United States Senate
WASHINGTON, DC 20510-0905

September 29, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Dear Chairman Pai:

We write today regarding concerns with your actions to weaken or eliminate the Federal Communications Commission's (FCC) long-standing media ownership limits. The steps you have taken since you were elevated to chair of the agency, in concert with your reported plans to act on additional media ownership issues this fall, undercut – and threaten to do permanent damage to – the American tradition of local broadcasting. Taken as a whole, these actions will take a wrecking ball to the pillars of localism and diversity in local broadcasting. Moreover, these steps have been – and likely will be – adopted without the FCC engaging in a detailed, substantive evaluation of the current broadcast media landscape. We strongly believe that your agency should not take any further actions to relax its media ownership limits without a thorough public review of the state of the broadcast marketplace today.

For decades, Congress has imposed, and the FCC has maintained, limits on the number of broadcast stations one company can own nationwide. In addition, the FCC has retained its own limits on the number of stations a company can own in a single media market. These limits recognize the unique role and obligations of local broadcasters and ensure that consumers benefit from diverse viewpoints and perspectives on the nation's airwaves. They also respect the fact that broadcasters are stewards of the nation's airwaves and should take that responsibility seriously by maintaining close relationships with the communities that they serve. Moves to change these rules could sever that relationship and fundamentally change the nature of broadcasting in the United States. That is why we have grave concerns about your efforts to weaken those rules.

In April, you resurrected the now technologically-outdated and illogical UHF discount, which was recently repealed by the FCC based upon a substantial and extensive record. Reinstating this historical relic directly contradicts Congress' intent in adopting a statutory national media ownership cap. And this action has directly facilitated the largest proposed broadcast television merger in history, which would give one company ownership of enough stations to reach over 70 percent of the American population.

The same company at the heart of that unprecedented broadcast consolidation also is known for using joint sales agreements and other arrangements to exert operational control over other stations around the country that they do not own. And earlier this year, you revoked previous guidance stating that the FCC would take a hard look at those agreements in any merger to ensure that they are not being used to skirt the media ownership limits. In effect, this change suggests that the FCC will take a blind eye towards agreements that allow functional operational control of a station by another – creating even more *de facto* consolidation without FCC oversight.

Many find the timing of your media ownership actions troubling and question whether they were taken knowing that they were essential to the business plans of a single company. It is obvious that without your change to the UHF discount, this proposed merger would not have been initiated. Whether or not one believes your reinstatement of the discount to be suspect, that action raises serious doubts about whether the FCC is acting impartially in these matters. In any event, your action does not conform to the justification for the national ownership cap adopted by Congress as part of the Telecommunications Act of 1996.

Reports now suggest that you intend to eliminate or seriously weaken many of the FCC's remaining media ownership limits sometime this fall. Those reports indicate that you are considering removing many of the limits on ownership of multiple stations by a single company in a single market and repealing the FCC's ban on co-ownership of TV stations and newspapers in the same market. The sum total of such moves would be nothing less than a declaration by you, as the nation's sole broadcast regulator, that further consolidation in the broadcast media marketplace is warranted and welcome. For decades, Congress and the FCC have maintained that reasonable limits on the number of stations a single company can own both nationally and in a particular market materially benefit the public interest. If in fact you repeal these rules, it would fly in the face of this long history and the belief that these rules are warranted because of the unique role of broadcasters in this nation (a role not replicated by any other media entity).

Americans continue to have faith in their local broadcast stations. Moves to repeal the media ownership rules threatens to create a world of corporatized, nationalized content being force fed to consumers under the guise of local news and public affairs programming. This is not the broadcast media that Americans deserve.

Your dismissive approach to the need for and longstanding history of the nation's media ownership rules is quite concerning. At a minimum, the FCC should not take any further action to relax the media ownership rules until it has completed another full quadrennial media ownership review. In fact, this is why Congress created the quadrennial media ownership review – to ensure that any changes to the media ownership rules are based on a fulsome review of the current broadcast landscape. It was just a year ago, at the end of the most recent quadrennial review, that the FCC concluded that its existing media ownership rules were essential. And if anything, the rapid technological and practical changes in the broadcast space since that decision suggest that the FCC must build a new thorough record about the state of broadcasting today.

The nation's media ownership limits have directly contributed to the trust that Americans have placed in their local broadcasters. Eliminating these rules and creating massive broadcast conglomerates directly contravenes the will of Congress and the public interest.

Sincerely,

Bill Nelson

BILL NELSON
United States Senator

Brian Schatz

BRIAN SCHATZ
United States Senator

Patty Murray

PATTY MURRAY
United States Senator

RON WYDEN
United States Senator

Dick Durbin

RICHARD J. DURBIN
United States Senator

Jack Reed

JACK REED
United States Senator

Maria Cantwell

MARIA CANTWELL
United States Senator

Robert Menendez

ROBERT MENENDEZ
United States Senator

Bernard Sanders

BERNARD SANDERS
United States Senator

Claire McCaskill

CLAIRE MCCASKILL
United States Senator

Sheldon Whitehouse

SHELDON WHITEHOUSE
United States Senator

Tom Udall

TOM UDALL
United States Senator

JEANNE SHAHEEN
United States Senator

JEFFREY A. MERKLEY
United States Senator

AL FRANKEN
United States Senator

RICHARD BLUMENTAL
United States Senator

TAMMY BALDWIN
United States Senator

EDWARD J. MARKEY
United States Senator

CORY A. BOOKER
United States Senator

TAMMY DUCKWORTH
United States Senator

MARGARET WOOD HASSAN
United States Senator

GARY C. PETERS
United States Senator

CATHERINE CORTEZ MASTO
United States Senator

AMY KLOBUCHAR
United States Senator

Testimony of
Gene Kimmelman
President & CEO
Public Knowledge

On Behalf of Public Knowledge and Consumer Federation of America

Before the
U.S. Senate
Committee on the Judiciary

Subcommittee on
Antitrust, Competition Policy & Consumer Rights

Hearing on:
Examining the Competitive Impact of the AT&T-Time Warner Transaction

Washington, D.C.
December 7, 2016

The proposed merger of AT&T and Time Warner could create a number of competitive harms, leading to higher costs and fewer choices for video services, and lower-quality and less diverse programming. The vertical integration of programming and distribution would give AT&T the incentive and ability to restrain competition by raising the costs its rivals must pay for Time Warner programming. This is in addition to the existing vertical integration, for some customers, of AT&T's access services (its wireless and wireline internet access businesses) and its online video distribution services. AT&T can already harm its video distribution competitors by making it more difficult to reach customers on its networks; acquiring Time Warner programming would increase AT&T's incentive to harm rivals in this way.

The online video marketplace, despite a number of established players like Netflix and Youtube, is still relatively nascent, and services like DISH's Sling TV and AT&T's DirecTV Now could benefit consumers significantly. Head-to-head competition between major services could drive prices down, and move more viewers to a world that breaks free of the traditional cable bundle and gives them more customizable and à la carte options. Allowing viewers more choice over the programming they want will ensure that programming that people actually want to see gets funding, creating more opportunities for diverse and independent programmers. And online viewers, if not Multichannel Video Programming Distributor (MVPD) subscribers, may finally be free of the rented set-top box.

But the fact that the technology and business models of online video may allow for a better world for consumers is no guarantee that it will actually happen. If a single company is able to control many of the key inputs to online video, from content production to last-mile transmission, then the competitive promise of this new market could be snuffed out, or at least limited, as familiar names seek to turn online video into Cable 2.0.

Of course, a large-scale media merger such as this one also raises serious concerns that go beyond the economic-focused lens of modern antitrust. Specifically, this merger raises concerns for its effects on media pluralism, diversity, and democratic discourse, as well as concerns about the collection and use of sensitive consumer information. In considering the implications of this deal, policymakers should take into account not just the effects on competition, but the effects on consumer access to information, as well.

Time Warner is the "[l]argest film and TV studio with leading franchises, production scale and content library,"[1] controlling 3 of the top 5 basic cable networks and a vast library of premium content. It controls HBO, CNN, TBS, TNT, Cinemax, Cartoon Network, Warner Brothers Pictures (which includes New Line Cinema and Castle Rock Entertainment), Warner Brothers Television, and DC Comics—and it owns 50% of The CW Network. With these assets, Time Warner controls some of the most popular, must-see programming[2] in the market today.

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[1] AT&T Time Warner Analyst Call, AT&T to Acquire Time Warner (Oct. 24, 2016), https://www.att.com/Investor/Earnings/3q16/10_24_16_analyst_call.pdf.

[2] In the video marketplace, market power should be measured not only by how popular or widely distributed programming is, but whether it is "must-have" programming—that is, whether a significant number of subscribers might choose to drop their subscriptions if the programming was no longer carried. A widely-viewed network might not necessarily have market power if it is easily substitutable, while a lesser-viewed network with unique programming might.

AT&T is a close second among nationwide wireless providers, with 133 million subscribers in the United States. Since the acquisition of DirecTV, it is the country's largest MVPD, with 25 million video subscribers. AT&T is also a major wireline ISP, with 16 million subscribers.[3] This merger would create a company with interests in the creation, transmission, and retail delivery of video programming, highly vertically integrated with the ability to use different aspects of its business to benefit the others, at times to the detriment of competition and consumers. Indeed, the very amount that AT&T proposes to pay ($85.4 billion, a 36% premium over Time Warner's announcement day market value[4]) will put enormous pressure on AT&T to maximize its revenues, including in ways that could raise rivals' costs and consumers' bills.

This proposed merger comes on the heels of a series of mega-mergers that have reshaped the communications landscape. Comcast acquired NBCUniversal, making the largest cable and broadband provider in the country also one of the major programmers. Charter acquired Time Warner Cable, creating a new cable giant of massive scale. AT&T purchased DirecTV, combining one of the major wireless carriers and a major landline ISP with one of the largest pay-TV providers. All of this happened in the context of a communications marketplace that is in general highly concentrated. As Mark Cooper observed in a recent paper, "Four firms (AT&T, Verizon, Comcast and Charter) dominate these four markets [wireline and wireless ISP service, MVPDs, and broadband data services], forming ... a 'tight oligopoly on steroids.' Not only is each market highly concentrated, with these four firms accounting for over 70 percent of the sale in each, but, to a remarkable extent, they have avoided head-to-head competition over the 20 years since the passage of the Telecommunications act of 1996."[5] The media marketplace is also highly concentrated, with just a few firms controlling the majority of production, including the "Big Six" (Comcast, Disney, Fox, Time Warner, CBS, and Viacom[6]) controlling a large percentage of television programming.[7] To highlight this, the "Big Six" currently control 72% of the ownership interests in the top 50 most-viewed basic cable networks, for a 73.19% weighted average.[8]

With this is a background, the ways that this merger could restrain competition, as well as harm democracy, and violate consumer privacy, is all the more apparent.

In recent days, AT&T has launched a new online streaming service, DirecTV Now. It joins a handful of other services like Playstation Vue and Sling TV that are offering a true

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[3] *Id.* at 7.

[4] AT&T Time Warner Analyst Call, AT&T to Acquire Time Warner (Oct. 24, 2016), https://www.att.com/Investor/Earnings/3q16/10_24_16_analyst_call.pdf.

[5] Mark Cooper, *ATT-Time Warner Merger Bad for Consumers*, Consumer Federation of America (Oct. 26, 2016), http://consumerfed.org/press_release/att-time-warner-merger-bad-for-consumers/.

[6] It may be more accurate to say that just *five* media companies control 90% of the marker, since CBS and Viacom have a common controlling shareholder and may try to merge soon.

[7] Free Press, Who Owns the Media?, http://www.freepress.net/ownership/chart.

[8] Public Knowledge analysis based on ratings information from Tony Maglio, *Top 50 Top Basic Cable Channels of 2015*, The Wrap, http://www.thewrap.com/50-top-basic-cable-channels-of-2015-espn-tbs-tnt-usa-disney-fox-news-tv-ratings.

alternative, rather than complement to, traditional cable and satellite TV packages online. Public Knowledge is, of course, happy to see more competitive alternatives to cable emerge.[9]

Aspects of how DirecTV Now is vertically integrated with other AT&T products raise competitive concerns on their own, but are exacerbated by the proposed acquisition of Time Warner. AT&T is a wireless and wireline broadband provider. By putting caps on the amount of data its broadband customers can use in a billing period, and then exempting its own services from metering—a practice commonly known as "zero-rating"—it can give its own services a significant competitive advantage over those of competitors. AT&T has made it clear that it plans to zero-rate DirecTV Now for its wireless customers. The FCC has recently made it apparent that this form of zero-rating is anticompetitive, imposes high costs on rivals, and harms consumers.[10]

The proposed acquisition of Time Warner by AT&T adds another dimension to this. First, when programming is owned by the same company that runs a distribution service like DirecTV it has mixed incentives. Rather than offering its customers the best programming possible, including programming from independent creators, it has the incentive to instead prioritize offering its own programming. Additionally, when the same company that creates popular programming that it sells to various distributors also offers a distribution service, it has the incentive to charge these other distributors, who are its direct competitors, above-market rates or to insist on anti-competitive contractual terms.

Complicating this still further is the relationship between the vertical integration of content and zero-rating. To the extent, of course, that one concludes that zero-rating gives an unfair advantage to AT&T's video distribution service, the ownership of Time Warner programming would give additional unfair advantages to AT&T—AT&T would be internalizing more the benefit of its actions, and keeping more of the revenue its service generates. Beyond that, however, there are implications on how AT&T makes zero-rating available to other providers. It has claimed[11] that it will offer zero-rating to third parties under terms that match its internal accounting. This is already a nearly impossible commitment to verify. To the extent that AT&T now controls a notable segment of the programming it makes available via DirecTV now,

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[9] Cable television providers have long had the commercial and technological ability to start offering such nationwide services that use the Internet for distribution, rather than maintaining the arbitrary geographic boundaries, which are rooted in the technological limitations of the earliest community antenna services of the 1940s. However, offering such services would mean that cable television providers would have to start competing with each other, instead of maintaining the gentleman's agreement that keeps them from entering each others' territories, and would risk cannibalizing their existing customers. It is therefore not surprising that AT&T, DISH, Sony, and others are taking the opportunities that cable has declined. The commercial, regulatory, and technological scale of such undertakings likewise makes it unsurprising that these services are being offering by incumbents in other or related industries with significant resources. However, ideally, online video should be open to truly new entrants.

[10] Jon Wilkins, Federal Communications Commission, Letter to AT&T (Dec. 1, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/12/Letter-to-R.-Quinn-12.1.16.pdf.

[11] Robert W. Quinn Jr., AT&T, Legal Analysis to FCC, at 5 (Nov. 21, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/11/White-paper-on-sponsored-data-Mon-PM.pdf.

attempting to use AT&T's internal accounting as a basis for what it charges third parties seems like more an exercise in imagination than economics.

Nor would this proposed merger be the last. In the expectation of a more lenient antitrust environment in the Trump administration, some analysts are already expecting a wave of yet more mergers. If this deal goes through, what's next? In recent days, for instance, a UBS analysis has advocated for a merger between Comcast and Verizon.[12] Companies like CBS, Viacom, Charter, Verizon, T-Mobile, DISH and 21st Century Fox could all feel pressure to combine or vertically integrate. Consumers might find that must-see programming is scattered across a plethora of different services, each of which works differently on different devices and networks. In short, an already-oligopolistic marketplace could become even more concentrated, and a few companies with strategic control over programming and infrastructure could leverage it to gain dominating positions in the new world of online video. The promise of the internet as a platform that could finally free consumers from the MVPD bottleneck would be quashed, and we could even see the rise of a single online video platform with a market share like that of Google in search or Facebook in social networking. The technology and business models exist to finally give customers more choice, but not if antitrust enforcers are asleep at the switch.

Finally, it bears remembering that the regulatory environment is likely to change in coming months, meaning that policymakers cannot point to industry-wide protections as a basis for a more hands-off approach to merger review. The incoming FCC may roll back Title II for broadband if not net neutrality generally, and an environment of less enforcement of video discrimination rules seems likely. The Comcast/NBCUniversal consent decree, which expressly sought to protect emerging video competition from the harms vertical integration can cause, is also about to expire. This makes a fact-specific analysis of the competitive harms this deal could cause all the more vital, and remedies, including blocking the deal, all the more necessary.

This is the time for antitrust authorities to send a message that competition, not anticompetitive consolidation, is the way to produce lower prices and better services for consumers. This deal, however, could represent a step in the wrong direction.

These manifold harms are difficult if not impossible to remedy with behavioral remedies. Behavioral remedies, in fact, are all the more risky given the possible rollback of Title II for broadband, net neutrality and privacy rules, and other protections by the upcoming administration, as well as the upcoming expiration of the Comcast/NBCUniversal merger conditions. Given these concerns, the simplest way for authorities to prevent this merger's consumer harms may be to block it.

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[12] John C. Hodulik, US Telecom and Pay TV: What if? A comprehensive look at sector M&A, UBS (Nov. 28, 2016), https://neo.ubs.com/shared/d1fuuUyliQUc/?off_id=AC201611E190241062W1174756857&ma=X434A644664786C44&camp_id=EM:UNKW:2016-11:28:U.

