions of Americans. This landscape raises the troubling prospect of spillover effects from more concentrated economic power to expanded political control and diminished diversity and independence in the media. Comcast-TWC comes at a time when the industry is grappling with fundamental policy questions about an open Internet, the answers to which could well be shaped by the proposed merger. Moreover, the American consumer appears to be particularly unhappy with the merging parties' cable TV and ISP products and services.

The Comcast-TWC deal raises potentially significant competitive issues, little or no offsetting cost savings or consumer benefits, and would be extraordinarily difficult to "fix" with either structural or behavioral remedies. While Comcast describes itself as the "perfect partner" for TWC, the merger is nevertheless a poor match for competition and consumers.[4] In light of these concerns, the interests of consumers might be better served if the U.S. Department of Justice (DOJ) and Federal Communications Commission (FCC) took a step back to contemplate the sea-change the deal would imply for the cable TV and broadband ISP industry. Adding in AT&T's bid for DirecTV, and the widely predicted transaction between Sprint and T-Mobile, makes the case for why competition authorities should consider a "go slow" policy for the next two years, or even a temporary moratorium on such mega-deals. At the very least, these various transactions should not be viewed as if each were an isolated event. Rather, industry-wide dynamics and overarching policy goals should factor prominently into an enforcement framework.

This White Paper explores what the American Antitrust Institute (AAI) believes to be the major competitive issues raised by the proposed merger and why it should be blocked. In contrast to the DOJ and FCC, which have access to proprietary data, AAI's analysis is based on public data and information and our conclusions are limited accordingly. The paper proceeds as follows. Section II provides background on Comcast's historical expansion through mergers and acquisitions. Section III sketches out the important backdrop for evaluating the proposed merger, namely the trend toward mega-deals, a history of swaps involving the parties, and their relatively poor performance. Section IV evaluates two major competitive issues raised by the proposed merger, namely how the merger could enhance the ability and/or incentive for a combined Comcast-TWC to potentially exercise buyer market power and engage in exclusionary conduct with regard to rivals. Section V analyzes Comcast-TWC's efficiencies claims. Section VI discusses

[4] *Investor Presentation*, Comcast and Time Warner Cable, February 13, 2014 (at 6), http://files.shareholder.com/downloads/CMCSA/2671320491x0x725713/781d73e7-0635-47b4-b25e-34e5c7ea4ff9/Comcast%20Investor%20Presentation.pdf.

the inadequacy of approving the proposed deal with remedies, particularly any proposal to graft the behavioral fixes imposed in Comcast-NBCU onto the Comcast-TWC transaction. Section VII concludes.

II. Comcast's Growth Through M&A

Comcast is the largest cable operator in the U.S., with approximately 22 million cable television subscribers and 21 million broadband residential and business customers.[5] The company also provides voice services to almost 11 million customers.[6] TWC has about 11 million cable television subscribers, almost 12 million broadband customers, and serves about 5 million voice customers.[7] Together, the combined company would have about 36% of the national cable TV market and about 38% of the national broadband market.[8] With an existing presence in 31 Nielsen "designated market areas" (DMAs), Comcast would expand through the acquisition of TWC to cover 15 additional DMAs, 12 of which are in markets in which Comcast does not currently operate.[9] Once merged, the combined company will have a presence in 92% of the 25 top DMAs, and 86% of the top 50 DMAs.

As shown in Figure 1, Comcast has grown significantly over the last 20 years through a series of major mergers and acquisitions of cable programming providers and video distributors. Comcast has expanded the geographic scope of its distribution operations by acquiring: Maclean Hunter (1994), Lenfest Communications (1999), and AT&T Broadband (2002). Some of Comcast's major content programming acquisitions include: the Golf Channel (1994), E! Entertainment (1997), and Outdoor Life Network (now NBCSN, 2001). Comcast currently has a controlling interest in eleven regional sports networks (RSNs), including networks in the Bay Area, Chicago, and Washington, D.C.

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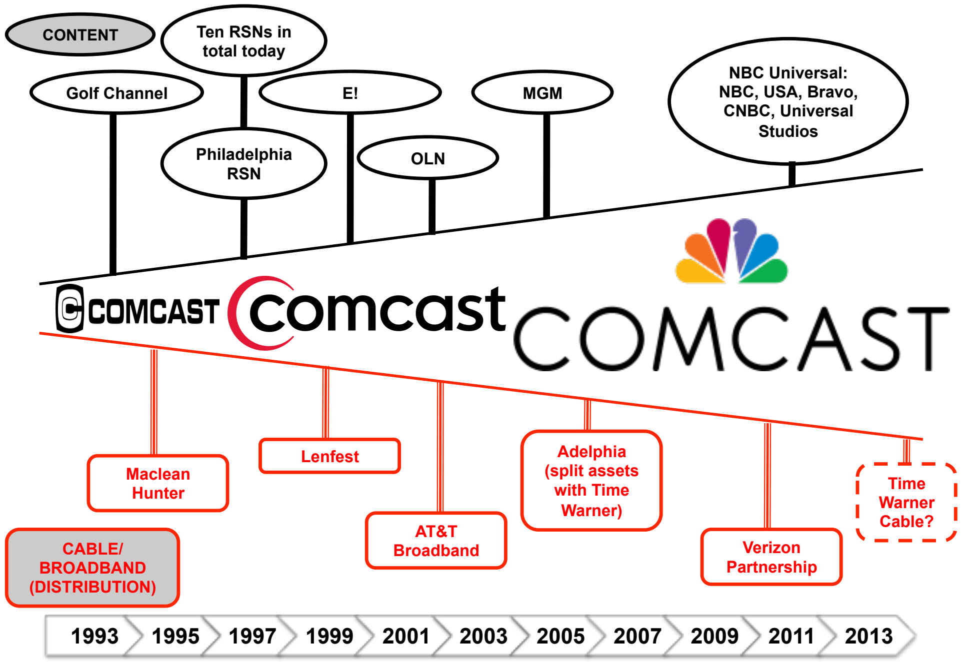
[5] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (Application)*, MB Docket No.14-57, before the Federal Communications Commission (April 8, 2014), at 8-9.
[6] *Id.* at 10.
[7] *Id.* at 14-15.
[8] *Supra* note 3.
[9] *Investor Presentation*, *supra* note 4. "DMA regions are the geographic areas in the United States in which local television viewing is measured by The Nielsen Company. The DMA data are essential for any marketer, researcher, or organization seeking to utilize standardized geographic areas within their business." See *DMA Regions*, NIELSEN, http://www.nielsen.com/us/en/campaigns/dma-maps.html.