Media mergers like this one can harm democratic discourse

As Barry Lynn has reminded us, one of the original purposes of competition law was to "preserve democracy through the careful distribution of economic power."[13] It is widely recognized that media industries have a particular impact on democratic values. As Werner A. Meir and Josef Trappel explain,

> Media diversity is one of the main preconditions ensuring political and cultural pluralism and effective citizen participation in democratic decision-making processes. Media diversity and media pluralism are prerequisites for effective freedom of expression and information...[t]he potential risks to diversity of ideas, tastes, and opinions caused by media concentration is certainly an old problem but with new dimensions and severe effects on society.[14]

As the OECD has cataloged, public interest factors such as "plurality of media" are commonly considered as a part of merger review in developed countries.[15] In the United States, the role of ensuring that media mergers that involve license transfers are in the public interest often falls to the FCC.[16] However, all policymakers and government officials are broadly charged with promoting the public interest.

An understanding of how media consolidation harms democracy is hardly confined to one political viewpoint. As a candidate, President-elect Trump reacted to the proposed AT&T/Time Warner merger under consideration today by stating "Deals like this destroy democracy. And we'll look at breaking that deal up and other deals like that." Of the Comcast/NBCU vertical merger, he stated "This should never ever have been approved in the first place."[17] Policymakers today and members of Congress should recognize, and respond appropriately, to the broad consensus that an ever-consolidating media marketplace is not only incompatible with free markets, but with a free society.

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[13] Barry C. Lynn, Antitrust: A Missing Key to Prosperity, Opportunity, and Democracy, at 6, http://www.demos.org/sites/default/files/publications/Lynn.pdf.

[14] Euromedia Research Group, Media Policy: Convergence, Concentration & Commerce 38 (Denis McQuail & Karen Siune eds., 1998).

[15] Aranka Nagy, Secretariat, Public Interest Considerations in Merger Control, OECD, at 4 (June 30, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En.

[16] The FCC must ensure that other public interest goals are protected as well, such as access to advanced telecommunications and information services across the country and encouraging deployment to all Americans; ensuring quality services available at just, reasonable, and affordable rates; promoting the development of the Internet and preserving the competitive free market for its provision; encouraging the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet; and preventing unjust or unreasonable discrimination. Petition to Deny of Public Knowledge and Open Technology Institute at 16-17, In the Matter of Comcast Corp., MB Docket No. 14-57 (2014).

[17] Ryan Knutson, Trump Says He Would Block AT&T-Time Warner Deal, WALL STREET J. (Oct. 22, 2016), http://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214.

This merger raises clear antitrust concerns

AT&T's business is complex and this merger has horizontal as well as vertical aspects—for instance, Time Warner offers HBO Now, a standalone online streaming service that partially competes with DirecTV Now. However, the most concerning competitive effects that would result from this merger arise from its vertical aspects: the combination of Time Warner programming with two nationwide and one regional video distribution services (DirecTV, DirecTV Now, and U-Verse TV); a nationwide wireless internet provider, and a regional fiber, DSL, and fixed wireless internet provider.

The Department of Justice and Federal Trade Commission both have a long history of closely examining and challenging vertical mergers that may harm competition, including many recent examples. The essential question is whether the claimed efficiencies and procompetitive benefits of the merger are real, and whether they outweigh potential harms. Examining the facts of this merger, it is apparent both that any claimed pro-competitive effects are either small or readily achievable through other means (e.g., contracting). It is also apparent that the threats to competition are real and could harm consumers and hold back new competition in an evolving marketplace.

AT&T would be able to raise costs on its rivals

AT&T's entry into the online streaming market could benefit consumers by offering them an interesting new choice that could pose a competitive threat to cable TV incumbents. AT&T's argument for this merger is predicated, in part, on its claim that acquiring Time Warner programming will help it compete even better with cable, and offer a better service at competitive prices. It is a matter of textbook antitrust analysis that vertical mergers, at times, can create efficiencies and allow the merged companies to compete more effectively with their rivals on the merits. However, the question is whether these purported procompetitive benefits are outweighed by anticompetitive harms, and whether the means that the merged company would use to compete with its rivals are in some way unfair. With respect to this merger, it appears that the harms to competition may substantially outweigh any purported benefits or other efficiencies.

One common way that vertical mergers may harm competition is through "input foreclosure"—that is, a vertically-integrated company may control an "input" its competitors need to offer service. As Deputy Assistant Attorney General Jonathan Sallet put it, "[i]nput and customer foreclosure theories arise from the fact that vertical transactions can create opportunities and incentives for firms to handicap rivals[.]"[18] Or, in the words of then-FTC Commissioner Christine Varney, "vertical integration can foreclose rivals from access to needed inputs or raise their costs of obtaining them."[19] In other words, when a merger creates a company that has the incentive and ability to restrict its competitors' inputs, it becomes more likely that

[18] The Interesting Case of the Vertical Merger, Justice News, Department of Justice (Nov. 17, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

[19] Christine A. Varney, Vertical Merger Enforcement Challenges at the FTC, Federal Trade Commission (July 17, 1995), https://www.ftc.gov/public-statements/1995/07/vertical-merger-enforcement-challenges-ftc.

the merger would reduce competition, rather than promoting it. In this case, AT&T would have the incentive to restrict access to Time Warner programming to its competitors—other online video distributors as well as traditional MVPDs. These restrictions may not take the form of an outright refusal to sell access to the programming, but above-market rates, contractual conditions, and delays could have the effect of raising its competitors' costs, reducing the quality of their offerings compared with its own, or both. Because this merger would give AT&T the ability to raise the costs of its direct competitors, it presents a classic example of a case where antitrust authorities may challenge a vertical deal.

The standard objection to this claim would be that Time Warner currently tries to sell its programming to all comers and maximize its value, and that AT&T would have the incentive to do the same. However, post-merger, this would only be true if the lost value AT&T would suffer by restricting access to Time Warner programming exceeds the benefit it would gain by advantaging its own video distribution services. As the Department of Justice put it in its analysis of the Comcast/NBCU merger, a "merged firm may find it profitable to forego the benefits of dealing with its rivals in order to hobble them as competitors to its own downstream operations."[20] There is good reason to believe, in this case, that the benefit that AT&T would obtain by restricting access to Time Warner programming exceeds the costs. Online video delivery is a growth market, and AT&T has the potential to win significant market share by taking customers from cable and existing online video subscription services like Netflix and Sling TV. The benefit from capturing this relatively new and promising market almost certainly exceeds whatever value AT&T might leave on the table by restricting access to Time Warner programming.

In this context it bears considering that AT&T also controls other valuable "inputs" as well. As a video programmer, a post-merger AT&T/Time Warner would compete directly with other programmers, large and small. But because AT&T is also a video distributor, it controls an input those competitors need to do business—access to customers. AT&T would, of course, ensure that Time Warner programming gets favorable distribution and promotion on its own video distribution services. To the extent that Time Warner programming competes with other programming for attention, advertising, and subscription revenue, AT&T would have the incentive to restrict its programming competitors' ability to obtain distribution on favorable terms on its own services. It might decline to carry certain channels, for example, or insist on paying less for them, or bury competing programming in unfavorable neighborhoods or disadvantage it in its recommendation algorithms or in its user interface, or even insist on unfavorable contractual terms. Not only would its programming competitors suffer, customers nationwide would lose the benefit of a fully competitive programming marketplace, and even AT&T's own customers would be harmed if AT&T has the incentive to promote its own programming over possibly-superior programming its customers might actually prefer.

Additionally, as an internet service provider, AT&T controls a vital input that rival online video distributors need to access to reach customers. Similarly to the dynamics described above, AT&T would have the incentive and ability to restrict access to this input to its rival online video service providers. These restrictions could take the form of what are currently, but may soon not

[20] Competitive Impact Statement at 20, United States v. Comcast Corp., 808 F.Supp. 2d 145 (2011).

be, violations of the FCC's Open Internet rules, manipulation of interconnection agreements, or discriminatory zero-rating. Of course, to an extent, this particular incentive would exist even if AT&T did not buy Time Warner. Even before it announced its plans to buy Time Warner, AT&T indicated that it intended to zero-rate its own video services on at least some of its access services. However, the merger could exacerbate these harms. But after acquiring Time Warner AT&T would internalize more of the benefit that its video distribution services like DirecTV Now acquire by being zero-rated or otherwise favored. Thus, the merger would, at least, increase AT&T's incentive to engage in anti-competitive behavior, even if its ability arises from its existing control of access networks.

Considering all the various methods AT&T can employ to raise its rivals' costs, this merger represents a serious harm to competition and a threat to consumers. They work together, not merely additively but qualitatively, giving a single company the ability to manipulate the prices and terms of various inputs to disadvantage its competitors in ways that may be difficult for outsiders to trace. Given the already concentrated and vertically-integrated nature of the programming and distribution markets, allowing AT&T to obtain these new abilities represents a serious threat.

This merger could harm innovation in a nascent market

As the Department of Justice described in its Comcast/NBCU Competitive Impact Statement, antitrust law not only "protects consumers from anticompetitive conduct" but also "ensures that firms do not acquire the ability to stifle innovation."[21] As the DOJ put it, citing a noted legal scholar, "restraints on innovation 'very likely produce a far greater amount of economic harm than classical restraints on competition,' and thus deserve special attention."[22] This is because "[a] merged firm can more readily harm competition when its rivals offer new products or technologies whose competitive potential is evolving."[23]

Congress expressly directed antitrust authorities to have an eye toward nascent and future competition, as well as existing competition. As the Supreme Court found,

> To arrest [the] "rising tide" toward concentration into too few hands... Congress decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by "plugging its loophole" and broadened its scope so as not only to prohibit mergers between competitors, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.[24]

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[21] *Id*. at 20.
[22] *Id*. at 21 (citing Herbert Hovenkamp, Restraints on Innovation, 29 Cardozo L. Rev. 247, 253-54, 260 (2007)).
[23] Competitive Impact Statement, Comcast Corp. at 21.
[24] United States v. Von's Grocery Co., 384 US 270, 276-77 (1966).

Again, Christine Varney's remarks on these points are instructive. In a speech discussing the competitive and innovative potential of "the Internet, the general convergence of technologies for voice, data, and video services," she noted that "[a]ccess and content will drive the demand for these new technologies," but that "[t]he content will be meaningless if the path is unfairly blocked by anticompetitive activities." She thus noted that policymakers such as the FTC should "ensure that consumers have the benefit of choices created by competition.... by attacking anticompetitive activities in markets, whether they take the form of anticompetitive mergers, or practices which lead to anticompetitive results."[25]

Of course, applying these principles to a given merger is a highly fact-specific inquiry. But here, an initial factual analysis indicates that many innovative markets would be affected by AT&T's acquisition of Time Warner and its programming—in particular, the market for the online delivery of video programming, particularly in forms like DirecTV Now that are directly competitive with traditional MVPD offerings. AT&T is a new entrant in the online video space and it has put forward quite a powerful offering that could win consumers from existing services like Sling TV or even persuade cable TV customers to "cut the cord." The benefits of winning this market could far exceed the costs of withholding or restricting Time Warner programming. At the same time, because the market is still young, AT&T's actions could not only unfairly disadvantage existing competitors but also create new barriers to entry that prevent new competitive alternatives from emerging—and all at little cost to AT&T. As the DOJ explained, "Nascent competitors may be relatively easy to quash. For example, denying an important input, such as a popular television show, to a nascent competitor with a small customer base is much less costly in terms of foregone revenues than denying that same show to a more established rival with a larger customer base."[26] Magnifying these harms, AT&T *also* has the ability, as an internet service provider, to harm its rivals in other ways.

Allowing a single firm to have such strong incentives and capabilities to restrain competition in an emerging market could cause significant consumer harm. The consumer benefits of online video do not just arise from a more modern distribution method that allows a provider to offer a nationwide service without first building out a nationwide last-mile infrastructure, or to watch programming on mobile phones and other general purpose devices. Benefits also arise from a market structure that is inherently more competitive than the legacy MVPD model. Policymakers should enable this competition to develop unfettered instead of allowing a single firm to restrict it.

AT&T would be able to use commercial information to harm competitors

It is also widely recognized that vertical mergers can create anticompetitive effects and harm consumers by giving the newly merged firm access to new kinds of information. For instance, Steven C. Salop and Daniel P. Culley write that "[a] vertical merger can lead to information transfers from rivals to the merging firm that might be misused strategically by the downstream division of the merged firm to preempt and thereby deter procompetitive actions by

[25] Christine A. Varney, Commissioner, Fed. Trade Comm'n, Remarks at the 1994 Conference on Business and Economic Policies, The Manufacturers Alliance (Dec. 1, 1994).
[26] Competitive Impact Statement, Comcast Corp. at 21.

non-merging firms," and that a "merger could provide the downstream division of the merged firm with access to sensitive competitive information of its competitors from the upstream division of the merged firm, which the downstream firm can use to more rapidly respond to or even preempt competitive moves by these competitors…."[27]

These effects appear likely in this merger. By acquiring Time Warner, AT&T will be able to use information it gains from Time Warner's operations to benefit its video distribution service. Additionally, AT&T would be able to use the information it gains from its distribution and access services to benefit Time Warner programming over competing programming. For instance, AT&T would know how much it pays, and the terms of carriage of other programmers on its video distribution service. It could use this information strategically in determining the terms and price under which it makes Time Warner programming available to other distributors, which could aid a strategy of using Time Warner programming to raise the costs of its distribution rivals, or allow it to benefit Time Warner programming over that of programming rivals.

Additionally, post-merger information exchanges can make collusion with other firms easier. Analyzing another vertical merger (GrafTech/Seadrift), the DOJ noted that "[t]he ability of a vendor to verify current commercial terms granted by a competitor could facilitate a tacit understanding on price or output and provide a means to detect cheating on such an understanding, increasing the likelihood of coordination. Accordingly, as the merger would remove a significant barrier to collusion, it likely would lead to anticompetitive effects."[28] A similar situation could obtain here, where the information AT&T would gain access to by acquiring Time Warner would make it easier for it to collude with programmer and distribution rivals to raise prices or otherwise harm consumers on an industry-wide basis. In this context, it is relevant that the DOJ is currently in litigation with AT&T over a collusion scheme in the video marketplace,[29] making similar harms post-merger more likely.

Finally, this merger would affect AT&T's incentive to use other information—the amount it "pays itself" to zero-rate its own video services on its access networks—in strategic ways to harm competition. AT&T has argued to the FCC that it is permitted to zero-rate its own video services, citing "decades of authority entitling telecommunications carriers to provide inputs to their affiliated entities so long as they offer to sell the same inputs to unaffiliated entities on nondiscriminatory terms—as AT&T does here."[30] It also argues that it is permitted to "charge any unaffiliated edge provider the same nondiscriminatory rates that it charges its

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[27] Steven C. Salop & Daniel P. Cully, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, GEO.L. SCHOLARLY COMMONS, at 14, 22 (2014), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub.

[28] Competitive Impact Statement at 2, United States v. Graf'Tech International Ltd., Case: 1:10-cv-02039 (2010).

[29] Justice Department Sues DIRECTV for Orchestrating Information Sharing Agreements with Three Competitors, Press Release, Department of Justice (Nov. 2, 2016), https://www.justice.gov/opa/pr/justice-department-sues-directv-orchestrating-information-sharing-agreements-three

[30] Robert W. Quinn Jr., AT&T, Legal Analysis to FCC, at 2 (Nov. 21, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/11/White-paper-on-sponsored-data-Mon-PM.pdf.

affiliates for use of the same telecommunications inputs."[31] However, the question of how much AT&T charges its affiliates is entirely an accounting matter internal to AT&T, and it has the ability to manipulate that figure, with the result that it can make zero-rating available to third parties under terms that are purportedly "nondiscriminatory" but in reality uneconomic. As discussed earlier, since acquiring Time Warner would cause AT&T to internalize more of the benefit it would gain from zero-rating services such as DirecTV Now, this merger would increase AT&T's incentive to use its commercial information in anticompetitive ways such as these.

Consolidation is not the solution to consolidation

A chief argument in favor of media consolidation in recent years has been that companies need to merge in order to counter other media giants—for instance, Comcast/NBCUniversal. However, this argument is flawed in several respects. First, of course, at some point the government must take steps to promote competition and put a stop to a consolidation arms race, which can lead only to a marketplace with fewer choices and higher prices for consumers. Perhaps it should have done so already—but now is a good time to start. After all, as the Supreme Court has noted, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers."[32]

Additionally, even if this merger would permit AT&T to counter Comcast in some way, the benefits of this, such as they are, would be limited and outweighed by other competitive harms. First, head-to-head competition between AT&T and Comcast for video customers would be limited to Comcast's current geographic footprint. Furthermore, even assuming that potential retaliation from Comcast (from whom AT&T must purchase programming, and whose last-mile infrastructure it must use to reach many customers) would prevent AT&T from behaving anticompetitively toward Comcast (and vice versa), a market with two vertically-integrated programming/access/distribution giants at equipoise with each other is no model of competitive health.

Making matters worse, this state of affairs makes collusion, or at least parallelism of some kind, all the more likely. Collusion between these two large industry players could simultaneously harm competition in the access, programming, and video distribution markets, increasing the incentive for such behavior. The risk of this collusion outweighs the purported benefits of further concentration.

Finally, it is true that the Comcast/NBCUniversal consent decree expires shortly. However, the response to this by antitrust authorities should not be to allow new mergers as some sort of counterweight. Rather, they should re-open and extend that decree if the competitive harms it seeks to alleviate would still be likely to occur in its absence.

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[31] *Id.* at 7 (emphasis added).
[32] United States v. Von's Grocery Co., 384 US 270, 277 (1966).

This merger could cause other harms, as well

This testimony is not intended to be exhaustive because a merger of the scale and scope of AT&T/Time Warner raises competition and public interest issues in many areas. For example, through its control of distribution infrastructure (both its access services and its online video services), AT&T will have a comprehensive window into consumer internet use and viewing behavior. It will be able to use this data to target advertisements to customers more effectively and to track them across different devices and networks. This not only gives it an advantage over non-vertically integrated programmers, distributors, and advertising platforms, but could also violate customers' privacy expectations—just as the FCC's privacy rules are in danger of being rolled back. Both the effects on the advertising market and the effects on consumer privacy merit consideration by policymakers.

Behavioral remedies are an uncertain tool to remedy competitive harms

Public Knowledge believes that this merger should be blocked if the authorities determine that is the only way to prevent the likely harms to consumers that would result from this latest in a long series of media mergers. Short of outright blocking a merger, there are limited ways to try to alleviate the competitive and public interest harms the merger could cause. The remedies "take two basic forms: one addresses the structure of the market, the other the conduct of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms."[33] But as the DOJ explains, allowing anticompetitive mergers to go through and subjecting them only to behavioral conditions is fraught with peril:

> Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.

The DOJ continues,

> Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter....Third, a conduct remedy may restrain potentially procompetitive behavior....Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.[34]

There do not appear to be any structural remedies that could eliminate the harms this merger would create, since requiring AT&T to "spin off" Time Warner programming would simply amount to blocking the deal. This is the course the DOJ should take unless it can be certain that

[33] Department of Justice, Antitrust Division Policy Guide to Merger Remedies, at 7 (2004).
[34] *Id.* at 8.

simple, clear, and enforceable conduct remedies would eliminate all of the harms this deal would create. As recent experience with the Comcast/NBCU deal demonstrates, this may be a difficult task.

The conduct remedies the DOJ imposed on Comcast were designed to remedy the anticompetitive harms its acquisition of NBCUniversal would create. While these conditions, and the attendant scrutiny of Comcast's business practices that accompanied them, may have induced Comcast to behave less anticompetitively than it otherwise would have, its record with certain of those conditions demonstrates that ensuring compliance can be difficult[35]—and that for some parties, the conditions fell well short of expectations.[36] What's more, the one of the things that any conditions would likely seek to address—program carriage agreements—contain highly confidential information, and can vary from one distributor to another, and one programmer to another. It is difficult for an outside agency to ensure compliance with conditions in this context.

Finally, whatever the efficacy of conditions may be, the fact remains that they are time-limited remedies for marketplace problems that may have no expiration date. For instance, the Comcast/NBCUniversal conditions will expire in 2018, but Comcast's ability to leverage its programming, cable, and broadband activities to restrain competition are as real today as ever and should be revisited before they expire.

Thus, the DOJ should err on the side of consumers and innovation and, if necessary to protect competition, block this deal. The costs of getting this wrong are simply too great.

Conclusion

For these reasons, I urge the members of this Committee to support a careful review of this merger by the expert agencies, and to encourage them to block or challenge it if that is the best way to protect competition.

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[35] Petition to Deny of Public Knowledge and Open Technology Institute at 56, In the Matter of Comcast Corp., MB Docket No. 14-57 (2014).

[36] *Id.* at 57.

Washington Center *for* Equitable Growth

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A communications oligopoly on steroids

Why antitrust enforcement and regulatory oversight in digital communications matter

July 2017 Gene Kimmelman and Mark Cooper

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Key takeaways

- On average, prices for cable, broadband, wired telecommunications, and wireless services charged by the telecommunications oligopoly in the United States are inflated by about 25 percent above what competitive markets should deliver, costing the typical U.S. household more than $45 a month, or $540 a year.

- U.S. consumers in aggregate pay almost $60 billion per year to the telecommunications oligopoly due to inflated prices for cable, broadband, wired telecommunications, and wireless services.

- The concentration of four main U.S. telecommunications companies enables these firms to earn astronomical profits. Their earnings before interest, taxes, and depreciation and amortization, or EBITDA, a standard financial measure of profitability, are between 50 percent and 90 percent compared to the national average for all industries of just under 15 percent.

- The measure of market concentration of these four telecommunications firms based on the standard Herfindahl-Hirschman Index, or HHI, used by antitrust regulators, stands at between 2,800 and 6,600 compared to the currently acceptable market concentration level of 2,500.

- Due to rigorous antitrust enforcement in 2011 that blocked a proposed merger between AT&T and T-Mobile, the wireless services sector of the telecommunications industry is the only one with meaningful competition. By 2015, the average revenue per user accrued by wireless services providers was between $4-to-$5 less than it would have been, saving consumers in total more than $11 billion per year.

Overview

Digital communications platforms, whether offered by a cable company, a telecommunications firm, or an internet services provider, deliver the most important text and video content that powers our economy, educates our citizenry, and fuels our democracy. Yet the business dynamics of these platforms and the natural incentives of platform owners to overcharge consumers for their goods and services create enormous opportunities for competitive abuse—harming consumers and exacerbating economic inequality—unless vigorous public oversight corrects significant and pervasive market imperfections. These increasingly anti-competitive digital business practices also are a drag on our nation's economic growth, causing consumers to overspend on these services far beyond what is necessary to induce any increased productive investments by firms in this key industry.

Under U.S. law, antitrust enforcement is one critical element necessary to protect consumers and the competitive process. Yet antitrust by itself is not enough to ensure the marketplace benefits and potential progressive societal advancements that digital communications platforms offer. Antitrust enforcement can prevent the creation of monopolies and actions that diminish competition, but these laws are not designed to maximize competitive options or promote social policies such as expanded employment, equitable access to content, and overall freedom of expression. Only with appropriately focused regulatory oversight alongside strict antitrust enforcement can the service providers in the cable, telecommunications, wireless, and broadband industries be driven to offer competitive, nondiscriminatory, innovative, and socially beneficial video and broadband services that maximize consumer value and choice in both the economic market and the marketplace of ideas. These steps, in turn, will boost demand for these goods and services in the broader economy and spark more investments in innovation and new infrastructure.

This paper details the state of these communications industries in the first dozen years after enactment of the 1996 Telecommunications Act, which opened the door to lax antitrust enforcement and excessive deregulation and led to highly concentrated oligopolistic markets that result today in massive overcharges for

consumer and business services.[1] Prices for cable, broadband, wired telecommunications, and wireless services have been inflated, on average, by about 25 percent above what competitive markets should deliver, costing the typical U.S. household more than $45 per month, or $540 per year, for these services.[2] This stranglehold over these essential means of communication by a tight oligopoly on steroids—comprised of AT&T Inc., Verizon Communications Inc., Comcast Corp., and Charter Communications Inc. and built through mergers and acquisitions, not competition—costs consumers in aggregate almost $60 billion per year, or about 25 percent of the total average consumer's monthly bill.

The paper then examines the efforts by the Obama administration to arrest this uncompetitive trend by launching numerous regulatory interventions and enhanced antitrust enforcement.[3] These efforts resulted in a change in course that was strongly positive for U.S. consumers and the economy. Alas, these actions could not address all of the structural harms caused by previous policy mistakes. What's more, these ongoing antitrust problems in the communications sector are unlikely to be addressed by the new Trump administration, which has signaled that it will seek to reverse many of the gains to consumers achieved under the Obama administration.

Potential remedies, however, remain within reach of policymakers in Congress, at the Federal Communications Commission—the chief telecommunications regulatory agency in this business arena—and at the other two key federal antitrust enforcers, the Federal Trade Commission and the U.S. Department of Justice. In the pages that follow, this paper will explain these complex antitrust and regulatory processes in the telecommunications sector, trace how antitrust and regulatory actions have performed since the enactment of the 1996 Telecommunications Act, and then showcase a number of efforts made by the Obama administration to protect consumers and strengthen competition in the various communications industries—efforts that were partially successful but are now under threat under the new Trump administration.

The need for dual antitrust and regulatory action in law

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Recent calls to revive antitrust enforcement in the U.S. economy, and particularly in the digital communications industries, in light of evidence of increasingly concentrated markets and broader dangers to society are long overdue. But sometimes these concerns are portrayed in too simplistic a manner. While some idealized version of antitrust actions may be theoretically capable of handling all competitive issues as well as the consequences of increased economic inequality and stunted economic growth in today's economy, neither current antitrust jurisprudence nor contemporary economic analysis supports this simplistic vision. What's also required—and what Congress has provided—are regulatory tools to promote both competition and other economic goals, in which case antitrust enforcement can work in tandem with targeted regulation to achieve many of the goals needed to create a more equitable and competitive marketplace in communications products and services.[4]

Most antitrust analysis is backward-looking, involving observed market outcomes that are considered to be the result of insufficient competition leading to conduct that is harmful to consumers. Structure is examined as the context that makes the conclusions about conduct more plausible. The lack of competition due to high levels of concentration, for example, makes it more likely that dominant sellers will be able to set prices above costs to earn excess profits, but antitrust tools generally are triggered only when abuses can be demonstrated.

Antitrust reviews of corporate mergers reverse this analytical flow because it is the one area where antitrust is forward-looking. That's because structural analysis is central to the complaint that a merger will so greatly increase market concentration as to pose a threat to competition and raise the potential for the abuse of market power.

In both classic antitrust cases and merger reviews, however, the antitrust authorities prefer structural remedies such as divestiture of assets to shrink market power, rather than remedies that require them to regulate the conduct of companies in

the marketplace. This means that market structure, conduct, and performance are focal points, yet basic market conditions receive less attention. In fact, antitrust enforcers do not generally address basic market conditions because they are beyond their policy reach.

Some characteristics of an industry make it unlikely that private investment and market forces will produce socially optimal outcomes.[5] In some cases, investors cannot project or capture the benefits of the production of a good—public goods such as emergency call "enhanced 911," or E-911, numbers or infrastructure, such as roads or communications networks that make an area much more functional. In other cases, consumers cannot project the benefits of more output, such as a so-called network effect, which makes the network more valuable to consumers, who can reach more people, and to producers, who can identify niches to expand output. As a result, supply or demand may be too little.

In other cases, economic characteristics lead to very large firms that boast strong economies of scale or scope, such as adding consumers or services, which spread costs across a larger base and make building two networks redundant and costly. The number of firms that the market can support may be very small—the minimum efficient scale is very large compared with the size of the market—resulting in weak competition and the threat of abuse of market power. These and other basic market conditions are mostly outside the purview of antitrust enforcers because they are not forward-looking in scope.

Many nations deemed communications to be a public good in the infrastructure sector, forgoing reliance on markets because the sector exhibits all of these characteristics to some extent. The United States chose to preserve private property but subject it to regulation and public policy that sought to capture the positive externalities while controlling the negative aspects.

In these areas, regulation is necessary because it tends to be forward-looking.[6] Legislation declares specific goals, often broadly defined, and grants a regulatory agency specific powers to pursue them. The Communications Act of 1934 gave the Federal Communications Commission, or FCC, substantial regulatory flexibility, and the courts have granted it deference as the expert agency. In merger reviews, for example, the FCC is charged with promoting competition—not just protecting it—and the public interest, which enables the agency to take a proactive role across a wide range of policies that address precisely the basic market conditions, structural factors, and performance goals that antitrust does not tackle

effectively. This is very different from the purview of the two traditional antitrust enforcement agencies, the Federal Trade Commission and the U.S. Department of Justice, which are directed solely to prevent the loss of competition.

As discussed below, the Telecommunications Act of 1996 was an effort to strike a new balance between the market and regulation that went awry because the act and those implementing it underestimated the continuing power of the fundamental, problematic characteristics of the industry. The benefits of injecting more competition could have been achieved without many of the negative consequences of the abuse of market power that was unleashed by lax regulation and antitrust enforcement.

The unique nature of digital communications and the role of antitrust enforcement and regulation

Infrastructure industries such as communications and now digital communications have long been recognized as unique from the point of view of U.S. economic and social policy. Although competition and markets have been the preferred form of industrial organization for economic activity, the extreme importance of infrastructure to a broad range of economic activity and the tendency for there to be very few providers of infrastructure services have led to additional oversight of these industries.[7] Yet antitrust enforcement, even in its "golden age" of trustbusting in the first half of the 20th century, has never been seen as enough.[8]

In the communications sector, competition to connect wired and wireless services to homes and businesses cannot be counted on to prevent the abuse of market power because the number of firms in any market is small and barriers to entry are high.[9] Because of its public goods value and powerful network effects, private facility owners cannot foresee or capture the value of diffuse benefits or externalities, so they will underinvest, harming consumers and economic competitiveness and growth. Seamless interconnection between communications networks and nondiscriminatory access to these networks may not develop or may not be sustained because the private interests of network owners are better served by blocking or charging very high prices for access and usage.

Communications has other characteristics that make it an even more unique concern in terms of fostering competition that boosts economic growth and lessens economic inequality. Whether it is the landline telephone of 100 years ago or the

wireless and broadband of today, these are necessities with relatively low elasticities of demand and few or no substitutes. But basic market conditions mean that companies do not or will not deliver services to large and significant groups and areas because providing service is not profitable where costs are high or incomes are low. These characteristics lay the basis for conduct that abuses market power. In short, market imperfections and failures may weaken the effect of competition. As the leading text Economics of Regulation and Antitrust puts it:

> *If we existed in a world that functioned in accordance with the perfect competitive paradigm, there would be little need for antitrust policies and other regulatory efforts. All markets would consist of a large number of sellers of a product, and consumers would be fully informed of the product's implications. Moreover, there would be no externalities present in this idealized economy, as all effects would be internalized by the buyers and seller of a particular product.*
>
> *Unfortunately, economic reality seldom adheres very closely to the textbook model of perfect competition. Many industries are dominated by a small number of large firms. In some instances, principally the public utilities, there may even be a monopoly. Not all market failures stem from actions by firms. In some cases, individuals can also be contributing to the market failure.*[10]

Here, it is important to note that the concern about the abuse of market power applies to both buyers and sellers—monopsony power is as big a concern as monopoly power. If one firm gains sufficient market power as a purchaser to depress the price it pays for inputs, such as content or equipment, then innovation and the supply of products can be diminished. In U.S. communications networks, Congress, regulators, and antitrust authorities have taken action to prevent the abuse of monopsony power given communications companies' control over access to customers and the lack of competition. The concern about the ability of network owners to function as economic monopsonists is reinforced by their ability to control what they communicate and also is the cornerstone of democratic discourse.

AP PHOTO/DOUG MILLS

The failure of the Telecommunications Act of 1996

The Telecommunications Act of 1996 was designed to give a strong push for competition but in a manner that was cognizant of the underlying difficulty of sustaining competition in the communications industries. Regulations were to be lifted only where competition had rendered them no longer necessary in the public interest. And a number of policies were instituted to try to promote and support competition, such as network sharing—or "unbundled telecommunications network elements" in industry parlance—and the removal of prohibitions on the entry of telephone and cable companies into each others' markets.

These efforts to boost competition worked in some areas, but they left a great deal to be desired in others. The reason: After the 1996 act became law, policymakers unfortunately invoked the theory of competition where little real competition existed, and they prematurely removed regulatory protections in areas where they needed to remain in place. These decisions sparked a wave of mergers within and across segments of the industry, eliminating or frustrating "intramodal competition"—the head-to-head competition between firms using similar technologies—under the false hope that intermodal competition would be sufficient to protect consumers.[11]

The eight regional telephone monopolies that emerged from the government's breakup of the old AT&T national monopoly in the 1980s merged into two dominant wireline and wireless giants—Verizon and AT&T—that not only acquired the "Baby Bells" created by the breakup in 1984 of AT&T but also swallowed the large independent companies that had existed from the early days of the industry, such as the old General Telephone and Electronics Corporation, and the largest long-distance potential competitors. Similarly, local cable monopolies combined into regional powerhouses—Comcast and Charter—and developed cozy relationships with a similarly consolidating content industry. Lax antitrust enforcement combined with weak regulatory oversight resulted in the growth of what we call a "tight oligopoly on steroids." By the standard definitions of antitrust and traditional economic analysis, a tight oligopoly has developed in the digital communications sector.[12] (See Figure 1.)

FIGURE I

The figure above shows the national levels of concentration based on the so-called Herfindahl-Hirschman Index, or HHI, which antirust enforcers use to gauge concentration. The current threshold for finding a market highly concentrated is 2,500—until 2010 it was 1,800—so even at the national level, these markets are all highly concentrated.[13] The markets are even more concentrated at the local level, which is where most market power is exercised, since consumers are dependent on local companies for access to communications services.

The figure above shows the local four firm concentration ratios based on the market shares of the dominant four firms in the market for each product. All are above the level—60 percent—at which markets are considered to be tight oligopolies.

The existence of such high levels of concentration indicates a strong possibility of the abuse of market power. The figure shows earnings before interest, taxes, and depreciation and amortization, or EBITDA, as a measure of profitability. This is the financial indicator frequently used by financial analysts.[14] While EBITDA for segments of a business vary, the national average of just under 15 percent is considered healthy, so the EBITDA in these sectors are not merely supranormal, as defined in economic analysis, but they are astronomical.

The conditions for the exercise of market power do not stop with highly concentrated markets. The market division strategies that the dominant firms chose to pursue—and got away with after the 1996 Telecommunications Act—have resulted in a tight oligopoly on steroids for each of the services at the local level. They all started with local franchise monopolies, when the 1996 act was passed, and refused to enter new markets to compete head to head with their sister companies. Cable companies never overbuilt cable and never entered the wireless market. Telephone companies never overbuilt other telephone companies and were slow to enter the video market. Each chose to extend their geographic reach by buying out their sister companies rather than competing. This means that the potentially strongest competitors—those with expertise and assets that might be used to enter new markets—are few. This reinforces the market power strategy, since the best competitors have followed a noncompete strategy.