Figure 1: The Growth of Comcast



In 2011, Comcast consummated its highest profile acquisition in the content area by acquiring a controlling stake in NBCU, the owner of, among others, NBC, USA, Bravo, and Universal Studios. In 2013, the company purchased General Electric's minority interest and became the sole owner of NBCU.

In contrast to Comcast's expansion-through-acquisition evolution, TWC was spun off in 2009 from film and television producer, and cable channel operator Time Warner. In addition to cable television and broadband distribution assets, TWC currently owns cable programming assets that include two RSNs in Los Angeles and interests in Sports Net New York and Sports Net LA.

III. The Merger in Context – The Trend Toward Mega-deals, a History of Swaps, and the Relatively Poor Performance of Comcast and TWC

A. The Trend Toward Mega-Deals

The proposed merger is part of a swell of mega deals that now pepper the popular business press on almost a daily basis. The Economist reported recently that in 2014, there have been 15 transactions worth more than $10 billion, the largest since the "M&A rush" of 2007.[10] Valued at $69.8 billion, Comcast-TWC fits into the high end of the recent parade of mega mergers. The takeover of DirecTV by AT&T (valued at $48 billion) will advance this trend.[11]

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[10] *Return of the Big Deal*, ECONOMIST, May 3, 2014, http://www.economist.com/news/business/21601585-spate-mergers-and-acquisitions-could-redraw-business-landscape-especially-europe.
[11] Michael J. de la Merced, *AT&T Said Near Deal to Buy DirecTV*, N.Y. TIMES DEALBOOK, May 17, 2014,

Annual reports to Congress by the DOJ and the Federal Trade Commission (FTC) indicate that since 2001, larger deals account for the biggest growth in transactions reportable under the Hart-Scott-Rodino pre-merger filing requirements. For example, the average annual growth in deals under $50 million in value was about -5% from 2000 to 2012. Deals between $100-$300 million grew at the rate of only 1.5% annually, while deals between $300-$500 grew at about 5% annually.[12] The real growth was in transactions valued between $500 million and $1 billion, which grew at about 12% per year over the period, and deals in excess of $1 billion grew at an annual rate of 6.5%.

Mega deals such as Comcast-TWC highlight the troubling trend toward consolidation in many important industries, including transportation, telecommunications, agriculture, and healthcare.[13] Despite claims of cost efficiencies, consumer benefits, and enhanced investment and innovation, the ability of merged companies to prove up the claimed benefits is increasingly viewed with skepticism.[14] Moreover, there is the real risk that "mergers-to-tighter-oligopoly" facilitate market structures that are conducive to tacit coordination that drives up price, restricts output, eliminates choice, and stifles innovation.

For example, the recently consummated merger of US Airways and American Airlines completed the transformation of the domestic passenger aviation industry into a tight oligopoly, potentially exacerbating the propensity of the few large carriers to coordinate on pricing and capacity decisions. A similar landscape is evolving in the cable TV and broadband ISP industries, where major incumbents have swapped service territories to solidify their dominance and mergers are creating larger conglomerate firms. These trends make markets less permeable to entry by innovative firms and smaller rivals, eliminate potential competition, and increase the risk of strategic exclusionary conduct by dominant players.

In the aftermath of the aborted AT&T-T-Mobile merger, the DOJ sent a warning shot across the bow of consolidation. The New York Times reported as follows on a January 2014 address by DOJ Deputy Attorney General William Baer to the New York Bar Association:

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http://dealbook.nytimes.com/2014/05/17/att-said-near-a-deal-for-directv/?_php=true&_type=blogs&_r=0.

[12] U.S. Department of Justice and Federal Trade Commission (F.T.C.), *Annual Reports To Congress Pursuant To The Hart-Scott-Rodino Antitrust Improvements Act Of 1976*, 2000 through 2012, Table 1, http://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

[13] Eduardo Porter, *Concentrated Markets Take a Big Toll on Economy*, N.Y. TIMES, May 28, 2014, at B1, *available at* http://www.nytimes.com/2014/05/28/business/economy/concentrated-markets-take-big-toll-on-economy.html?src=rechp&_r=2.

[14] See, e.g., Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, *Where Mergers Go Wrong,* MCKINSEY ON FINANCE 2004, at 2-3, *available at* http://www.ceoexpress.com/asp/mckinseyalls4.asp?id=m0286.See also Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, American Antitrust Institute, November 21, 2013, http://www.antitrustinstitute.org/content/aai-issues-white-paper-delivering-benefits-efficiencies-and-airline-mergers.

> "It's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers," he [Baer] said, without referring to any specific merger proposal. "Any proposed transaction would get a very hard look from the antitrust division." Mr. Baer said that the division would similarly scrutinize any proposed merger among cable television companies.[15]

A key question for many keystone U.S. industries where tight oligopolies now exist is whether additional consolidation is permissible under the U.S. antitrust laws.

B. Dividing Markets and Solidifying Dominance Among Video Distributors

The broader trend toward mega-deals provides an important backdrop against which to consider the Comcast-TWC (and AT&T-DirecTV) merger. Add to this mix the fact that cable TV providers and broadband ISPs have a history of dividing up markets and solidifying their dominance in market areas. For example, Comcast and TWC teamed up to acquire and divide the assets of bankrupt cable provider Adelphia Communications in 2006. Later, they executed a series of swaps to consolidate and solidify each firm's presence in several major DMAs in the current top 15, including Los Angeles (TWC), Philadelphia (Comcast), Houston (Comcast), Dallas (TWC), and the Twin Cities (Comcast).[16]

Comcast and TWC, along with cable provider Bright House, also entered into a major partnership with Verizon in 2012. Comcast and its cable peers transferred spectrum to Verizon in exchange for the telecom giant's pledge not to further expand its FiOS fiber optic network. In exchange, the participants in the transaction agreed to market each other's wireless and wireline services.[17] This widely criticized deal amounted essentially to market division, whereby cable providers abandoned any intentions of getting into the wireless business while Verizon halted its spending on entry into cable TV and fixed

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[15] Edward Wyatt, *Wireless Mergers Will Draw Antitrust Scrutiny Says Antitrust Chief*, N.Y. TIMES DEALBOOK, Jan. 30, 2014, http://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/?_php=true&_type=blogs&_r=0 (quoting Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer to the New York State Bar Association, Reflections on Antitrust Enforcement in the Obama Administration (Jan. 30, 2014), *available at* http://www.justice.gov/atr/public/speeches/303269.pdf).

[16] *Time Warner Cable and Comcast to Acquire Assets of Adelphia Communications; Companies Also to Swap Certain Cable Systems and Unwind Comcast's Interests in Time Warner Cable and Time Warner Entertainment,* Press Release, Comcast Corp., COMCAST, April 21, 2005, *available at* http://corporate.comcast.com/news-information/news-feed/time-warner-cable-and-comcast-to-acquire-assets-of-adelphia-communications-companies-also-to-swap-certain-cable-systems-and-unwind-comcasts-interests-in-time-warner-cable-and-time-warner-entertainme.