Regulatory policy was equally lax, deregulating services that were far from competitive based on the hope or hype that competition would grow in areas such as access to broadband services, specialized higher-speed connections for businesses—business data services—and mobile wireless.[15] Inaction stalled progress on important economic goals to reduce inequality of access to affordable new internet services as well as key social goals such as enhanced privacy, where the Federal Communications Commission took no action.

As a result, today these four firms enjoy geographic separation, technological specialization, and product segmentation that makes it easy to avoid competition. They cooperate—via TV Everywhere subscriber authentication—collaborate—via the Verizon-cable joint venture—or engage in reciprocal reinforcing conduct—via the purchase of out-of-region special access and political action—rather than compete. While some markets are slightly more competitive than others, the dominant firms are deeply entrenched and engage in anti-competitive and anti-consumer practices that defend and extend their market power, while allowing them to overcharge consumers and earn excess profits.

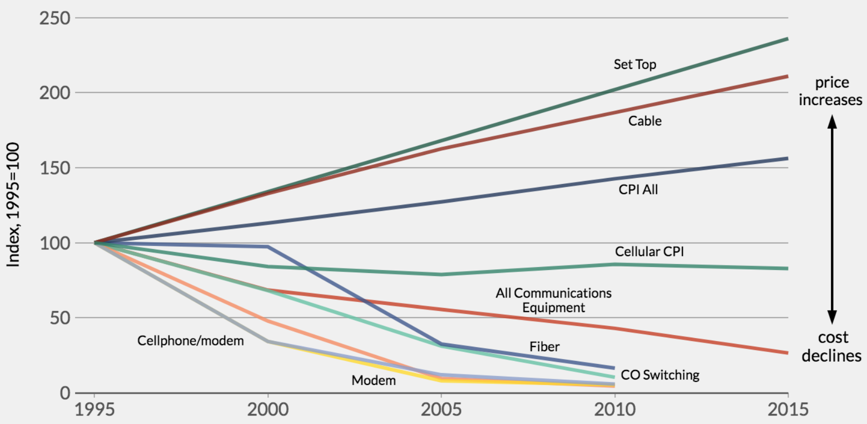
The consequences for consumers and the economy of this abuse of market power

As outlined in the Merger Guidelines—a set of federal rules governing antitrust enforcement—the antitrust authorities review mergers with an eye toward price increases, applying what's referred to as the "small but significant, non-transitory price increase" standard.[16] This standard, which defines small but significant as at least 5 percent and defines nontransitory as lasting at least two years, serves as a good baseline benchmark for evaluating pricing. By this standard, our analysis shows that the communications markets have performed poorly for the entire period since the passage of the 1996 Telecommunications Act.

The pocketbook impact is rising prices for buyers and falling costs for sellers. In truly competitive markets, a significant part of cost reductions would be passed through to consumers. Based on a detailed analysis of profits—primarily EBITDA—we estimate that the resulting overcharges amount to more than $45 per month, or $540 per year, an aggregate of almost $60 billion, or about 25 percent of the total average consumer's monthly bill.[17] (See Figure 2.)

FIGURE 2

U.S. telecommunications oligopoly overcharges consumers as costs fall
Telecommunication service-price increases versus declining equipment costs, 1995 to 2015



Source: Cost trends: David M. Byrne and Carol A. Corrado, Prices for Communications Equipment: Rewriting the Record, released February 2012, revised and released as Finance and Economics Discussion Series, 2015-069; "Recent Trends in Communications Equipment Prices," FEDS Notes, September 29, 2015. Price trends: Bureau of Labor Statistics, Consumer Price Index.

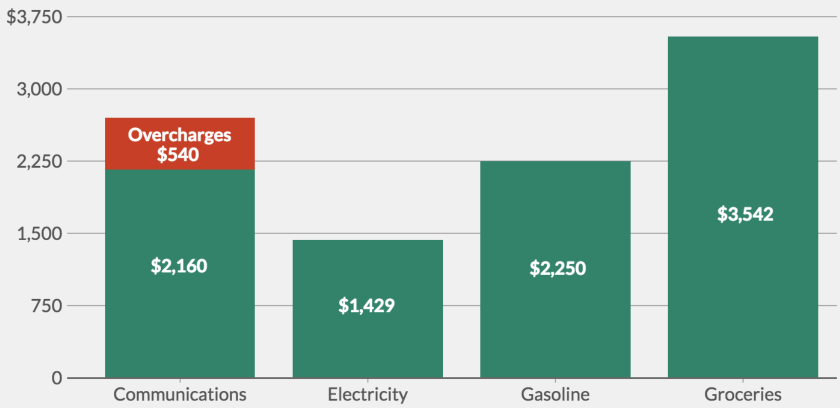
The impact of this abuse of market power on consumers is clear. According to the most recent Consumer Expenditure Survey[18] by the U.S. Bureau of Labor Statistics, the "typical" middle-income household spends about $2,700 per year on a landline telephone service, two cell phone subscriptions, a broadband con-

nection, and a subscription to a multichannel video service.[19] The new digital services, broadband and wireless, account for about two-thirds of the total. Adjusting for the "average" take rate of services in this middle-income group, consumers spend almost twice as much on these services as they spend on electricity.[20] They spend more on these services than they spend on gasoline. Consumer expenditures on communications services equal about four-fifths of their total spending on groceries. (See Figure 3.)

FIGURE 3

The telecommunication oligopoly's inflated pricing capabilities

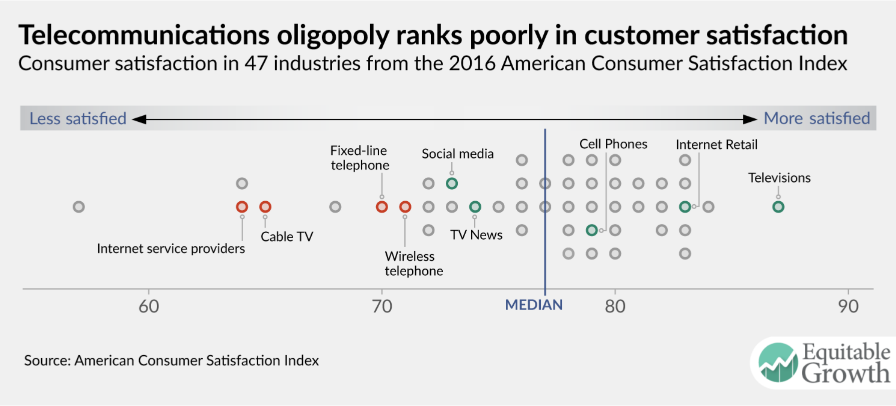
Household expenditures and overcharges for communications services compared to other important household items



Note: A "typical" middle-income household is modeled with data from the Bureau of Labor Statistics' Current Population Survey and assumes that 90% of the households in this middle-income group have MVPD and broadband.

Given this massive overcharging, companies that have the market power to overcharge also lack the incentive to invest in customer service, we would expect consumers to be less than thrilled with these services. Indeed, the 2016 American Customer Satisfaction Index, which ranked 47 industries, shows that the services provided by the telephone company half of the tight oligopoly on steroids ranks 41st for wireless and 42nd for landline, while the half supplied by cable ranks 44th for video and 45th for internet service. Among 350 individual companies with rankings in 2015 or 2016, AT&T ranks 284th and 313th, depending on the service. Verizon is ranked equally poorly at 290th and 305th, while Charter Communications, ranked 333rd and 338th, and Comcast, ranked 340th and 340th, are even worse. (See Figure 4.)

FIGURE 4


Telecommunications oligopoly ranks poorly in customer satisfaction
Consumer satisfaction in 47 industries from the 2016 American Consumer Satisfaction Index
Less satisfied
More satisfied
Fixed-line telephone
Social media
Cell Phones
Internet Retail
Televisions
Internet service providers
Cable TV
TV News
Wireless telephone
60
70
MEDIAN
80
90
Source: American Consumer Satisfaction Index
Equitable Growth

AP PHOTO/SUSAN WALSH

The policy turnaround under the Obama administration

The Obama administration made a 180-degree reversal of direction in antitrust enforcement and regulation. Seven mergers in the telecommunications sector were considered and either rejected or approved subject to extensive conditions.[21] Simultaneously, ambitious regulatory initiatives sought to redress past missteps and ensure that the benefits of platforms that both cooperate and compete (co-opetition) and positive externalities, flowing from a well-regulated communications infrastructure sector could be realized.

On the merger front, the Department of Justice and the Federal Communications Commission blocked two mergers—AT&T Inc. and T-Mobile US Inc. (the U.S. subsidiary of Deutsche Telekom AG), and Comcast Corp. and Time Warner Inc.—and jawboned another out of existence (Sprint Corp. and T-Mobile). The two antitrust enforcers also imposed extensive conditions on several approved mergers, among them Comcast and NBCUniversal Media LLC, AT&T and DIRECTV LLC, Charter Communication's acquisition of Time Warner Cable and Bright House Networks LLC, and the cable joint venture Cellco Partnership Inc. between Verizon Communications and Comcast and Time Warner and Bright House. See the following sidebar for a closer look at the three different types of mergers—horizontal, vertical, and geographic extension—dealt with by the antitrust agencies during the Obama administration.

Three snapshots of antitrust merger reviews during the Obama administration

In this sidebar, we examine three different types of mergers—horizontal, vertical, and geographic extension. All three of these cases involve intensive examination of market structure and market imperfections as a cause of the abuse of market power.

AT&T Inc./T-Mobile US Inc.: The benefits of rejecting an anticompetitive merger[22]

The wireless sector experienced significant competition in the 1990s, but a subsequent merger wave drove the industry to a highly concentrated condition by 2000, with pricing clearly reflecting the increased market power of the remaining companies in the sector.[23] The proposed AT&T/T-Mobile merger in 2011 would have dramatically increased concentration. In almost every market served by the two firms; the merger exceeded the thresholds of the Merger Guidelines—a set of federal rules governing antitrust enforcement—falling in the range where it was "presumed to be likely to enhance market power." Despite enormous political pressure applied by AT&T as well as strong expectations on Wall Street that antitrust officials would never outright reject such a transaction, the prospect of reducing the number of national-scale carriers to just three alongside the evidence of competitive harm led the Department of Justice to challenge the transaction in court.[24]

After the denial of the proposed AT&T merger with T-Mobile, T-Mobile found itself with a large cash infusion and valuable spectrum licenses from the deal's breakup fee but also with the prospect of having to stand alone. As the fourth-largest of the major national carriers, and as a firm that had played the role of a disruptive maverick, it made the decision to compete vigorously on price and service terms to increase market share, as the Justice Department had anticipated.

By 2014, the impact was apparent. The dominant national carriers were forced to respond to T-Mobile's competitive behavior by abandoning the pattern of relentlessly raising prices, and their operating income per subscriber showed the effect. By 2015, average revenue per user was $4 to $5 less than the pre-merger trend. This competitive gain was not by any means sufficient to wring out all of the pricing abuse by the dominant wireless carriers, but it shows the benefits of competition. At $4 per subscriber, the total savings for consumers are more than $11 billion per year.

Moreover, financial analysts looking at the AT&T/T-Mobile merger during the review period argued that the merger could have resulted in average price increases of $5 per month above the underlying trends. They made these estimates using the standard relationship between the so-called Herfindahl-Hirschman Index, which antitrust authorities use to measure market concentration, and prices.[25] In other words, had the merger been approved, rates could have been $10 higher than they are today. In addition, the more consumer friendly aspects of cell service bundles, such as higher usage levels; the elimination of long-term contract requirements; and other consumer-friendly policies might not have become prevalent.

In the end, T-Mobile's aggressive competition strategy on price and quality not only increased its market share and placed downward pressure on prices but also resulted in

increasing profit margins as it achieved scale. Today, the company appears to be a much more viable competitor to dominant Verizon and AT&T.

Comcast/NBCUniversal Media: Conditions on a vertical merger[26]

As the largest multichannel video programming distributor and largest broadband internet access service provider in the nation, Comcast occupies a key strategic location in the 21st century communications sector. Access to the network is an essential component for both consumers' internet and video services and content providers' access to consumers. Comcast is the dominant provider of the dominant technology. The vertical links created by the proposed Comcast-NBCUniversal merger could have given Comcast the incentive and ability to exercise market power through vertical leverage that would have had harmful effects on horizontal competition, consumers, and the public interest in every market in which it was a major player.

Although the access market is local, if a single entity dominates a large enough share of the local markets, it can influence the outcome of services that compete in national markets. Denying access to a large body of consumers who subscribe to a network or imposing excessive costs and conditions on gaining access to those consumers can reduce or undermine the ability of potential and actual content competitors to survive or provide effective competition.

Similarly, withholding access to or placing onerous conditions on access to some of the most popular content can reduce or undermine the ability of actual or potential distribution competitors to survive or provide effective competition. Additionally, a company that creates some of the programming it carries while selling it to distribution competitors can gain access to market intelligence that its nonvertically integrated rivals lack, whether they are programmers or distributors.

The Department of Justice's Antitrust Division and the FCC reached the conclusion that the Comcast-NBCUniversal merger posed these threats based on a close examination of the record.[27] The department filed an extensive complaint documenting the problem.[28] The two agencies then chose as a remedy to impose conditions on the merger, rather than block it.[29] The complaint, factual findings, and remedy marked an important milestone in the quarter-century-long struggle to protect consumers from the abuse of market power that was unleashed by the Cable Communications Policy Act of 1984, when Congress fully deregulated local cable monopolies. That decision led to skyrocketing cable rates and massive industry consolidation amid the hope that there would be a second cable company and a full-service satellite provider deployed ubiquitously. The first never happened, and

the second could not get started until the 1992 Cable Television Consumer Protection and Competition Act eliminated the stranglehold that cable had on programming, and even then, it never competed effectively against cable on price.

The consent decree in the Comcast-NBCUniversal merger sought to address the vertical leverage problem with merger conditions designed to ensure that distributors of video content over the internet would have access to broadband consumers. The network non-discrimination and data metering conditions sought to protect consumers and competitors from potential transmission discrimination by the largest broadband internet access provider. Additionally, the Justice Department sought to ensure that a minimum capacity adequate to support video distribution would be available on Comcast's network.

Another goal of the consent decree was to ensure that programming would be available for internet distribution—that is, Comcast would be limited in its ability to use contractual restrictions to prevent independent programming from being carried by competitors. Similarly, Comcast was required to match the best practices in making its own content available by other programmers that are similar in size.

The Justice Department's consent decree and the FCC order set the foundation for ensuring that internet video enjoys the same protections that multichannel video programming distributor-delivered video enjoys under the Communications Act, particularly when it comes to dominant incumbents restricting the availability of content to new entrants. The agencies sent a strong signal through these merger conditions that they intended to prevent network operators from stifling internet-based offerings by ensuring fair, reasonable, and nondiscriminatory access to audiences.

Congress and antitrust and regulatory authorities had successfully pursued this approach numerous times in the past.[30] The growth of over-the-top content in the wake of these decisions suggests that it was partially successful, although it did not attack the underlying market power directly and therefore has not been successful at deconcentrating the video market.

Comcast Corp./Time Warner Cable: Rejecting anti-competitive geographic extension

Fewer than four years after acquiring NBCUniversal Media, Comcast was back proposing another merger and using many of the same failed arguments.[31] Comcast and its experts claimed that because its proposed merger with Time Warner Cable was largely a geographic extension merger and all of the market segments involved were vigorously competitive,

the merger posed no actual or potential threat to competition, consumers, or the public interest. The Competitive Impact Statement and the Complaint filed by the Justice Department in the Comcast-NBCUniversal merger thoroughly undercut Comcast's claims of no impact on competition and no harm to consumers.

The Economist magazine took a position similar to the one that the FCC and the Justice Department ultimately agreed with:

> *The deal would create a Goliath ... For consumers the deal would mean the union of two companies that are already reviled for their poor customer service and high prices. Greater size will fix neither problem. … The biggest worry is Comcast's grip on the internet. … Comcast will have extraordinary power over what content is delivered to consumers, and at what speed.*[32]

Given the persistent dominance of cable multichannel video programming distributors and the recognition of the complex vertical relationships that were growing in the internet distribution of video, it is easy to argue that the Comcast/Time Warner merger posed a much greater threat to competition, consumers, and the public interest than the Comcast/NBCUniversal merger. The acquisition of Time Warner would grow Comcast to a point where it would dominate the landscape at multiple levels. In addition to being the dominant provider of local broadband connectivity, post-merger, Comcast would have been 1.5 times as large as the next largest multichannel video programming distributor, two times as large as the next largest internet access service provider, and three times as large as the next largest service provider with the capacity to deliver an integrated bundle of video and broadband. It would have become the dominant cable and broadband operator in 24 of the nation's largest 25 video markets, including the addition of the most important media markets, New York and Los Angeles.

The FCC also shifted its attitude toward regulatory policy in the communications sector, seeking to promote competition and consumer welfare wherever possible.[33] The agency sought to address the problems caused by excessive market power and concentration instead of wishing them away. The agency, for example, concluded that the deployment and adoption of broadband service was not adequate, as defined by the Communications Act, and issued rules to transform the universal service "affordability" program from one that supported only 20th century voice communications to one that supports 21st century broadband. And in two cases, the agency successfully turned to Title II of the Communications Act to remedy abusive market power. Specifically, the FCC:

- Declared broadband internet access service to be regulated under Title II, making these services partially subject to common carrier obligations, even when they were provided by companies such as Comcast that had not been common carriers. This activated the language of the act that prevents dominant communications companies from imposing unjust, unreasonable, or discriminatory rates, terms, and conditions, although other common carrier obligations, like funding universal service were not activated.