[17] Azam Ahmed, *Verizon Wireless Buys Spectrum for $3.6 Billion*, N.Y. TIMES, Dec. 2, 2011, *available at* http://dealbook.nytimes.com/2011/12/02/verizon-wireless-buys-spectrum-from-comcast-and-others-for-3-6-billion/.

broadband.

Yet another swap is on the horizon, subject to DOJ and FCC review, if the Comcast-TWC deal goes through with the proffered divestiture of almost four million subscribers. Charter Communications will reportedly acquire divested subscribers and swap subscribers with Comcast.[18] This swap is being marketed as a boon to efficiency. Comcast Chief Executive Office Brian Roberts stated: "The realignment of key cable markets achieved in these transactions will enable Comcast to fill in our footprint and deliver operational efficiencies and technology improvements."[19] If the proposed Charter-Comcast swap operates much like the swaps of 2006, Comcast could solidify its dominance in regional geographic areas. While some swaps that promote cable clustering may enhance scale economies, those benefits may come at the risk of higher concentration and higher prices to consumers. And to the extent swaps are contemplated to implement market division, they are illegal under the U.S. antitrust laws.

C. The Relatively Poor Performance of Comcast-TWC and U.S. Broadband

Another important element of the landscape against which the Comcast-TWC merger should be evaluated is how well the two companies have fared in the eyes of the consumer. Comcast has grown primarily through mergers and acquisitions, as opposed organic growth, and in the process has eliminated choices for consumers. This has garnered significant attention in the debate over Comcast-TWC. While part of a broader array of indicators of competitive vigor, consumer satisfaction rankings provide important insight. In a national survey by Consumers Union, for example, Comcast ranked in the lowest 25th percentile for consumer satisfaction in pay TV and broadband Internet service. TWC also performed badly – ranking in the bottom 30th percentile for satisfaction.[20] The 2013 American Customer Satisfaction Index (ACSI) rankings reveal that Comcast and TWC came in 8th and 9th (out of nine total companies), respectively, in consumer satisfaction for pay TV. Comcast and TWC came in 7th and 8th (out of eight companies), respectively, for broadband Internet service.[21]

Poor consumer satisfaction rankings stand oddly in contrast to Comcast-TWC's claims in its FCC application that Comcast is the leading innovator in cable TV and broadband

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[18] David Gelles, *Charter and Comcast to End Fight Over Time Warner Cable*, N.Y. TIMES DEALBOOK, April 27, 2014, http://dealbook.nytimes.com/2014/04/27/charter-said-to-finalize-deal-with-comcast-for-subscribers/.
[19] *Id.*
[20] *Telecom Services Ratings*, CONSUMERREPORTS, *available at* http://www.consumerreports.org/cro/electronics-computers/computers-internet/telecom-services/bundled-service-ratings/ratings-overview.htm. Ratings are based on Spring 2013 survey information.
[21] *Benchmarks for Comcast, Subscription Television Service Score Table*, American Customer Satisfaction Index, http://www.theacsi.org/index.php?option=com_content&view=article&id=149&catid=&Itemid=214&c=Comcast&i=Subscription+Television+Service; Benchmarks for Comcast, *Internet Service Providers Score Table*, American Customer Satisfaction Index, http://www.theacsi.org/index.php?option=com_content&view=article&id=149&catid=&Itemid=214&c=Comcast&i=Internet+Service+Providers.

Internet.[22] One explanation for this anomaly is that such innovation has not yet been translated into metrics that are meaningful to the American consumer. Another explanation is that Comcast's leading innovator "benchmark" is not particularly useful. In wired broadband, where most American consumers have little choice of provider, a U.S. benchmark has limited usefulness.[23] Indeed, the U.S. industry struggles with poor marks relative to the development of broadband pricing, availability, and innovation in other parts of the world.

The FCC's third INTERNATIONAL BROADBAND DATA REPORT highlights the performance of the U.S. industry relative to other countries.[24] In 2011, for example, the U.S. ranked in the top 20% of countries with the highest monthly net price for broadband service.[25] For high-speed residential fixed broadband service (e.g., 15-25 mbps of download speed), the U.S. ranked in the most expensive 20% of countries in the survey.[26] Based on average weighted speed-adjusted price, the U.S. ranked in the most expensive 30% of countries.[27] In terms of speed of broadband service, the U.S. also performed poorly, ranking in the bottom 38% for slowest speeds.[28] These price and quality rankings exist even in light of the fact that broadband is highly accessible to most of the U.S. population. Namely, the U.S. ranks in the top 20% for broadband subscriptions per 100 inhabitants and in the top 40% for households with access to broadband.[29]

Other surveys, such as those performed by the Organization for Economic Cooperation and Development, generally confirm the observations in the FCC report.[30] The U.S. industry is therefore in somewhat of a conundrum. With good broadband penetration and availability, we still perform relatively poorly in terms of relative prices and speed. Prices could be related to any number of factors, including: the degree of competition, regulation, geography, population density, the availability of wireless broadband, and a host of other factors. Without additional economic analysis, explaining relatively high

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[22] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (Application)*, MB Docket No.14-57, before the Federal Communications Commission, Exhibit 6, Mark A. Israel, *Implications of the Comcast/Time Warner Cable Transaction for Broadband Competition*, at 81. *See also Investor Presentation*, *supra* note 4, at 17. The company reports that it has increased HSD speeds 12 times in the past 12 years (with speeds up to 505 Mbps), was the first to deploy DOCSIS 3.0 (an international telecommunications standard that permits the addition of high-speed data transfer to an existing cable television), and offers the fastest in-home Wi-Fi.

[23] It is unclear whether wired and wireless broadband are yet effective substitutes. *See, e.g., Application,* at 54, note 120 (citing *Ex Parte* Submission of the U.S. Dep't of Justice, GN Docket No. 09-51, at I0 (Jan. 4, 2010) ("It is premature to predict whether the wireless broadband firms will be able to discipline the behavior of the established wireline providers, but early developments are mildly encouraging.")).

[24] Federal Communications Commission, International Broadband Data Report (Third Report) (FCC Int'l. Broadband Report), August 31, 2012, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1334A1.pdf.

[25] *Id*. Appendix A, Figure 1, at 5. Reflects a net price (i.e., reflects the price per month, including rebates, installation charges, equipment charges such as modem rentals and other fees.)

[26] *Id.* Appendix A, Figure 2c, at 8. As download speeds drop, however, the U.S. becomes less expensive, relative to other countries.

[27] *Id.* Appendix A, Figure 5, at 13.

[28] *Id.* Appendix F, Figure 1a, at 3.

[29] *Id.* Appendix E, Tables 1-2, at 1-2.

[30] Porter, *supra* note 13.

U.S. broadband prices is difficult. But where there are concerns about relatively poor historical consumer satisfaction and industry performance, the effect of mergers on competition and consumers warrants attention.

IV. Major Competitive Effects of the Proposed Merger

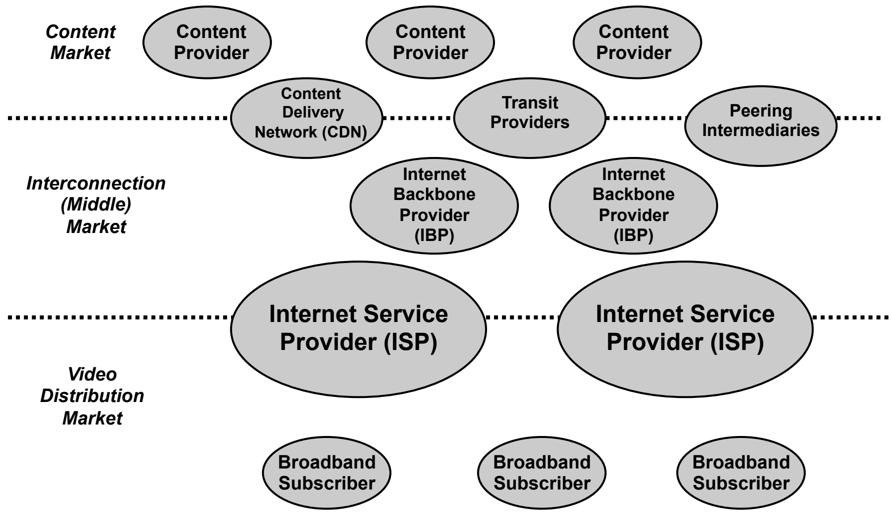
Others have already made several arguments as to why the proposed transaction is likely to adversely affect competition and consumers.[31] Those arguments include, but are not limited to, eliminating potential competition in video distribution markets and exclusionary conduct regarding the carriage of, or access to, rival sports (e.g., RSN) programming. Our review of those arguments generally confirms their reasonableness, but in the interest of focusing attention on less frequently probed competitive issues, we analyze two major concerns.

A. A Merged Comcast-TWC Will Have a Greater Ability and Incentive to Potentially Exercise Buyer Power Against Upstream Rivals

A combined Comcast-TWC will be a more powerful buyer of programming content and middle market services because of its significantly expanded post-merger cable TV and broadband ISP footprint. The middle market is the wholesale market for Internet interconnection. As shown in Figure 2, ISP systems interconnect with IBPs and a variety of edge market players such as CDNs, peering intermediaries, and transit providers in the middle market. These entities bridge the gap upstream with content providers (shown in the upper part of the diagram) and downstream with broadband ISPs (shown in the lower part of the diagram).

[31] *See, e.g.,* Maurice Stucke & Allen Grunes, *Crossing the Rubicon: Why the Comcast/Time Warner Cable Merger Should Be Blocked*, GLOBAL COMPETITION REV., February 2014, *available at* http://globalcompetitionreview.com/usa/article/35322/analysis/; Susan Crawford, *Here's Why the Comcast-Time Warner Merger is Bad*, MIT TECH. REV., April 10, 2014, *available at* http://www.technologyreview.com/view/526461/heres-why-the-comcast-time-warner-merger-is-bad/.

Figure 2:
The "Middle Market"



A combined Comcast-TWC will likely have greater bargaining leverage with upstream sellers of complementary products and services. With fewer attractive alternatives to dealing with Comcast-TWC, content providers could lose bargaining leverage. An outcome of the shift in bargaining power through the potential exercise of buyer market power could be to reduce content providers' profits, and therefore their incentives to invest in quality. Such quality reductions would lead to non-trivial efficiency losses. This scenario stands in contrast to any claims that post-merger shifts in bargaining power would be felt only in a redistribution of the "pie" among stakeholders in a buyer-seller relationship.

Similarly, any loss of bargaining leverage by middle market participants in negotiations with a more powerful Comcast-TWC might lower incentives to invest in upgrading and maintaining interconnections. IBPs, for example, must already make significant sunk cost investments in backbone facilities. Ensuring fewer (and therefore faster) connections is a major way that IBPs compete. The merger could adversely affect incentives to invest in infrastructure that would otherwise prevail in a more competitive buyer-side market, thus reducing efficiency.

Faced with a more powerful buyer, IBPs may themselves be faced with incentives to merge, raising the risk of coordinated pricing and capacity decisions. With the growing dominance of any given IBP, the incentives to improve connectivity are commensurately lower and incentives to degrade the quality of peering with smaller IBPs are higher. While not a direct effect of the potential exercise of buyer market power by a merged Comcast-TWC, the merger could trigger reactive consolidation throughout the telecommunications-media supply chain. Enforcement in the Comcast-TWC case would be usefully informed by fact that reactive consolidation is occurring in the agriculture and healthcare industries in the U.S., with significant concerns over adverse effects on price, output, innovation, and safety and reliability.

Even a cursory review of recent events highlights the competitive battles that are being waged in the middle market around the strategic value of interconnection. For example, in 2010, Comcast and IBP Level 3 entered into a dispute over peering arrangements involving Netflix.[32] More recently, Netflix signed a priority traffic agreement with Comcast in order to connect directly to obtain smoother, faster streaming speeds to broadband ISP customers.[33] In doing, so, Netflix bypassed Cogent Communications (an IBP), which in turn claimed that Comcast refused to upgrade its interconnections, even when Cogent offered to pay.[34] Bypass is not, in itself, an adverse development. However, incentives created by the Comcast-TWC merger that could promote inefficient bypass or bypass that impairs competition in the middle market should arguably be considered an adverse effect of the combination. As Internet traffic grows, bypass and other middle market issues will expand, as we have witnessed in other industries such as electricity with important wholesale interconnection markets.

B. A Merged Comcast-TWC Will Possess Greater Ability and/or Incentive to Potentially Exclude Rivals

The proposed merger enhances the ability and/or incentive for the combined company to engage in potentially exclusionary conduct with regard to rivals. Two major effects involve: (1) frustrating or cutting off TWC's video distribution rivals' access to important Comcast-NBCU programming, and (2) as a more powerful gatekeeper, limiting competition from nonaffiliated content providers and middle market suppliers. In order to better understand these concerns, it is important to note that the merged firm will have a significant "wingspan" that covers upstream content and downstream video distribution (MVDs and OVDs) markets, as shown in Figure 3. The middle market segment in Figure 3 is described in more detail in Figure 2.