- Concluded that under Title II, broadband consumer privacy required greater protection, and issued rules to prevent the customer proprietary information that broadband network service providers needed to operate the network efficiently from being used for other commercial purposes.

The importance of Title II in both of these situations is worth a short, deep dive.[34]

As communications have become more important in the economic, social, and political life of Americans, network owners have argued that the regulatory structure of the Communications Act has become outdated, in part because services that were once sold by separate firms using separate networks have converged onto broadband networks. Arguing that they are all just information services, which are, at best, very lightly regulated by the Communications Act, the network owners would like to have regulation driven to the lowest common denominator, which is almost zero. Indeed, in many respects, they just want to do away with the Communications Act and rely solely on the antitrust laws.

Yet it became clear over the past decade that technological innovation and convergence are no guarantee against the abuse of market power. Under conditions of lax merger review and weak regulation, technological convergence leads to increased concentration and enhanced market power. The fundamental conditions of communications technology and the lack of competition that have long made it important to apply the dual oversight of antitrust and regulation are reinforced, not weakened. The stakes are huge in terms of the economic and social values that the United States has embraced for more than a century.

The following three cases show how the Obama administration decided that it would be more appropriate to continue the regulation of communications networks and converge regulation to the highest common denominator, Title II. The 1996 Telecommunications Act specifically preserved the definition of telecommunications—subject to the highest level of oversight—regardless of the technology

used. Thus, Title II enforcement would continue to recognize the unique importance and market structures of the voice and video markets, even as those services are delivered over broadband.

Economic abuses

At issue before the Obama administration's FCC was nondiscrimination in the provision of telecommunications services and efforts to misclassify services by the industry.[35] And informing the actions of the agency were the widely recognized decisions in prior decades that promoted competition and ensured nondiscriminatory access to networks and seamless interconnection, which played a critical part in creating the conditions for the success of the internet and wireless revolutions.[36] These decisions were a mixture of regulatory and antitrust policy.

In the 1990s and 2000s, network owners offering internet access service resisted the obligation to provide nondiscriminatory access.[37] They initially sought classification of internet access service as a cable service under Title VI of the Communications Act, which has no such obligation.[38] They continued to resist being subject to a weak form of oversight—ancillary authority under Title I.[39] Moreover, whenever network owners think that they might not be subject to strong rules on nondiscrimination, they have repeatedly engaged in aggressively discriminatory practices.

During the early days of this open access debate, Time Warner imposed a series of demands on independent internet service providers that would have strangled competition. After it became obvious that network neutrality was at risk, the FCC in 2004 put forward a list of "Four Freedoms" that had little market impact due to a perceived lack of enforceability.[40] For more than a decade, network owners repeatedly violated this approach to nondiscrimination, and the courts expressed concern about the use of FCC authority.[41]

The increasing importance of broadband internet access service in the communications sector led the FCC in 2015 to classify this service as a Title II telecommunications service.[42] Yet the agency restricted its own authority to a narrow subset of the Title II obligations and took a flexible approach to enforcement. This convinced the courts that this was the appropriate way to achieve the goals of the Communications Act.

Privacy and consumer abuse

Concerns about privacy have been a constant issue since mass market use of the internet expanded in the mid-1990s.[43] The Federal Trade Commission studied the problem repeatedly, and in 2008, the FTC and the U.S. Department of Commerce finally admitted that numerous, significant, and persistent market failures afflict privacy in the digital marketplace.[44] Yet both agencies failed to move aggressively to address the problems, with their powers limited under existing statutes.

Then, in 2017, the FCC—using the power under Title II to protect customer proprietary network information under the Communications Act—took action to prevent the abuse of consumer privacy by broadband network operators. The FCC concluded that the network operators have a uniquely powerful position from which to gather such information because they see everywhere the consumer goes—information that then can be sold to third parties. Using its new authority over broadband providers under Title II of the Communications Act, the agency made mandatory an existing voluntary FTC framework as the basis of its approach to protecting the privacy of broadband users.[45]

This effort of the FCC to protect consumer privacy was later overturned by the incoming 115th Congress earlier this year, using the Congressional Review Act procedures.[46] The move by the new Congress exposed consumers to having their valuable personal information collected, monetized, and sold by the very internet service providers that those same consumers must use to access essential services and content.

Premature deregulation of a vital service

The FCC at the end of the Obama administration also was considering rules to control network operators' abuse of market power in the increasingly important and rapidly growing business data services market.[47] High-speed, high-capacity communications services for businesses—called "special access" and later "business data services"—were long regulated as Title II common carrier services. Many of these connections were first built by the original telephone monopoly companies. They were among the first services deregulated after the passage of the 1996 Telecommunications Act, under the theory, or hope, that competition would develop to make close regulation of rates, terms, and conditions unnecessary.[48]

Business data services today are a pervasive input to the delivery of a wide range of goods and services, not just the communications services that consumers pay for directly. They are the high-speed, always-on connections that businesses have come to rely on for their routine communications, including mobile broadband and phone service; small, medium, and large businesses need much more capacity than a single telephone line, as do branch networks such as ATMs, gasoline stations, and the emerging internet of things, all of which have many nodes that need to be online all the time.

The central role of business data services in the communications economy is matched by the high level of concentration for these services and the pattern of abusive conduct that developed when these services were prematurely deregulated starting in 1999.[49] In fact, the FCC compiled the largest data set in its showing of the history of abuses in the business data services market. It shows that about three-quarters—at least 70 percent and as much as 80 percent—of consumers purchase business data services under the conditions of an absolute monopoly.[50]

Unfortunately, the FCC was unable to finalize reform of this market, and the intervening change of FCC leadership and the new Trump administration make robust action to remedy the effects of this uncompetitive market less likely. In fact, FCC Chairman Ajit Pai's plan to roll back net neutrality protections[51] is likely only to make matters worse, not better. Nevertheless, this issue demonstrates that targeted regulatory action can address competitive shortcomings, even if it is no guarantee that this regulatory action will occur. Indeed, the market abuses in the telecommunications sector that these changes in policy direction were intended to correct or prevent and the benefits of doing so are now at risk of being cut off by the Trump administration.

Conclusion

Antitrust enforcement and regulatory policy in the communications sector over the past 20 years demonstrate both the potential benefits of effectively aligned interventions and the enormous costs resulting from failed industry oversight. In such markets where historical monopolies, capital-intensive investments, and generally high levels of market concentration have only recently been challenged by policy adjustments and technological breakthroughs, there is very little margin for error if policymakers want to harness the full economic potential of the communications sector in ways that boost sustainable economic growth that is fair and equitable.

Early "hands off" antitrust and regulatory policy prevented new potential competitors from experimenting, solidified the dominance of telecommunications incumbents through regional expansion, and ossified the natural economic tendencies in these markets—thereby leading to massively inflated prices for consumers. More recently—and especially under the Obama administration—more aggressive intervention in proposed mergers and parallel regulatory actions designed to expand competitive opportunities for wireless, broadband, and broadband-delivered video services broke some of the price-inflating cycle, unleashed substantial innovation in the video streaming market, and started to police against new potential abuses of dominance in data and transmission bottlenecks.

The challenge in telecommunications and network industries that was recognized a century and a quarter ago remains relevant today. These industries benefit from immense economies of scale and scope that lead to large size and the threat of market power. We call them platforms today. They impact a wide range of economic and social activities that ride on these platforms and public policy should not destroy the economic benefits while it prevents the abuse of the inherent market power. The Progressive Era response was a nuanced mix of regulation and antitrust enforcement. The more dynamic the sectors of the communications industry, the more difficult and important is the need to find the right mix.

The key lesson in the communications sector is that vigorous regulation and antitrust enforcement can create the conditions for market success. But balance is the key. Technological innovation and convergence are no guarantee against the abuse of market power, but the effort to control the abuse of market power should not stifle innovation. If the Trump administration jettisons the enforcement practices of the past eight years, then the telecommunications sector is likely to see a wave of new consolidation and a dampening of the price cutting and innovative wireless and broadband services that have been slowly emerging. These markets will not remonopolize, but they will become a tighter oligopoly on stronger steroids even more dominated by two or three vertically integrated giants charging vastly inflated prices and asserting excessive power over the marketplace of ideas.

About the authors

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Mark Cooper holds a Ph.D. from Yale University and is a former Yale University and Fulbright fellow. He is director of research at the Consumer Federation of America, a fellow at the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado Law School, and a senior research fellow at the Institute for Energy and the Environment at Vermont Law School. He has provided expert testimony more than 350 times for public interest clients including attorneys general, people's counsels, and citizen interveners before state and federal agencies, courts, and legislators in almost four dozen jurisdictions in the United States and Canada. Cooper has published six books and hundreds of

articles and papers on energy, media, telecommunications, and high-technology industries, most recently *The Political Economy of Electricity: Progressive Capitalism and the Struggle to Build a Sustainable Power Sector* (Praeger, 2017).

Appendix

The merger wave underlying the tight oligopoly

ACQUISITION	WIRELESS	WIRELINE	WIRELESS	WIRELINE	MVPD	MVPD	PROGRAMMING	
Acquirer	VERIZON		ATT		COMCAST	CHARTER	Acquirer	Owned or acquired
	Vodafone	PacBell	*McCaw Linn*	PacBell	Scripps	Avalon	Fox	20th Century
	GTE	SNET	*SNET*	SNET	Philadelphia	Falcon		Duopolies in LA, Minn., DC, Houston, Chicago, Orlando
	Price	Ameritech	*Bell South*	Ameritech	Lenfest	Cablevision		
	CalNor	Bell South	*Cingular*	Bell South	Susq	ATT		
	Rural	ATT	*DodsonATT*		Adelphia	Helicon	Viacom	Paramount
	Alltel		*Centennial*		Patriot	Interlink		UPN
	Vodafone		*Alltell*		NBCU	Bresnan		King World
	Airtouch		*Leap*		Prime	Bright House		CBS
	CellularOne		*Cingular*		Jones	Renaissance	NBC	Universal
	Cellco		DirectTV (MVPD)		Storer	Time Warner		Paxon (30%)
					Media one	KBL		Telemondo
					TCI	Summit		Univision
					ATT cable	Century	ABC	Disney
					NBCU (content)	Adelphia		
						Insight		
						Duke		
						Cablevision		
						Duke		

Sources: Eli Noam, Media Ownership and Concentration in America (New York: Oxford University Press, 2009), pp. 77, 236, 237, 240, and 246; Federal Communications Commission, "Competition Reports; Cable and Wireless" (various years); Stephen Grocer, "A Tangled Family Tree," *The Wall Street Journal* Deal Journal, March 29, 2011, available at https://blogs.wsj.com/deals/2011/03/29/a-tangled-family-tree-how-att-became-att/. Pew Research.org, Chart of the Week, based on Rani Molla, Chart: Two Decades of Cable TV Consolidation," *The Wall Street Journal*, February, 13, 2014; U.S. Department of Justice, Complaint, Competitive Impact Statement, *United States v. Comcast Corp.*, 808 F.Supp.2d 145 (D.D.C. 2011) (No. 1:11-cv-00106); Complaint, Competitive Impact Statement, *United States v. AT&T Inc.* and Deutsche Telekom, AG (No. 1:11-cv-01560), August 31; Competitive Impact Statement, *U.S. and State of New York, v. Verizon Communications Inc.*, CEllCO Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc., and Bright House Network, LLC (No. 1:12-CV-01354), August 16, 2013; Competitive Impact Statement, Charter Communications, Inc., Time Warner Cable Inc., Advance/New House Partnership, and Bright House Networks, LLC. Civil Action No. 1:16-cv-00759 (RCL), May 10, 2016; Jon Sallet, "The Federal Communications Commission and Lessons of Recent Merger & Acquisition Review," Remarks to the Telecommunications Policy Research Conference, September 25, 2015, explains the Federal Communication Commission's approach in several of the mergers.

Endnotes

1 This paper draws heavily on Gene Kimmelman and Mark Cooper, "Antitrust and Economic Regulation: Essential and Complementary Tools to Maximize Consumer Welfare and Freedom of Expression in the Digital Age," *Harvard Law & Policy Review* 9-2 (2015): 403, available at http://harvardlpr.com/wp-content/uploads/2015/07/9.2_5_KimmelmanCooper.pdf; Mark Cooper, "Overcharged and Underserved: How a Tight Oligopoly on Steroids Undermines Competition and Harms Consumers in Digital Communications Markets." Working Paper (Roosevelt Institute, 2016), available at http://rooseveltinstitute.org/wp-content/uploads/2017/02/Overcharged-and-Underserved.pdf.

2 See Cooper, "Overcharged and Underserved," Chapter IX.

3 Ibid., Chapter I.

4 Market structure affects conduct, which in turn determines market performance, but basic conditions set the context in which structure and conduct operate. See Frederic M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3rd edition (Boston: Houghton Mifflin Company, 1990), p. 5.

5 John B. Taylor (John B. Taylor, Economics (Houghton Mifflin, 1998, Glossary) provides a series of simple definitions for these concepts in the glossary: **Public good**—a good or service that has two characteristics: non rivalry in consumption and nonexcludability**; Public infrastructure investment/project**—purchases of capital by goods for use in as public goods, which add to the productive capacity of society/an investment project such as a bridge or jail funded by government designed to improve publicly provided services such as transportation or criminal justice**; Externality**—the situation in which the cost of producing or the benefit of consuming a good spills over onto those who are neither producing nor consuming the good**; Economies of scale**—also called increasing returns to scale, a situation in which long-run average total cost declines as the output of the firm increases**; External economies/diseconomies of scale**—a situation in which growth in an industry causes average total cost for the individual firm to fall/rise because of some factor external to the firm**; Minimum efficient scale**—the smallest scale of production for which long-run average total cost is at a minimum.

6 See Cooper, "Overcharged and Underserved," Chapter V.

7 Alfred Kahn, T*he Economics of Regulation: Principles and Institutions, Volume I* (Cambridge, MA: The MIT Press, 1988), p. 11. The importance of these industries is measured not merely by their own sizable share in total national output but also by their very great influence as suppliers of essential inputs to other industries on the size and growth of the entire economy. These industries constitute a large part of the "infrastructure" uniquely prerequisite to economic development. On the one hand, they condition the possibilities of growth—as Adam Smith recognized, the division of labor is limited by the extent of the market, and the latter depends on the availability and price of transportation. On the other hand, because many of these industries are characterized by great economies of scale, their own costs and prices depend in turn on the rate at which the economy and its demand for their services grow.

8 The Interstate Commerce Act, the granddaddy of federal regulation, was passed in 1887, primarily to regulate railroads, but in 1910 it was extended to the telephone industry. The Sherman Antitrust Act, the foundation of U.S. antitrust policy, was enacted in 1890 and extended by the Clayton Antitrust Act in 1914; it was extended to all corporations in the Federal Trade Commission Act. One of the first consent decrees signed by the Department of Justice dealt with AT&T. Antitrust and regulation have been intertwined ever since. See Kimmelman and Cooper, "Antitrust and Economic Regulation."

9 The level of competition that is possible in a particular market depends on characteristics such as population density and geography, as well as characteristics with a regulatory component such as ease of permitting, availability of public rights of way, access to conduit and utility poles, and so forth. In many cases, communications infrastructure markets tend toward natural monopoly or require public subsidy, municipal or cooperative ownership, or some other structure to be possible at all.

10 W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, *Economics of Regulation and Antitrust, 3rd edition* (Cambridge, MA: MIT Press, 2000), pp. 2–3.

11 See appendix.

12 For sector-specific analyses, see Cooper, "Overcharged and Underserved," Chapters XI, XII, and XIII.

13 According to the Horizontal Merger Guidelines, moderately concentrated markets have a Herfindahl-Hirschman Index between 1,500 and 2,500, and highly concentrated markets have an HHI above 2,500. See U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* 19 (2010).

14 Investopedia described earnings before interest, tax, depreciation, and amortization as follows: While average EV/EBITDA values vary by sector and industry, a general guideline is an EV/EBITDA value below 10 is commonly interpreted as healthy and above average by analysts and investors. As of 2015, the average EV/EBITDA value for the overall market is 14.7.

The EV/EBITDA Multiple—The name of this metric indicates the formula used in its calculation. The value of the metric is determined by dividing a company's enterprise value (EV) by its earnings before interest, taxes, depreciation and amortization (EBITDA). The numerator of the formula, the EV, is calculated as the company's total market capitalization and preferred shares and debt, minus total cash.

This popular metric is widely used as a valuation tool, allowing investors to compare the value of a company, debt included, to the company's cash earnings less noncash expenses. It is ideal for analysts and potential investors looking to compare companies within the same industry. Typically, EV/EBITDA values below 10 are seen as healthy, but comparison of relative values among firms operating in the same industry is a good way for investors to determine companies with the healthiest EV/EBITDA within a specific sector.

Benefits of EV/EBITDA Analysis—Though the price-

to-earnings, or P/E, ratio is often primarily used as a valuation tool, there are benefits to using it along with the EV/EBITDA, or to using the latter on its own. The EV/EBITDA is considered by some to be a better valuation metric because it remains unaffected by changing capital structures and offers fairer comparisons of companies with capital structures that differ. It also removes the effects of noncash expenses on a company's value.