The solid lines connecting Comcast-NBCU content and distribution and TWC content and distribution in Figure 3 represent pre-merger ownership. The dashed lines show how the merger will enhance horizontal and vertical integration. Needless to say, not all horizontal or vertical aspects of the proposed merger are equal in potential competitive impact. For example, TWC brings relatively little content to the merger, but the combination of the Comcast-NBCU and TWC video distribution systems is significant, as is the pairing of Comcast-NBCU content with TWC distribution.

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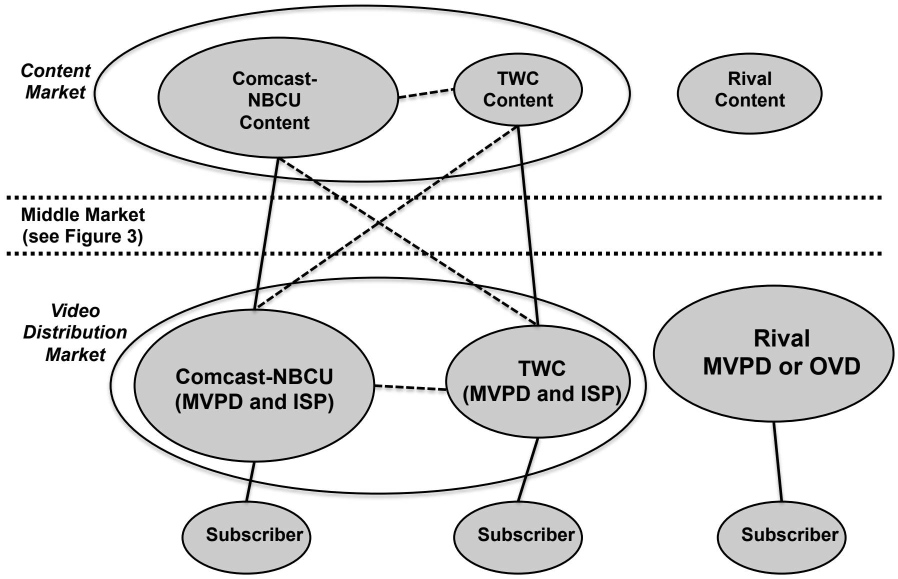
[32] Marguerite Reardon, *Understanding the Level 3-Comcast spat (FAQ): Level 3 says Comcast is violating Net neutrality principles. Comcast says Level 3 is looking for free Ride,* CNET, November 30, 2010 3:28 PM, *available at* http://www.cnet.com/news/understanding-the-level-3-comcast-spat-faq/.

[33] Cecilia Kang, *Netflix opposes Comcast's merger with Time Warner Cable, calls it anticompetitive*, WASH. POST., April 21, 2014, http://www.washingtonpost.com/blogs/the-switch/wp/2014/04/21/netflix-opposes-comcasts-merger-with-time-warner-cable-calls-it-anticompetitive/.

[34] Grant Gross, *Comcast deal gives it market power on Internet backbone, critic says*, CFOWORLD, May 8, 2014, http://www.cfoworld.com/technology/87050/comcast-deal-gives-it-market-power-internet-backbone-critic-says?page=0,0.

Figure 3:
The Wingspan of Comcast and Time Warner Cable



By combining Comcast and TWC into a larger video (cable TV and broadband ISP) distributor, the merger enhances the incentive of the combined firm to preferentially control access to the company's last mile networks. Comcast-NBCU produces and sells content across its own platforms (e.g., Xfinity and TVEverywhere) that compete directly with edge providers such as Netflix, Pandora, and others. Comcast plans to extend its own content platform to TWC if the merger moves forward. Post-merger, Comcast-TWC will be in a better position to act on competitive threats to its own content platforms by controlling whether, what, and when content is allowed through the Comcast-TWC ISP gate.

Post-merger gatekeeping strategies potentially include exploiting greater bargaining power in negotiations with upstream content rivals, thus raising their costs and making it more difficult for them to compete. A merged Comcast-TWC could also extract higher tolls from middle market participants for direct or priority access to Comcast-TWC's ISP networks, thus raising their costs. An important part of this analysis is considering how different middle market services and interconnection arrangements involving regional and local ISP networks are possible substitutes for one another.

The loss of Comcast-TWC subscribers resulting from any loss of quality or availability of content or middle market services is unlikely because a larger video distribution footprint would minimize any lost revenues. Potentially exclusionary strategies directed at upstream rivals by a merged Comcast-TWC would hamper competition in upstream markets (e.g., content and middle market services), with the effect of raising subscriber prices, lowering quality, reducing consumer choice, or stifling innovation.

A second exclusion problem arises because the proposed merger pairs Comcast-NBCU content with TWC distribution. As such, the merger enhances the ability and incentive of the merged company to potentially restrict TWC's MVPD and OVD rivals' access to content. Foreclosing video distribution rivals would make it more difficult for them to compete with the merged company. Limited choices in pay TV and broadband Internet mean that Comcast-TWC would likely gain rivals' subscribers in the event Comcast-TWC withheld content. This concern over market foreclosure was raised in the DOJ's Complaint in Comcast-NBCU:

> The proposed JV would allow Comcast to limit competition from MVPD competitors and from the growing threat of OVDs. The JV would give Comcast control over NBCU content that is important to its competitors. Comcast has long recognized that by withholding certain content from competitors, it can gain additional cable subscribers and limit the growth of emerging competition . . . . The JV will have less incentive to distribute NBCU programming to Comcast's video distribution rivals than a stand-alone NBCU. Faced with weakened competition, Comcast can charge consumers more and will have less incentive to innovate . . . . Because these competitors serve areas outside Comcast's cable footprint, other local markets served by these rival distributors may be affected, with the competitive effects of the transaction potentially extending to all Americans.[35]

A similar outcome in Comcast-TWC could harm competition in video distribution, leading to higher subscriber prices, lower quality, less consumer choice, and less innovation. Similar to what is described in the DOJ's Comcast-NBCU Complaint, competitive harms could also extend to rivals outside TWC's footprint, including other local markets served by TWC rival distributors, with competitive effects "potentially extending to all Americans." With a larger footprint, the merged firm would likely recapture more of the benefits of foreclosing rival MVPDs and OVDs than Comcast-NBCU would before the merger, thus enhancing the merged firm's incentive to potentially engage in market foreclosure. Without admitting to the prospect of further market foreclosure in Comcast-TWC, the companies propose that the behavioral conditions imposed in Comcast-NBCU be applied to the larger and more complex merged entity. This is unlikely to protect competition and consumers, or make for successful competition policy, for a variety of reasons discussed in Section VI.