15 In telephony, the unbundled network element, or UNE, approach failed. In special access, new facilities-based competition did not emerge in many markets. In consumer broadband, weak regulation—no line-sharing requirements and weak or no net neutrality rules—was justified by the phantom of facilities-based competition, which proved to be either largely imaginary—as in broadband over power line—or transitory, as copper-line-based Digital Subscriber Line proved to be far inferior to coaxial cable and fiber. In mobile wireless, the presumption of competition allowed the major incumbents to increase their spectrum holdings unencumbered by an effective competition-promoting screen.

16 Cooper, "Overcharged and Underserved," Chapters II and IV.

17 Ibid., p. 5.

18 The most recent survey available from the Bureau of Labor Statistics is for the year ending July 2015. The comparisons here use the middle quintile, which has a mean income before taxes of just under $49,000 per year.

19 The typical middle-income household—in the third quintile of the income distribution—buys these services, according to the recent Consumer Expenditure Survey, Mid-year, 2016.

20 Instead of looking at the "typical" middle-income household we analyzed above, the Consumer Expenditure Survey provides average expenditures for all households, whether or not they take services. The expenditures per household estimated in this way look smaller because a significant number of households that have no expenditures are included in the denominator used to calculate the average.

21 Kimmelman and Cooper, "Antitrust and Economic Regulation"; Cooper, "Overcharged and Underserved," Chapters VI and VII.

22 Cooper, "Overcharged and Underserved," Chapters VI and XII.

23 Ibid., pp. 65–66.

24 See Bureau Staff Analysis and Findings in Applications of AT&T, Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65 (rel. Nov. 29, 2011).

25 Yankee Group, 2011. Yankee Group, 2011, *ATT/T-Mobil Merger: More Market Concentration, Less Choice, Higher Prices.*

26 See Cooper, "Overcharged and Underserved," Chapters VII and XIII.

27 Comcast's incentives and ability to raise the cost of or deny NBCUniversal programming to its distribution rivals, especially Online Video Distributors, will lessen competition in video programming distribution. (DOJ, 2011: 4, 52). In public, Comcast executives claimed that OVDs did not pose a competitive challenge; in private, they thought and acted in exactly the opposite manner. In fact, in the FCC order, which reviews the record in detail, there are almost 50 citations to proprietary documents that contradict the company's public statements. This is approximately one-third of all the citations to proprietary documents in the body of the FCC order. In addition to the key issue of OVD competition, these citations covered other key issues, including exclusionary conduct with respect to multichannel video programming distributors, or MVPDs; online distribution of content affecting both OVDs and MVPDs; and broadband internet access service.

28 See U.S. Department of Justice, Competitive Impact Statement, *United States v. Comcast Corp.*, 1:11-cv-00106 (D.C.C. Jan. 18, 2011). Other relevant documents can be found at U.S. Department of Justice, "U.S. and Plaintiff States v. Comcast Corp., et al.," available at https://www.justice.gov/atr/case/us-and-plaintiff-states-v-comcast-corp-et-al (last accessed June 30, 2017).

29 In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees Memorandum opinion and order, MB Docket No. 10-56 (rel. Jan. 20, 2011).

30 For a discussion, see Kimmelman and Cooper, "Antitrust and Economic Regulation." Antitrust includes a string of actions: Old AT&T consent decree (19140, the Supreme Court decision in the Associated Press case, the AT&T breakup, and prime time monopolization. Legislation includes actions such as the cable compulsory license, must carry, and retransmission consent. FCC actions include the Carterfone, computer inquiries, and Financial Interest and Syndication rules.

31 Application and Public Interest Statement, 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 (rel. Apr. 8, 2014).

32 *The Economist*, "Turn it off: American regulators should block Comcast's proposed deal with Time Warner Cable," March 15, 2014, available at http://www.economist.com/news/leaders/21598997-american-regulators-should-block-comcasts-proposed-deal-time-warner-cable-turn-it.

33 See Cooper, "Overcharged and Underserved," Chapters XV and XVII.

34 Mark Cooper, "The Long History and Increasing Importance of Public Service Principles for 21st Century Public Digital Communications Networks," *Journal on Telecommunications and High Technology Law* 12 (1) (2014): 1–54; ibid., Chapter XV.

35 See Cooper, "Overcharged and Underserved," Chapters VIII and XVIII; Mark Cooper, "The ICT Revolution in Historical Perspective: Progressive capitalism as a response to free market fanaticism and Marxist complaints in the deployment phase of the digital mode of production," Paper presented at Telecommunication Policy Research Conference, 2015; Federal Communications Commission, "The Digital Past as Prologue: How a Combination of Active Public Policy and Private Investment Produced the Crowning Achievement (to Date) of Progressive American Capitalism, Regulating the Evolving Broadband Ecosystem," Paper presented at American Enterprise Institute/University of Nebraska Forum, September 10, 2014.

36 See, for example, Federal Communications Commission, "Connecting America: The National Broadband Plan" (2010), pp. 49 and 58, available at https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

37 Dial-up internet service providers (ISPs) were traditionally unregulated, but consumers accessed them over regulated, Title II telephone networks. Those regulations ensured that consumers could access the dial-up

ISPs of their choice without discrimination from the network owner. When broadband integrated the ISP and network functions into one service—and as new technologies such as cable began to offer telecommunications service—broadband ISPs sought to bring the entire service down to the lowest level of regulation, leaving behind the obligation of network owners to provide nondiscriminatory access.

38 See citations in *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities et al*., Declaratory Ruling and NPRM, 17 FCC Rcd 4798, 60-69 (2002). AT&T and Cox were among the companies making this argument.

39 See *Comcast v. FCC*, 600 F.3d 642 (2010).

40 The Four Freedoms were described in a speech titled "Preserving Internet Freedom: Guiding Principles for the Industry" (Michael K. Powell, "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," Remarks before Silicon Flatirons Symposium, University of Colorado School of Law, Boulder, Colorado, February 8, 2004. The FCC's first attempt to enforce these freedoms against an ISP was overturned in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C.C. 2010).

41 See, for example, *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).

42 *Protecting and Promoting the Open Internet, Report and Order on Remand*, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015).

43 See Cooper, "Overcharged and Underserved," Chapter XVII.

44 Federal Trade Commission, "FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising" (2009), available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf.

45 Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, WC Docket No. 16-106, 2016 WL 6538282 (2016).

46 *Disapproving the rule submitted by the Federal Communications Commission relating to "Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*," Public Law 22, 115th Cong., 1st sess. (April 3, 2017).

47 See Cooper, "Overcharged and Underserved," Chapters X and XI.

48 See Access Charge Reform, CC Docket No. 96-262; Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, CCB/CPD File No. 98-63; Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999).

49 The record shows that the business data services market exhibited strong structure (high concentration, no good substitutes, high economic barriers to entry, deep-pocketed incumbents), conduct (artificial contractual barriers to entry, cross subsidies, price squeezes and foreclosures of competitors, reciprocity in multimarket contracts) and performance (high prices, high profits, poor service) characteristics that strongly indicate the necessity of regulation. See *Business Data Services in an Internet Protocol Environment*, 31 FCC Rcd 4723, ¶¶. 160-237 (2016).

50 This is using a fairly lax geographic definition of the market. The remainder have, at best, a duopoly—one competitor serving someone in the building. In very few circumstances do customers have four or more competitors. The economic analysis shows that competition reduces prices and that the more vigorous the level of competition, the larger the price reduction. The impact of eight or more competitors, which is likely very rare, is a price reduction of 43 percent. Adding the eighth competitor lowers prices by about 10 percent, which exceeds the small but significant, nontransitory increase in price standard.

51 Ajit Pai, "The Future of Internet Freedom," Remarks at Newseum, Washington, DC, April 26, 2017, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0426/DOC-344590A1.pdf.

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United States Senate

WASHINGTON, DC 20510-2309

October 24, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20536

The Honorable Loretta Lynch
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Chairman Wheeler & Attorney General Lynch:

I am writing to urge you to examine AT&T's proposed acquisition of Time Warner with the highest level of scrutiny. I have serious reservations about the $85.4 billion deal, which would give one of the nation's largest telecommunications providers control over a wide array of content. A deal of this magnitude could have a lasting effect on the quality and affordability of programming available to consumers across America. And I'm skeptical of any further consolidation in the media and telecommunications industries that could lead to higher prices, fewer choices, and even worse service for Americans. As you await more details regarding the proposal, I urge you to consider how the deal will affect consumers' access to content and to recognize the very serious enforceability challenges that render behavioral conditions ineffectual.

As the largest pay TV provider in the nation, after acquiring DIRECTV just last year, and the second largest mobile broadband provider, AT&T is one of the nation's leading distributors of content. Time Warner is one of the world's largest TV and entertainment companies and owns some of today's highest-rated programming, including HBO, CNN, and Warner Bros. Combining these behemoths would create a mega media conglomerate with both the incentive and ability to use its platform to harm consumers and competitors alike. It could promote its own programming above that of other TV and entertainment companies' or restrict other distributors' ability to offer its highly-desired content. Innovative offerings like HBO's internet streaming service could be jeopardized entirely, or made available on different and discriminatory terms to broadband customers of companies other than AT&T, if such restrictions were profitable for the combined company. And neither independent programmers nor small pay TV and online video distributors would be able negotiate on fair terms against the gigantic entity this massive deal would produce. The potential loss of entertainment and cultural programing diversity, available on widespread bases and at affordable prices, is a serious concern.

AT&T's CEO Randall Stephenson has already stated that any of the aforementioned concerns would be adequately addressed by behavioral conditions[1], but I have serious doubts about the enforceability and reliability of such conditions as a remedy for anticompetitive behavior. When Comcast initiated its acquisition of NBCUniversal in 2011, I sent the Federal Communications Commission (FCC) a letter expressing concern because – like AT&T's proposal to acquire Time Warner – it was "a vertical merger that gave one company the ability to control both programming and the pipes that carry the programming." I predicted then that "Comcast would have strong incentives to favor its own programming and raise prices, thereby harming both consumers and competitors." Sure enough, in violation of a condition imposed on the deal, Comcast subsequently undertook efforts to favor its own programming by keeping MSNBC and CNBC – its newly acquired channels – in a TV channel lineup "neighborhood" of news networks while relegating Bloomberg News to an undesirable location. Over two years after Bloomberg complained to the Commission, and following a protracted and expensive legal battle, Comcast was finally compelled to end its anticompetitive treatment of Bloomberg News and comply with the condition.

And this was just one of many complaints about Comcast violating or not honoring conditions. Comcast was sanctioned by the FCC for failing to deliver on promises regarding affordable standalone broadband offerings, and it was accused of violating both the spirit and the letter of its commitments on local news, racial diversity in programming, and online video distribution. Unfortunately, many of those complaints languished before the Commission for extended periods of time, delaying resolution of disputes and allowing anticompetitive behavior to continue. As a result of Comcast's questionable compliance with its merger order, I am doubtful that any behavioral conditions in a context such as this one could be structured with sufficient precision to prevent all competitive harms.

AT&T itself may have a similarly troubling track record when it comes to compliance with merger commitments. For example, the company quickly hiked prices after acquiring DIRECTV last year – citing higher programming costs as a factor, despite having told regulators that the merger would help it keep those programming costs in check. There have also been accusations that AT&T has failed to meet commitments it made to meet broadband deployment goals when it combined BellSouth, Cingular Wireless, and the legacy AT&T long distance company to form the current company over a decade ago. To the extent that AT&T has a history of going back on its commitments made in furtherance of an acquisition or merger, such history should be taken into account when evaluating its current proposal.

For the above stated reasons, I urge you to afford the highest scrutiny to the potential anti-competitive repercussions of AT&T's proposed acquisition of Time Warner. I strongly believe that further consolidation in the telecommunications and media industries should only be permitted if it results in better and more affordable services for consumers across the nation, and I have serious doubts that such aims could be achieved with this deal.

[1] *US to Examine AT&T Deal to Buy Time Warner*, BBC (Oct. 24, 2016), http://www.bbc.com/news/business-37747358.

As always, thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me or Leslie Hylton on my staff at Leslie_Hylton@judiciary-dem.senate.gov or (202) 224-5641.

Sincerely,

Al Franken
United States Senator

January 25, 2017

Randall Stephenson
Chief Executive Officer
AT&T
208 S. Akard St.
Dallas, TX 75202

Jeffrey Bewkes
Chief Executive Officer
Time Warner, Inc.
10 Columbus Circle
New York, NY 10019

Dear Mr. Stephenson and Mr. Bewkes:

We are writing regarding AT&T's recent filing with the Securities and Exchange Commission, which signaled that you are structuring AT&T's proposed acquisition of Time Warner in a way that avoids scrutiny by the Federal Communications Commission (FCC). In doing so, AT&T and Time Warner will circumvent the FCC's merger and acquisition review standard, which requires that the parties demonstrate – on the public record – that the proposed deal would serve the public interest by, among other things, improving access and affordability of telecommunications services, promoting the diversity of ideas, and ensuring the free exchange of information. To achieve greater transparency for regulators, lawmakers, and American consumers, we ask that you provide us with a public interest statement detailing how you plan to ensure that the transaction benefits consumers, promotes competition, remedies all potential harms, and further serves the public interest through the broader policy goals of the Communications Act.

Before a company can complete a merger or acquisition involving telecommunications licenses that the FCC has previously granted, it must submit an application seeking the FCC's approval. The Commission will approve such an application only if it determines that the parties seeking approval have demonstrated that the deal would affirmatively benefit consumers and competition and more broadly serve the public interest. Importantly, the parties' application is made available to the public, and consumers, advocacy organizations, and the business community are given a meaningful opportunity to respond with their perspective on how the transaction would impact their individual interests. But by divesting the relevant licenses, AT&T and Time Warner will no longer have the legal burden of proving that the proposal would serve the public interest, and the public is left largely in the dark about how the deal would impact the affordability and quality of their phone, internet, and video services.

While we appreciate your testifying before the Senate Judiciary Committee in December of last year, we remain concerned about how a deal of this size could affect consumers and competition. AT&T is already the world's largest pay TV provider and the largest telecommunications company. Combining it with one of the world's largest producers of content gives AT&T-Time Warner both the incentive and ability to use its platform to harm competitors, and as a result, consumers. The combined company could promote its own programming above that of other content companies' or restrict other distributors' ability to offer its highly-desired content. As a result, the merger could raise prices on consumers, reduce access to independent

programming; and harm small businesses, content distributors, and innovative new business models. Your testimony at the hearing highlighted potential innovative customer offerings that could arise out of the deal, but it was not made clear that those benefits either lessened or outweighed the substantial competitive and consumer harms that were raised by many members of the panel.

To ensure a greater understanding of the impact of AT&T's proposed acquisition of Time Warner, we respectfully request that by February 17, 2017, you provide us with a public interest statement that includes a comprehensive and detailed explanation of whether and how the proposed transaction would produce consumer benefits, encourage competition, remedy all potential harms, and ultimately serve the public interest. In providing this information, the statement should demonstrate how the deal would further the broader policy goals of the Communications Act, including deploying services, particularly to rural and underserved areas, ensuring non-discriminatory access to communications networks, improving network reliability, promoting diversity of ideas and voices in the marketplace, and encouraging the free flow of information via telecommunications services.

We maintain that further consolidation in the telecommunications and media industries should only be permitted if it results in better and more affordable services for consumers across the nation, and we look forward to working with you to achieve this critical goal. Thank you for your attention to this matter.

Sincerely,

Al Franken
United States Senator

Edward J. Markey
United States Senator

Sherrod Brown
United States Senator

Bernard Sanders
United States Senator

Ron Wyden
United States Senator

Patrick J. Leahy
United States Senator

Elizabeth Warren
United States Senator

Cory A. Booker
United States Senator

Patty Murray
United States Senator

Richard J. Durbin
United States Senator

Maria Cantwell
United States Senator

Jeff Merkley
United States Senator

Richard Blumenthal
United States Senator

United States Senate
WASHINGTON, DC 20510

June 21, 2017

The Honorable Jeff Sessions
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

We are writing to urge the Department of Justice (DOJ) to closely scrutinize AT&T's proposed acquisition of Time Warner. We have strong concerns that the combined company's unmatched control of popular content and the distribution of that content will lead to higher prices, fewer choices, and poorer quality services for Americans – substantial harms that cannot be remedied with unreliable, unenforceable, and time-limited behavioral conditions. Our constituents face significant and growing costs for telecommunications services.[1] Before initiating the next big wave of media consolidation, you must consider how the $85 billion deal will impact Americans' wallets, as well as their access to a wide-range of news and entertainment programming. Should you determine that the substantial harms to competition and consumers arising from the transaction outweigh the purported benefits, you should reject the proposed acquisition.

I. THE PROPOSED DEAL WOULD SUBSTANTIALLY LESSEN COMPETITION, RESULTING IN FEWER CHOICES AND HIGHER PRICES FOR CONSUMERS.

As the largest pay-TV provider in the nation, after acquiring DIRECTV in 2015, and the second largest mobile broadband provider, AT&T is one of the nation's leading distributors of content, with 135 million wireless subscribers and 25.5 million pay-TV subscribers.[2] Time Warner is one of the nation's largest media companies and owns high-rated programming, including HBO, TNT, TBS, CNN, and Warner Bros. Combining these behemoths would create a mega media conglomerate with both the incentive and the ability to favor its own content over that of other entertainment companies and to restrict competing video distributors from accessing that content, harming its competitors and ultimately consumers. While the companies have suggested that the proposed deal will result in certain consumer benefits, they have thus far failed to demonstrate that these purported benefits are either merger-specific or sufficient to outweigh the substantial harms of the deal.