V. Why Bigger Is Not More Efficient and May Even Be "Inefficient"

A. Comcast-TWC's Three-Part Efficiencies "Defense"

Comcast and TWC devote significant space in their FCC application to explaining the numerous efficiencies they predict will be generated by the combination of their distribution and content systems. The companies estimate $1.5 billion in operating efficiencies and $400 million in capital expenditure efficiencies, with additional

[35] Complaint at 17, 19-20, United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106).

opportunities for revenue synergies.[36] Such efficiencies are small relative to the size of the transaction. Operational efficiencies typically encompass the types of scale, scope, and coordination economies that can potentially be realized through horizontal and vertical integration.[37] While the merged company also expects to realize revenue synergies, they say that they have not yet estimated them. These synergies, they claim, will nonetheless translate into consumer benefits for residential and business customers and advertisers.

There are three basic themes behind Comcast-TWC's efficiencies claims. First is the concept that the company faces stiff competition not only from other MVPDs but also from the Googles, Amazons, and Apples of the world. They argue that such companies are global in scope, with resources and a customer base to facilitate innovation.[38] By creating a larger footprint through horizontal integration, the merged company expects to realize scale economies in almost every aspect of operations, from the purchase of capital equipment, voice, cable TV, broadband products and services, advertising, to R&D. Moreover, Comcast-TWC considers these scale economies necessary for continued investment and innovation in video distribution.[39]

A second element of the Comcast-TWC efficiencies defense is that the need to integrate vertically is driven by stalled attempts by video distributors to coordinate as standalone entities with the many actors in the dynamic communications, media, and technology markets. Moreover, the pace of technological change would require numerous partnerships that would be difficult to establish because of uncertainty regarding costs, prices, profits, risks, business models, technology, and complexity. The merger would therefore reduce the transactions costs created by the difficulty of negotiating and coordinating with a vast array of players. These range from content providers, middle market participants (e.g., IBPs, CDNs, and peering intermediaries), device manufacturers, to rival distributors.

Finally, the parties argue that the merger is necessary to foster the ongoing "virtuous cycle of innovation" that Comcast and TWC claim has been spurred by competition in broadband. The economies of scale and expansion of Comcast's geographic footprint to capture and exploit the clustering of distribution assets will enhance Comcast-TWC's ability to invest and innovate. This, in turn, could lead to the development of new technologies and uses of broadband networks, thereby spurring demand for network improvements – again leading to new investment and innovation. The parties also credit

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[36] The parties expect to realize operating efficiencies in full within three years, with more than 50% achieved in the first year. Operational efficiencies are expected to continue at the $1.5 billion level each year thereafter. *See Investor Presentation*, *supra* note 4.

[37] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (Application)*, MB Docket No.14-57, before the Federal Communications Commission, Exhibit 4, Declaration of Michael J. Angelakis, at 3. Operational synergies are expected to include reductions in corporate overhead, integration of cable operations through the elimination duplicative networks, assets, and functions by creating one backbone and content delivery network, and reductions in programming costs associated with more favorable rates and terms.

[38] *Id.* at 6.

[39] *Id.* at 2, 6-9.

positive spillover effects associated with improving Internet backbone reliability, and feedback effects from an enhanced customer experience that would likely induce infrastructure and equipment manufacturers to pursue relationships with a merged Comcast-TWC.

B. Most of the Claimed Efficiencies Are Unlikely to Clear the HORIZONTAL MERGER GUIDELINES' Hurdles

The merging parties offer a tantalizing efficiencies story, crafted to gain maximum traction and leverage under both antitrust and regulatory review. However, the HORIZONTAL MERGER GUIDELINES set a high bar for efficiencies claims – one that is not cleared by Comcast-TWC. There are a number of reasons for this. First, the basic notion underlying the GUIDELINES' approach to efficiencies is that they must be merger-specific and "cognizable."[40] Cognizable efficiencies include cost savings and other benefits created by the merger that can be verified, i.e., that are not vague or speculative. While the AAI does not have access to the internal analyses submitted by Comcast-TWC, many of the parties' claimed efficiencies stray far afield from those that would be merger-specific and demonstrably reduce marginal costs. As such, they become less creditable under the GUIDELINES.

For example, Comcast asserts that it has *already* achieved sizeable scale economies. Realization of substantial, incremental scale economies almost implies an emerging national natural monopoly in wired broadband.[41] Such an industry structure, however, is fundamentally at odds with Comcast-TWC's claims that they operate in highly competitive cable TV and broadband Internet markets.[42] Other claimed efficiencies include enhanced post-merger investment/innovation and reducing transactions costs associated with standalone negotiations with various players in the supply chain. While economies of coordination and improved opportunities for dynamic efficiency (innovation) are appealing in theory, it is well known that they are difficult to verify and to validate as merger-specific.[43]

The parties' efficiencies defense also stands in contrast to the logical implication of Comcast's claims that it is already the leader in innovation. Namely, Comcast has significant incentive to innovate in its networks already, by virtue of vigorous competition in edge markets for content, applications, services, and devices. It could thus be expected to already have captured significant benefits from innovation and network improvements, since consumers have few alternatives for switching and they are (to some extent) locked in by bundling cable TV and broadband Internet services. Adding TWC to the mix is therefore unlikely to change the rate, volume, or success of innovation post-merger.

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[40] U.S. Department of Justice/Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (GUIDELINES) (2010), at §1, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.
[41] Angelakis Declaration, *supra* note 37, at 7.
[42] Application, *supra* note 5, at 3.
[43] *See, e.g.,* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1173-1175 (N.D. Cal. 2004) and FTC v. H.J. Heinz Co., 246 F.3d 708, 722-724 (D.C. Cir. 2001).

Second, the GUIDELINES emphasize that when the potential adverse competitive effect of a merger could be particularly substantial, "extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive" and that "the more [such efficiencies] must be passed through to customers, principally in the form of lower prices."[44] In light of the competitive problems raised by the merger, Comcast-TWC is unlikely to pass this test. For example, given relatively little competition and few choices faced by consumers, Comcast-TWC would have little incentive to pass on any gains from the merger. Moreover, many of the claimed cost synergies are fixed costs savings, which are much more likely to go to shareholders, as opposed to passed on to consumers in the short run. And even if savings were passed on by Comcast-TWC in the longer run, they should not be assumed to benefit consumers in the markets where there is probable competitive harm.

Third, the GUIDELINES note that cognizable efficiencies will be assessed net of the costs incurred in achieving them.[45] The parties themselves indicate that in the case of Comcast-TWC, operational and contractual integration issues are "non-trivial."[46] The parties conclude nonetheless "…benefits should directly and relatively quickly extend to the TWC systems following the approval and consummation of the transaction."[47] Airline mergers demonstrably suffer from the problem of difficult system integration, particularly as mergers of larger and larger systems have been proposed and poorly executed. As a result, integration costs are often underestimated and integration times protracted, which should reduce *a priori* efficiencies estimates at the time of merger review.[48] These similarities should provide a valuable comparison in evaluating efficiencies claims in Comcast-TWC.

C. Lessons from History – Why We Should Be Skeptical of Efficiencies Claims

The GUIDELINES explain that the antitrust agencies will view projections of efficiencies with skepticism, and that "claims substantiated by analogous past experience are those most likely to be credited."[49] It is important to note that the efficiencies claims in Comcast-TWC are vastly larger and more complex than those made a mere four years ago, when Comcast made its play for NBCU.[50] Comcast-TWC have marshaled an arsenal of efficiencies claims ranging from traditional cost savings, to revenue enhancements,

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[44] GUIDELINES, note 40. In Staples-Office Depot, for example, the court concluded that the magnitude of the likely pass-through rate was insufficient to rebut the presumption that the proposed merger would substantially lessen competition. *See* Federal Trade Commission v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), at 6.
[45] *Id.*
[46] Angelakis Declaration, *supra* note 37, at 12.
[47] *Id.*
[48] Moss, *supra* note 14.
[49] *Id.*
[50] *Comcast-NBC Universal: Will the Marriage of Cable and Content Work?*, Wharton School, December 9, 2009, https://knowledge.wharton.upenn.edu/article/comcast-nbc-universal-will-the-marriage-of-cable-and-content-work/.

consumer benefits, and enhanced investment/innovation. This is due, in part, to the increased complexity of the transaction. But the turnaround between Comcast-NBCU and Comcast-TWC almost begs the question: What has happened in the last few years that has so changed the industry landscape that a large, anticompetitive merger should be justified on the grounds that it will produce largely unsubstantiated efficiencies?

Evidence from past mergers supports the GUIDELINES' tough standards on efficiencies.[51] For example, in December 2009, when Comcast-NBCU was announced, the conservative think-tank Progress and Freedom Foundation published a white paper: *A Brief History of Media Merger Hysteria: From AOL-Time Warner to Comcast-NBC*. The study concludes that mergers such as AOL-Timer Warner, NewsCorp-DirecTV, Sirius-XM proved to be "blunders."[52] Indeed, a 2004 study by McKinsey study found that 70 percent of mergers studied examined failed to achieve expected revenue synergies and managers in 40 percent failed to fully deliver on estimated cost savings.[53] Such failures are likely to be felt by consumers through higher prices, lower quality, and less innovation.

In light of the foregoing, it is entirely possible that the very reasons used to justify Comcast-TWC on efficiencies grounds could be the Achilles heel of the merged company. Namely, managers struggle with the complexity of integrating large and complex operations. This means they can fall short of their efficiencies targets and lose customers in the process – thus sacrificing revenue synergies. Many of these problems reduce claimed efficiencies and increase integration costs. They may even go the step further of creating merger-related inefficiencies or spillovers in the form of consumer inconvenience and degraded quality. The fact that Comcast and TWC already struggle with poor consumer satisfaction should make these important considerations in the DOJ's and FCC's review of the proposed transaction.

VI. Why Remedies Will Not "Fix" the Comcast-TWC Merger

A. Divestitures and Net Neutrality Provisions are Inadequate

Without admitting to the prospect of competitive harms, Comcast-TWC have proposed a number of measures to assuage the DOJ's and FCC's likely competitive concerns. The first is the divestiture of about four million customers. This amounts to about 10-13% of their total customer base in the U.S. As a preliminary matter, a divestiture of this size would do little, if anything, to remove the incentive and/or ability of the merged entity to potentially engage in exclusionary conduct or to exercise buyer market power. Buyer power issues can emerge at market shares that are lower than what is considered problematic when evaluating seller market power. And there is no assurance that the proposed divestitures are designed specifically to address the dominance of Comcast-TWC as a more powerful buyer.

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[51] See, e.g., John E. Kwoka, *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST LAW JOURNAL 619 (2013), at 633.
[52] Adam Theirer, *A Brief History of Media Merger Hysteria: From AOL-Time Warner to Comcast-NBC,* Progress and Freedom Foundation, 16(25) PROGRESS ON POINT (DECEMBER 2009), at 11.
[53] Christofferson, et al., *supra* note 14.

Comcast-TWC have also committed to applying the network neutrality (i.e. open Internet) principles in Comcast-NBCU to its post-merger operations. These principles, however, apply primarily to the last mile interconnection between the ISP provider and the consumer. They do not apply to the middle market where major adverse effects of the proposed merger are also likely to be felt. Even if open Internet principles applied to the middle market, there remains the problem that only a piece of the industry would be subject to such provisions, creating an imbalance in governing conduct among rivals that makes no particular sense and might even induce strategic behavior.

B. Behavioral Remedies Fall Short in Theory and in Practice

Comcast-TWC also propose that the behavioral conditions in Comcast-NBCU be extended to the new, larger, more complex merged entity – an offering that is erroneously billed as an "efficiency" associated with the merger. Behavioral remedies fall short both in theory and in practice. The DOJ and FCC conditions encompass a variety of requirements and prohibitions on the behavior of Comcast-NBCU, largely in an effort to prevent exclusionary conduct or discrimination against rivals.[54] It remains, however, that behavioral remedies are fraught with difficulties. Much like traditional regulation, prohibiting certain actions by the firm does not negate the incentive to pursue profit, nor the firm's interest in circumventing the prohibition. For this reason, the type of conduct prohibited by behavioral remedies often goes "underground," or the merged firm develops workarounds to exploit loopholes in the remedies. Moreover, just as does regulation, behavioral remedies require ongoing oversight, monitoring, and compliance enforcement on the part of the government and a parallel compliance organization within the merged company. Both may involve non-trivial costs.[55]

[54] The major remedies imposed in Comcast-NBCU are as follows. The DOJ: (1) required Comcast to license content to OVDs on non-discriminatory terms, (2) prohibited Comcast from retaliating against content providers for licensing to online distributors or against online distributors for obtaining content, (3) prohibited exclusivity or other restrictive licensing arrangements for content; and (4) subjected Comcast to subject to network neutrality-like rules that prohibit unreasonable discrimination in the transmission of content over its network. *See* Proposed Final Judgment, United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106). "Non-discriminatory" terms are defined as comparable to those offered to MVPDs or comparable to those offered by "peer" content providers. The FCC applied all the conditions required by the DOJ and included additional remedies not included in the consent decree, including: (1) a prohibition on discrimination in programming carriage on the basis of affiliation (2) a must carry requirement for news and business channels in the same "neighborhood;" (3) the requirement to add ten new independently owned and operated channels to its basic cable package and market standalone broadband service at a given speed and price for a fixed period of time; (4) a prohibition on offering a specialized service composed substantially or entirely composed of its own content; and (5) a prohibition on Comcast from engaging in "unfair methods of competition or unfair or deceptive acts" that would hurt traditional or online rivals (i.e., network neutrality obligations). Both the DOJ Consent Order and FCC order are effective until January 2018.