[1] The average American household, which has two cell phones, one landline, and a video-internet bundle, spends approximately $2,700 per year on these services. Mark Cooper, *Overcharged and Underserved: How a Tight Oligopoly on Steroids Undermines Competition and Harms Consumers in Digital Communications Markets* (Consumer Federation of America & Public Knowledge 2016).
[2] AT&T, Inc., *Investor Briefing*, Q4 2016, 4, 13 (Jan. 25, 2017).

A. AT&T-Time Warner could favor its own programming and unfairly discriminate against that of other TV and entertainment companies.

A combined AT&T-Time Warner would have both the ability and the incentive to increase viewership of its newly acquired content by restricting AT&T subscribers' access to other content or otherwise prioritizing its own. From forcing its customers to buy bigger bundles of Time Warner's programming to foreclosing rival content creators' access to AT&T customers, AT&T-Time Warner could engage in a wide variety of behaviors that would harm competition in the media market.

i. *Premium Channels Market*

AT&T-Time Warner could prioritize Time Warner content, including HBO, over HBO's competitors in the premium channels market, such as Starz and Showtime. While premium channels are working to reach subscribers through over the top (OTT) services, many Americans still access premium channels by selecting them when they purchase or update their pay-TV service, such as AT&T-owned DIRECTV. Because AT&T-Time Warner would have an incentive to drive subscribers to HBO, the combined company could choose to not market, market less vigorously, or otherwise harm its premium channel competitors during the DIRECTV sign-up process, which AT&T controls. As a result, Starz and Showtime could face a significant decrease in new subscriptions from AT&T-DIRECTV subscribers, which would limit their power in the premium channels market and leave room for HBO to dominate, ultimately restricting consumers' choice. And as AT&T-Time Warner is further enriched by HBO's dominance of the premium channels market, it will have greater ability to raise HBO prices for its own AT&T-DIRECTV subscribers, as well as for competing distributors. It could also use this bargaining leverage to negotiate lower payments for inputs, such as the creative talent necessary to produce high-quality programming.

ii. *Net Neutrality*

AT&T-Time Warner could also expand its discriminatory treatment of content under its Sponsored Data zero-rating program, whereby AT&T offers its wireless customers access to certain sites or services without such data usage counting towards their monthly data cap. Zero-rating programs can be anticompetitive if providers offer special treatment of certain content without meaningfully offering the same treatment to other content creators. AT&T currently only offers its customers zero-rated treatment of its own DIRECTV OTT product, DIRECTV Now, although the company claims that participation in the program is offered at a similar rate to other interested content providers.[3] However, that suggestion ignores the reality that the cost of participation has a different financial impact on AT&T-owned DIRECTV than on competing streaming services, because AT&T is merely paying itself that price and shifting the supposed costs from one subsidiary to another.[4] If competitors to DIRECTV Now, including more

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[3] AT&T, Inc., White Paper on Sponsored Data 3 (Nov. 21, 2016).

[4] In December of last year, the Federal Communications Commission (FCC) found that in order for DIRECTV Now competitors to participate in the Sponsored Data program they would have to pay AT&T a rate so high "that it would make it very difficult, if not infeasible, to offer a competitively-priced service" while AT&T would incur no such cost by zero-rating its own DIRECTV Now service. Ultimately, the FCC determined the program was anticompetitive, anti-consumer, and violated the principles of net neutrality. Letter from Jon Wilkins, Wireless

traditional streaming services like Netflix and Amazon Prime, as well as newer live TV OTT services like Sling TV and Sony VUE, choose to pay for equal treatment, they would be forced to raise their monthly user rates to make up for the cost of participation, thus forcing their users to foot the bill for the AT&T subscribers' data.

Should a combined AT&T-Time Warner expand its Sponsored Data program and zero-rate Time Warner content, these anticompetitive problems would be exacerbated. By offering popular HBO programming "free" from data charges under an arbitrarily low data cap, AT&T could capture subscribers from competing wireless providers, and DIRECTV Now could capture users from competing streaming services that can't financially justify participation in the Sponsored Data program. Ultimately, AT&T could expand its power in both the mobile broadband and OTT markets and foreclose competition from OTT startups that can't afford to compete on such discriminatory terms.

Furthermore, the combined AT&T-Time Warner would have the incentive to engage in anticompetitive behavior that would violate the principles of net neutrality in a wide variety of ways. For example, the combined company could expand its use of significantly lower data caps and additional fees on its subscribers who use competing streaming services as their primary source of television – a practice that AT&T is already known for aggressively employing.[5] It could also create discriminatory charges to disadvantage content companies that compete with Time Warner for providing sufficient internet bandwidth to enable high-quality video distribution. These practices would leave AT&T subscribers paying extra for streaming services that compete with DIRECTV Now and may ultimately result in fewer options for OTT programming.

iii. *Free Flow of Information*

Finally, allowing one giant company like a combined AT&T-Time Warner to control the content available to Americans would threaten the basic principles of our democracy, especially given Time Warner's ownership of key information sources like CNN. With both the incentive and the ability to direct consumers to Time Warner-owned content, AT&T-Time Warner could restrict its subscribers' access to alternative viewpoints, such as those offered by competing news outlets like Fox, MSNBC, or Breitbart. As a result, the free flow of information that our democracy relies on would be stymied.

B. AT&T-Time Warner could restrict other video distributors' ability to offer Time Warner content.

A combined AT&T-Time Warner would also have both the ability and the incentive to restrict its competitors in the video distribution market, including both traditional pay-TV providers and OTT services, from offering Time Warner's highly desirable content. As AT&T-

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Telecomm. Bureau Chief, Fed. Commc'n Comm'n, to Robert W. Quinn, Senior Executive Vice President, AT&T, Inc. (Dec. 1, 2016) *available* at https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7575775/Letter_to_R._Quinn_12.1.16.0.pdf.

[5] Letter from Harold Feld, Legal Director, Public Knowledge, & Sascha Meinrath, Director, New America Foundation's Open Technology Initiative, to Sharon Gillet, Chief Wireline Competition Bureau, Fed. Commc'n Comm'n (May 6, 2011) *available* at https://www.publicknowledge.org/documents/letter-to-fcc-on-att-data-caps.

Time Warner restricts access to or raises the prices for its content, competition in the already highly concentrated pay-TV market will decrease even more, and consumers will face fewer options and higher prices for video services.

i. *Over the Top Market*

Any efforts by a combined AT&T-Time Warner to restrict access to its content could have a significant impact on the growing, but fragile, OTT market. With control of both the DIRECTV and Time Warner content and apps, and in order to favor DIRECTV, AT&T-Time Warner could withhold access entirely or substantially raise prices of its programming for competing distribution platforms, such as Roku and Amazon Fire, as well as OTT services like Hulu, Netflix, and Sling TV. Start-ups could be foreclosed from entering the OTT market altogether. As Americans switch to AT&T for lower-priced access to Time Warner content, the combined company would have less incentive to innovate and develop new offerings of their own, and consumers, who face increasingly high cable bills, will have fewer options if they cut the cord.

ii. *Traditional Pay-TV Providers*

With ownership of Time Warner's content, the combined company would also gain substantial bargaining leverage when negotiating content carriage with traditional pay-TV providers, including Comcast, Charter, and DISH, as well as smaller cable providers that already have limited negotiating power. AT&T-Time Warner could raise rates for Time Warner programming, which would ultimately be passed on to its competitors' subscribers. It could also more aggressively pursue anticompetitive bundling strategies, forcing competing providers, as well as their subscribers, to accept more of Time Warner's content than they may desire in order to access popular networks like HBO or CNN. AT&T-Time Warner could use such tactics to ultimately expand its power in the pay-TV market. And if competing distributors are forced to pay more for Time Warner content, they will have less buying power to support independent programmers, and consumers will have less access to a wide range of entertainment and news programming.

iii. *AT&T-Time Warner's National Footprint*

AT&T and Time Warner have repeatedly stated that the combined company would have no incentive to restrict or foreclose access to its newly acquired content,[6] but we question the credibility of this claim. We agree that under normal circumstances, merging video distributors and content creators would maintain an incentive to maximize viewership of their jointly controlled programming. In the case of Comcast-NBCUniversal, for example, the combined company has some incentive to seek carriage of its content by rival distributors because of the

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[6] Letter from Timothy P. McKone, Exec. Vice President, AT&T, Inc., & Steve Vest, Senior Vice President, Time Warner, Inc., to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley *available* at https://www.franken.senate.gov/files/documents/170217ATTTimeWarnerResponse.pdf.Letter from Timothy P.; *Examining the Competitive Impact of the AT&T-Time Warner Transaction Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm.* On the Judiciary, 114th Cong. (2016) (statement of Randall Stephenson, Chairman, CEO, & President, AT&T).

limits of Comcast's distribution footprint. But AT&T's reach is far greater: DIRECTV's nationwide satellite service coupled with AT&T's nationwide wireless footprint would ensure that Time Warner content could pass through nearly every home in America even if the combined company decided to offer it exclusively and deny it entirely to rival distributors. While restricting competitors' access to its content may reduce Time Warner viewership initially, any short term losses in viewership could be recouped in the form of higher prices for Time Warner content among its competitors and its own customers or through increased power in the pay-TV market.

C. The companies have failed to demonstrate that the efficiencies arising from the deal are merger-specific or sufficient to outweigh the substantial harms to competition and consumers caused by the deal.

AT&T and Time Warner have suggested that the proposed deal will result in a number of benefits, but they have thus far failed to demonstrate that the purported benefits either are merger-specific or would outweigh the substantial harms described above. In particular, the companies have highlighted the reduction of "bargaining friction" that they say the deal will allow.[7] Through the elimination of certain negotiations between AT&T and Time Warner, the companies suggest that the deal will allow them to "generate additional innovative ways for consumers to experience video anywhere and anytime, with greater levels of customization and interactivity", including interactive methods of viewing live events, more relevant advertising in video services, and social media sharing opportunities.[8] It is currently unclear, however, why the proposed transaction – as opposed to a contract between the two companies in their current capacities – is necessary to achieve such goals. As demonstrated by AT&T's current offering of free HBO as part of its Unlimited Plus wireless plan, the companies already enjoy a strong working relationship – one where contract negotiations have thus far not prevented them from collaborating in mobile video distribution.

Furthermore, while the companies assure us that the proposed innovations will result in "better value" for consumers, they are silent with respect to whether a reduction in bargaining friction will be passed on to consumers in the form of lower prices for video services. As customers of both AT&T and competing video distributors face higher prices and fewer choices for programming as a result of this deal, we believe that any proposed benefits should speak to how those harms would be counteracted by lower prices for other content or services.

II. BEHAVIORAL CONDITIONS ARE INSUFFICIENT TO ADDRESS THE SUBSTANTIAL HARMS THAT THE PROPOSED DEAL WOULD CAUSE.

In 2011, the Antitrust Division recognized that "conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers," but it also warned that "no matter what type of conduct remedy is considered, however, a remedy is not effective if it

[7] Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.
[8] *Id.*

cannot be enforced."[9] After reviewing conditions placed on the Comcast-NBCUniversal deal, we believe that the demonstrated lack of enforceability and reliability of such conditions have rendered them insufficient as remedies for deals of this nature. Furthermore, we are strongly concerned about how such conditions would be enforced given the lack of oversight of the deal by the Federal Communications Commission (FCC) and the uncertainty surrounding the future of the Open Internet Order.

While the individual facts of each proposed deal require separate analysis, analogous past deals should provide insight into whether behavioral conditions are successful in remedying competitive harms that these deals pose. Like the deal at issue today, Comcast's 2011 acquisition of NBCUniversal raised concerns that the combined company would have strong incentives to favor its own programming over others and restrict its competitors in the pay-TV market from accessing its programming. Acknowledging these concerns, the DOJ and FCC imposed a number of behavioral conditions on that deal – conditions that Comcast-NBCUniversal has since been accused of repeatedly violating.[10] Enforcement of the conditions proved to be an expensive and lengthy process, allowing Comcast's anticompetitive behavior to persist largely unchecked.

AT&T itself has a similarly troubling track record when it comes to compliance with its past promises. Almost immediately after acquiring DIRECTV in 2015, the company hiked prices and cited rising programming costs as a factor, despite having told regulators that the merger would help it keep those programming costs in check.[11] There have also been accusations that AT&T has failed to meet commitments it made to meet broadband deployment goals when it combined BellSouth, Cingular Wireless, and the legacy AT&T long distance company to form the current company over a decade ago.[12] And most recently, DOJ sued DIRECTV when the pay-TV provider "orchestrated a series of information exchanges with direct competitors that ultimately made consumers less likely to be able to watch their hometown team."[13] AT&T's history of going back on its public promises and engaging in anticompetitive behavior demonstrates that the company cannot be relied on to abide by any commitments made in furtherance of its proposal.

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[9] Jon Sallet, Deputy Assistant Att'y Gen., Dep't of Justice, Remarks at the American Bar Association Fall Forum: The Interesting Case of the Vertical Merger (Nov. 17, 2016).

[10] Comcast favored its own programming by keeping its newly acquired MSNBC and CNBC in a TV channel lineup "neighborhood" of news networks while relegating Bloomberg News to an undesirable location. The FCC sanctioned Comcast for failing to deliver on promises regarding affordable standalone broadband offerings. It was also accused of violating its commitments on local news, racial diversity in programming, and online video distribution. *See* Eriq Gardner, *FCC Orders Comcast to Put Bloomberg TV Alongside Other News Channels*, Hollywood Reporter, Sep. 27, 2013, *available* at http://www.hollywoodreporter.com/thr-esq/fcc-orders-comcast-put-bloomberg-638226; Cynthia Littleton, *Byron Allen Accuses Comcast, FCC of Violating NBCUniversal Merger Conditions*, Variety, Mar. 28, 2016, *available* at http://variety.com/2016/tv/news/byron-allen-fcc-discrimination-petition-1201740110/.

[11] Karl Bode, *Now Merged, AT&T and DirecTV Raise TV Rates in Perfect Unison*, DSLREPORTS, Dec. 17, 2015, *available* at https://www.dslreports.com/shownews/Now-Merged-ATT-and-DirecTV-Raise-TV-Rates-in-Perfect-Unison-135907.

[12] *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, HUFFINGTON POST, Nov. 18, 2012, available at http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html.

[13] David Lieberman, *Justice Department Settles Suit Over DirecTV's Effort To Keep Dodgers Games Dark – Update*, Deadline, Mar. 23, 2017, *available* at http://deadline.com/2017/03/justice-department-sues-directv-conspiracy-keep-los-angeles-dodgers-games-dark-1201846950/.

Finally, we question how the DOJ will enforce many of the potential behavioral conditions that could be placed on the deal without the assistance of the FCC. AT&T and Time Warner have suggested that one major consumer benefit of the acquisition is that it will strengthen their incentives to invest in the deployment of wireless broadband.[14] It is unclear, however, how this benefit would counteract the harms to competition created by this deal, and how the DOJ would hold a communications provider accountable for such a commitment should the Department make it legally binding. Therefore, we question whether it is appropriate for the Antitrust Division to consider these stated benefits of the deal – and whether they outweigh the substantial harms – if there is no way to ensure that the combined company actually acts to achieve such benefits.

In sum, while we cannot possibly predict all the harms that could arise from this deal, we maintain that AT&T's proposed acquisition of Time Warner would result in higher prices, fewer choices, and worse service for consumers – consequences that we believe cannot be remedied by unenforceable behavioral conditions. As the DOJ finalizes its review of the transaction, we call on you to defend American competition and innovation and ensure that Americans have open and affordable access to communications services, as well as a wide range of programming. We hope you'll take a stand for U.S. consumers and businesses and closely scrutinize the transaction. Should you determine that the substantial harms arising from the transaction outweigh the purported benefits, we urge you to reject it. As always, thank you for your attention to this matter.

Sincerely,

Al Franken
United States Senator

Edward J. Markey
United States Senator

Elizabeth Warren
United States Senator

Ron Wyden
United States Senator

[14] Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.

Richard Blumenthal
United States Senator

Jeffrey A. Merkley
United States Senator

Bernard Sanders
United States Senator

Maria Cantwell
United States Senator

Sherrod Brown
United States Senator

Tammy Baldwin
United States Senator

Cory A. Booker
United States Senator

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http://blumenthal.senate.gov

September 27, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

I write to express my vehement opposition to Sinclair Broadcast Group's (Sinclair) proposal to acquire Tribune Media. As Chairman of the Federal Communications Commission (FCC or "the Commission"), you have a duty to review whether this transaction complies with FCC's broadcast media ownership rules, and serves the public interest by promoting localism and diversity. This transaction clearly fails on both accounts. If approved, this transaction would decidedly harm the public's ability to access truly local news and the autonomy of broadcasters to generate and air programming that is responsive to the needs and interests of their local community. Blessing such a media behemoth would reflect an abject failure on your part to protect the public interest and to uphold FCC's duty to promote localism and diversity.

Creating a media conglomerate such as Sinclair-Tribune would give a single company, Sinclair, undue influence over the public. That's because companies like Sinclair keep a short leash on broadcasters they own or operate, choosing what and how events are covered, if they are even covered at all. With this proposed transaction, Sinclair threatens to strangle whatever remaining localism remains in our communities. With its outsourced news and distant ownership, Sinclair would reduce the number of independent voices in each of these markets and sharply reduce the number of local journalists and reporters. Every market impacted by this mega-merger would experience a reduction in responsive local news due to Sinclair's unresponsive top-down approach – denigrating diversity, diminishing our already distorted civic discourse, and devaluing the local voices of women and people of color.