[55] *See, e.g.,* John E. Kwoka and Diana L. Moss, *Behavioral merger remedies: evaluation and implications for antitrust enforcement,* 57 THE ANTITRUST BULLETIN 979 (2012). Behavioral remedies suffer from a variety of problems, including: information asymmetries, implementation costs, inability to fully specify remedies in consent orders, countervailing incentives, noncompliance and arbitration problems, and inability to specific the term of the remedy in light of market dynamics. *See also* Jarod Bona, *The Comcast-TWC Merger: Limit the Government's Options*, Competition Pol'y Int'l Antitrust Chron. 4(1) (Apr. 2014).

Any application of behavioral remedies in Comcast-TWC would be usefully informed by actual experience with such remedies in Comcast-NBCU. Comcast has been involved in a number of disputes regarding violations of the DOJ consent decree, not all of which have been resolved. For example, Bloomberg filed a complaint with the FCC Media Bureau in June 2011, alleging that Comcast was in violation of the news "neighborhooding" requirement. The FCC ruled in favor of Bloomberg. In October 2011, Project Concord (an OVD) filed a complaint after it failed to obtain desired content (e.g., to license new films) from Comcast. In November 2012, the FCC held that recent films were subject to the mandatory licensing requirements.[56] In 2008, Comcast imposed monthly data caps on broadband subscribers but four years later exempted Xfinity (its video streaming service) from the data cap, thus giving preferential treatment to its own service over rivals like Netflix and Amazon. Netflix has also claimed that Comcast has slowed delivery of its streaming service.[57]

C. A "One-Size-Fits-All" Approach is Flawed

Adopting a one-size-fits-all approach to behavioral remedies by porting the Comcast-NBCU remedies over to a different "patient" would create a particularly toxic stew. As discussed earlier, Comcast-TWC is a larger and more complex transaction that presents additional competitive issues not present in Comcast-NBCU. Horizontal and vertical integration could give rise to yet unknown complications that would render the remedies ineffective in addressing competitive problems in Comcast-TWC. Adequate behavioral remedies would be difficult to develop and enforce because they would need to address competitive issues related to the durability of Comcast-TWC's buyer market power and potential exclusion of middle market participants such as IBPs, CDNs, and peering intermediaries.

Because the Comcast-NBCU remedies do not address every competitive problem in Comcast-TWC, there should be no presumption that those conditions would be adequate here. Moreover, Comcast-TWC would likely resist remedies that actually work – both in settlement negotiations with DOJ and in implementation – as their compliance experience suggests. Developing behavioral remedies in light of these constraints risks stifling the dynamism of the cable TV-broadband ISP-media ecosystem as much, if not more, than the merger itself.

The Comcast-NBCU remedies are also due to expire in 2018. In light of competitive

[56] The Commission also found, however, that licensing this content to Concord would put Comcast in breach of contractual obligations to third parties.

[57] Netflix claimed that the average streaming speed for Comcast subscribers declined by 27 percent between October 2013 and January 2014, as compared to only 19 percent reduction for Verizon FiOS subscribers. *See* Shalini Ramachandran, *Netflix to Pay Comcast for Smoother Streaming*, WALL ST. J., Feb. 23, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702304834704579401071892041790; Jon Brodkin, *Netflix Performance on Verizon and Comcast Has Been Dropping for Months*, ARS TECHNICA, Feb. 10, 2014, *available at* http://arstechnica.com/information-technology/2014/02/netflix-performance-on-verizon-and-comcast-has-been-dropping-for-months/.

harms posed by the transaction, this is arguably an inadequate period of time for the remedies to be in place. If the DOJ and FCC ultimately consider behavioral conditions in Comcast-TWC, a consent order would have to be in effect for a significant time period in order to constrain potential anticompetitive post-merger conduct. Any approval of the Comcast-TWC deal thus realistically carries with it the risk of re-crafting behavioral conditions and imposing new conditions. Moreover, the merger could trigger reactive consolidation at all levels of the industry, ensuring that any remedy will be applied in a rapidly changing and perhaps quite different industry, rendering it ineffective. At a time when enforcement agencies are probably over-taxed with the review of multiple, large transactions, the need to monitor and adjudicate additional merger-related compliance issues imposes an undue burden on public resources.

VII. Conclusion

In sum, even if there were good reasons to allow the Comcast-TWC transaction that have not been revealed through publicly available information, the competitive risks outlined above, lack of credible efficiencies, and the difficulty in crafting remedies suggest that the merger is impossible to fix. Put differently, why should the American consumer assume all of the risks of an anticompetitive merger simply because a large firm wants to get bigger, with no probable public benefit?

Aside from merger-specific questions, the Comcast-TWC proposal raises broader issues related to the evolution of the cable TV, broadband ISP, and media markets. For example, it is clear that allowing the merger would inflict collateral damage on the ability of competition authorities, and the FCC in particular, to promote competition. A larger Comcast-TWC would remove a benchmark for the FCC, not only because there are fewer competitors, but also because the larger firm might more easily resist information demands.

Yet another critical question is how the Comcast-TWC merger should be evaluated in light of AT&T-DirecTV, or any other mergers that spring from the current swell of consolidation. The mergers, alone or together, have the potential to fundamentally change the structure of and incentives facing participants in relevant markets. Such strategic consolidation would indelibly influence the evolution of a critical industry. This includes the development of policy that maintains an open Internet versus one that relies on a pricing system to ration demand or provide premium access to the highest bidder. That policy will likely be influenced by competing arguments, marshaled by powerful economic and political agents that are strengthened through mergers.

The hope is that the DOJ and FCC will not evaluate Comcast-TWC or AT&T-DirecTV in a vacuum, but consider scenarios in which both are approved, with or without conditions. As sector regulator, the FCC can take a long-term perspective on industry evolution and its consequences for competition.[58] Traditional antitrust review does not take the long

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[58] See, e.g., Jonathan Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector*, 9 COMPETITION POLICY INTERNATIONAL (Spring 2013) and Jonathan Baker, *Sector-Specific Competition Enforcement at the FCC,*

view, which poses a problem with current enforcement. Without coordination and some alignment of resources and approach by multiple review authorities, outcomes may be in conflict, exacerbating competitive problems and creating inefficiencies. These are tall orders and, given the numerous strikes against Comcast-TWC, make the case for why competition and consumers are best served by just saying "no."

66 NYU ANNUAL SURVEY OF AMERICAN LAW 413 (2011).