Our communities are diverse, vibrant, and engaged, but that is not reflected when in-depth coverage of local civic and cultural affairs disappear, when minorities aren't covered for their contributions to the community, and when you flip from one channel to another and the anchors are reading the same exact script. Americans value choice and they will lose the ability to choose between different voices and viewpoints when they watch local news if this merger is approved.

In the United States, the airwaves belong to the American people. The FCC is charged with making sure those airwaves are being used to serve the public interest by enriching the

marketplace of ideas, promoting democracy and civic engagement. The FCC's media ownership rules have long sought to promote a marketplace where broadcast stations, "respond to the unique concerns and interests of the audiences within the stations' respective service areas."[1] Despite the proliferation of news and information online in the digital age, communities across the country rely on their broadcasters for local news, weather, and emergency alerts. According to Pew Research Center, "Local TV news still garners more viewers on average than cable and network news programs."[2]

Following your confirmation hearing, I asked you what localism means to you. You wrote, "A broadcast station advances localism when it airs programming that is responsive to the needs and interests of the community which it is licensed to serve."[3] However, the Sinclair-Tribune proposal directly undermines this pillar of the FCC's mission – even by your own definition.

As employees from the KOMO broadcast station in Seattle, Washington would tell you, since the station's acquisition in 2013 by Sinclair, the station has suffered alarming new restrictions in its ability to deliver quality local news for its community.[4] Like all Sinclair-owned stations, KOMO is required to air centrally produced video segments known as "must runs," including a daily segment from a "Terrorism Alert Desk" and a segment titled "The Point" by one of Sinclair's corporate executives, Mark Hyman. Since announcing its intention to acquire Tribune, Sinclair has in fact ramped up its requirements that its stations run such national cookie-cutter content. Airtime for political commentary by Boris Epshteyn – a former Trump White House official – was recently tripled, and can now be viewed on all Sinclair stations nationwide nine times a week.

Sinclair has exhibited a regular pattern of imposing national demands on local stations, dating back to at least 2004, when Sinclair ordered a majority of its stations to air a documentary on the presidential candidate John Kerry during prime-time hours.[5] That year, Sinclair also directed stations to block the broadcast of an NBC "Nightline" episode about soldiers killed in the Iraq war – overriding the independence of local stations to make their own judgment call.[6]

Regardless of the merits or shortcomings of this programming, the plain effect of making any such demands on local stations is that available airtime for true local news is squeezed out and a station's ability to be attentive to local needs is subverted. In fact, the FCC's own research

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[1] *Broadcast Localism,* MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd at 1327, ¶ 6.
[2] Matsa, K. (2017 July 13). Local TV News Fact Sheet. *Pew Research Center; Journalism & Media.* Retrieved from http://www.journalism.org/fact-sheet/local-tv-news/
[3] 2017 07 31 Pai QFR Response to Senator Blumenthal
[4] Ember, S. (2017 May 12). Sinclair Requires TV Stations to Air Segments That Tilt to the Right. *New York Times.* Retrieved from https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html
[5] Farhi, P. (2004 October 11). Sinclair Stations to Air Anti-Kerry Documentary. *The Washington Post.* Retrieved from http://www.washingtonpost.com/wp-dyn/articles/A22788-2004Oct10.html
[6] Heffter, E. (2013 April 12). Sinclair known for conservative political tilt. *The Seattle Times.* http://www.seattletimes.com/business/sinclair-known-for-conservative-political-tilt/

has demonstrated what Americans have long known intuitively—locally owned broadcast stations provide more local and community news than non-locally owned stations.[7]

Orders to air certain national content, without affording broadcasters the liberty to consider the needs of the local community, are antithetical to the promotion of localism. It is vital that the FCC act assertively to protect broadcasters' ability to be responsive to the real needs of their local community, and not just the personal interests of executives in their corporate headquarters. For this reason, scrutinizing Sinclair's business practices and "must run" requirements and how they threaten the FCC's and broadcasters' core values of localism should be of highest relevance to the Commission's review of this transaction.

News that Tribune stations WCCT and WTIC (FOX61) in the Hartford-New Haven market may be acquired by Sinclair has been met with immense alarm in Connecticut. Sinclair is known for cutting the local newsroom staff and relocating resources and all authority to corporate headquarters after buying a station. Just after acquiring Seattle's KOMO and Portland, Oregon's KATU in 2013, Sinclair fired nearly 30 employees in these local newsrooms.[8] For Sinclair-owned stations, the average number of employees per station has declined, dropping by 10 to 20 percent since 2001. Such reductions in local newsroom staff directly reduce a station's ability to produce quality local content. Sinclair has also eliminated many local meteorologists, choosing instead to air weather reports from corporate headquarters. As reported in the *New Haven Register*, Sinclair's acquisition of the Tribune stations in the Hartford-New Haven market "could send familiar faces packing."[9]

Sinclair's proposal clearly violates existing caps on how many stations one company is allowed to own and presumes your agency will lift these limits prior to allowing the transaction. This is an arrogant approach to your agency, the Communications Act, and the rule of law. This transaction not only blatantly violates existing rules, it also violate several FCC policies that were just recently scrapped under your watch. You resurrected the illogical and wildly out-of-date UHF discount just this year, allowing Sinclair to more easily purport to comply with congressionally mandated limits on TV station groups' nationwide audience reach. This action can only be explained by your interest in prioritizing the outlandish demands of Sinclair over the public interest.

The sheer size of this transaction creates glaring violations of statute and of current FCC rules. If approved, the combined Sinclair-Tribune company would have as many as 233 local television stations and would be the largest television broadcast company in the United States, covering 72 percent of U.S. households across 108 markets, including 39 of the top 50. This would give Sinclair access to a far larger share of U.S. households than any other television broadcaster. At a reach of 72 percent of U.S. households, the new Sinclair would dramatically

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[7] (2004 January 15). Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News. *Federal Communications Commission.* Retrieved from https://apps.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf

[8] Topper, J. et al. (2013 November 6). Something's happening to local news . *The Baltimore Sun.* Retrieved from http://www.baltimoresun.com/news/opinion/oped/bs-ed-sinclair-20131106-story.html

[9] Turmelle, L. (2017 May 8). Proposed Tribune acquisition could send familiar faces packing. *New Haven Register.* Retrieved from http://www.nhregister.com/business/article/Proposed-Tribune-acquisition-could-send-familiar-11315459.php

exceed the congressionally established national television ownership rules, which cap the reach of a single company's television stations at 39 percent of U.S. television households.

Even with your inexplicable decision to reinstate the UHF discount, which may not survive litigation, the combined company would still exceed the national cap by 6.5 percent. However, it is evident Sinclair pays little respect to such rules protecting the public's interest and views them merely as obstacles to be gamed. In fact, Sinclair's former CEO has said, "I'd like to have 80 percent of the country if I could get it. I'd like to have 90 percent."[10]

In addition, this transaction would violate the local television ownership rule, also known as the "duopoly rule," in at least ten markets where both Sinclair and Tribune currently own or operate stations. This rule limits common ownership of television stations serving the same geographic region, and regulates the type of stations and network affiliations that may be commonly held even when multiple ownership is allowed. Multiple ownership has been demonstrated to decrease local news programming. Instead of respecting the objectives of these rules, Sinclair deliberately and repeatedly skirted these rules in market after market by striking deals known as "sidecars" to control and operate stations it isn't allowed to directly own under current media ownership rules.

To be sure, the newly proposed transaction would violate the duopoly rule in ten or more markets, even without counting the new "sidecars" that this deal could create. But *de facto* control of multiple stations should be viewed as a clear violation of localism – whether or not these broadcasters hold all of the licenses or control some of the stations through such arrangements. In February 2014 comments filed with the FCC, the Department of Justice called out these agreements because they "often confer influence or control of one broadcast competitor over another" and said they warrant tougher regulations.[11] The DOJ recommended the FCC "scrutinize agreements on a case-by-case basis and take action where those agreements do not serve the public interest." In March 2014, the FCC's Media Bureau issued a public notice stating that it would closely scrutinize any proposed transaction that includes such "sidecar" agreements.

Under your leadership, the Media Bureau rescinded this well-considered guidance in February 2017. The obvious effect of this rescission was to reduce the level of scrutiny your agency would be required to apply to Sinclair's proposed transaction.

The FCC established media ownership rules for the express purpose of protecting and advancing localism and communities' access to such information. For the FCC to now approve the Sinclair-Tribune merger, in blatant violation of these long-regarded rules, would demonstrate an abject failure by the FCC to abide by its duty to uphold and promote localism.

---

[10] Potter, D. and Masta, K. (2014 March 26). A Boom in Acquisitions and Content Sharing Shapes Local TV News in 2013. *Pew Research Center; Journalism & Media.* Retrieved from http://www.journalism.org/2014/03/26/a-boom-in-acquisitions-and-content-sharing-shapes-local-tv-news-in-2013/

[11] Flint, J. (2014 February 21). Justice Department wants tougher oversight of local broadcasters. *Los Angels Times.* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-justice-department-broadcasters-20140221-story.html

Promoting localism is a value core to FCC's mission and also a thoroughly bipartisan value. That's why a collection of diverse conservative media outlets have also submitted filings urging you to deny the merger. In its filing, Newsmax wrote, "The level of media concentration proposed by this transaction will homogenize the content available to U.S. consumers, eliminate unique viewpoints and reduce press diversity, especially in the delivery of local news."[12]

As you know, the FCC's obligation to promote diversity and localism, and to ensure that broadcasters are responsive to the needs and interests of the local community, is enshrined in the Communications Act. You have a duty to uphold this obligation. The Sinclair/Tribune transaction poses a clear threat to local communities, which deeply value their access to independent local news. I urge you to deny Sinclair's proposal to acquire Tribune.

Sincerely,

Richard Blumenthal
United States Senate

[12] Ember, S. (2017 August 8). Sinclair Deal Draws Unlikely Opponent: Conservative News Media. *The New York Times.* Retrieved from https://www.nytimes.com/2017/08/08/business/media/sinclair-bid-to-acquire-tribune-media-draws-opposition.html

Public Knowledge

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Cable Broadband Providers: What Ever Happened to “The Customer is Always Right”?

By Kristine DeBry

June 06, 2017 Competition, Competition Policy

The concept that “The Customer is Always Right” has such resonance that it has been popular around the globe for more than 100 years, from Marshall Field’s department store in Chicago to Selfridge’s in London, and from the Ritz in Paris, whose motto was "*le client n'a jamais tort”* (the customer is never wrong) to the German "*der Kunde ist König*" (the customer is king) and the Japanese *"Okyakusama wa Kamisama desu"* (the customer is like a god).

Unfortunately, America’s large cable broadband providers seem to have forgotten this maxim. Worse yet -- from bloated programming bundles to antiquated set top boxes to misleading bills, the motto appears to be *caveat emptor* -- let the buyer beware.

Consider just a few aspects of the cable broadband experience, some of which are detailed in a recent Senate Report. Perhaps, for example, you are enticed by this **pricing offer** -- Charter’s bundled cable TV, internet, and phone, for **$89 per month**. But then, the next year your rates suddenly rise to **$109 per month**, and the following year, to **$129 per month**. These increases are buried in fine print and the price jumps come as a surprise.

You call to complain, but the **customer service** agent pushes back, and when you decide you are better off cutting off the service, he refuses -- and tries to sell you again. A Time Warner Cable training document literally instructs customer service representatives to "**do the opposite of what the customer is calling for.** If the customer is calling into cancel, your goal is not to cancel the services! And if the customer wants to lower the bill, you're going to try to avoid that, and perhaps even raise the bill!"

Finally, consider the truly absurd "**Protection Plans**." Most cable providers have some sort of optional insurance-type service that consumers can purchase to cover repair charges or failures, should they occur. For Comcast customers, this could be $5.95 per month, so **$71.40 a year**, to avoid the cost of the service call, which would be $37.15. Most customers who pay for it never use it, and if you assume there could be multiple service problems, this calls into question the quality of the provider and whether the customer should be bearing the burden of faulty service or installation at all. (These examples are just some of the consumer abuses, see more topics here.)

The "Customer is Always Right" maxim was perpetuated because it reflected a truth: in a competitive market, the seller that gives the customer what the customer wants will succeed and others will fail. But **there is not enough competition in cable broadband markets to force cable companies to focus on satisfying customer needs** as a path to beating the competition and "winning" the customer.

Two large providers -- Comcast and Charter -- control more than half of American cable broadband connections. And, since they operate in separate regions and do not compete against each other, **the majority of Americans have no choice of cable broadband provider**. According to the Federal Communication Commission's latest Broadband Progress Report (*see* Figure 4), three quarters of census blocks in the United States have at most one provider that offers a 25 Mbps broadband connection. Only about a third of Americans have a choice of two or more providers, less than 10 percent have a choice of three or more, and the picture gets worse as internet speeds increase.

No competition means no pressure to satisfy consumers with better prices and innovative products. Compare cable broadband to the **wireless phone market, where there are four competitors**. According to the Wall Street Journal, Verizon recently cut prices and added more data to its wireless plans to stop customers from fleeing to T-Mobile and Sprint, which offered unlimited data plans. Recall that T-Mobile attempted to merge with AT&T but was stopped by regulators. Instead of a merger, consumers got an innovative competitor. T-Mobile pushed the

market by ending two-year contracts and cancelling overage fees. Furthermore, in this competitive market, **prices for wireless phone service were down 11 percent** in March 2017 from the previous year, and down 7 percent from the previous month. Four competitors is still not very many, and the wireless industry has its own problems, but even a little competition helps.

And, if you thought you could leave cable programming behind and rely on over-the-top internet to stream programming to your screen, that may be wishful thinking. Cutting the cord can actually be more expensive than an internet and TV bundle. For example, Comcast's 100Mbps standalone internet service is about $85 per month and the same internet speed with 100 channels is about $75 a month. Needless to say, consumers expect that if they want to get *less* service, they should pay *less*. One of the explanations behind the high cost of standalone internet is that consumers are being overcharged. Based on this study, consumers are probably overpaying by at least $20 per month for standalone service.

Consumers are clamoring for plain broadband service so they can save money and choose only the programming they want by streaming it through services like Netflix, Amazon, Hulu and so many others. Comcast's pricing scheme shows an attempt to discourage that behavior and thwart the development of a competitive market for broadband and programming. According to a Pew Research Center study, 15 percent of Americans are now "cord cutters" adding to 9 percent who are "cord nevers" -- those who have never subscribed to cable or satellite TV. The market is evolving and so should providers.

Clearly consumers are clamoring for more choice at lower prices, but the cable broadband monopoly has no incentive to deliver. Instead, cable companies are dragging their heals, hoping consumers just give up. The only answer is competition. We need policymakers to change the rules of the road to put consumers in the driver's seat.

COMCAST STANDALONE PRODUCT	PRICE	COMCAST BUNDLED PRODUCT	PRICE
"Performance Internet" standalone internet at up to 25Mbps	$74.95	"Internet Plus" internet at up to 25Mbps with 10 Channels	64.99
"Performance Pro" standalone internet at up to 100Mbps	$84.95	"Internet Pro Plus" internet at up to 100 Mbps with 100 Channels	$74.99

(We’ve used the prices after the 12-month intro discount in the table above. It’s worth noting that there is a ton of fine print, fees, and a new undisclosed price after the 24th month for many of Comcast’s services, making cost and service comparisons maddeningly difficult for consumers.)

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GOP senator calls for tight scrut on AT&T's proposed Time Warne merger

BY ALI BRELAND - 06/27/17 02:00 PM EDT

4 SHARES

© Greg Nash

Sen. Susan Collins (R-Maine) told the Department of Justice on Monday that she wants closer scrutiny of AT&T's merger with Time Warner.

In a letter to acting Assistant Attorney General Andrew Finch, Collins expressed concern with a consolidation of power that could lead to "reduced programming choices and higher prices for consumers."

"The risk is real that the acquisition of such a prominent content producer by a distributor of AT&T's size could allow it to dramatically reduce consumer choice in favor of its new in-house brand," Collins wrote, noting that no other premium network like Showtime or Starz is also owned by distributors.

"I'm also concerned that this merger could encourage and enable AT&T and DirecTV to raise content costs to harm pay-TV competitors," she continued.
Collins is not the first lawmaker to voice this type of sentiment. Other members of Congress have also called on the federal government to look closely at the $85 billion deal.

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In a congressional hearing regarding the merger, Sen. Al Franken (D-Minn.) expressed skepticism at AT&T's argument that the merger will benefit consumers and lead to reduced costs to customers by expanded economies of scale.

Experts don't expect the merger to be blocked. Vertical mergers, like AT&T and Time Warner, are often less contested than horizontal ones like AT&T's proposed merger with T-Mobile, which the government stopped in 2011.

Makan Delrahim, the Trump-nominated antitrust chief at the Justice Department, hasn't given any hint on his thoughts about the merger, but his conservative track record suggests a tendency to shy away from intervening in markets.

TAGS SUSAN COLLINS AL FRANKEN

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imge. insights

OPEN INTERNET SURVEY

Key Findings

Methodology
IMGE, a Republican consulting firm based in Alexandria, Virginia, conducted a national survey of 1,502 registered voters between June 26-29, 2017 using a mix of online and landline telephone interviews. The margin of error is 2.5%.

Majority support net neutrality
"Do you support or oppose net neutrality?"

	All voters	Republicans	Trump voters
Support	50%	51%	48%
Oppose	16	15	17

Broad consensus the internet has improved under net neutrality

"Overall, do you think the internet has improved over the last few years?"

	All voters	Republicans	Trump voters
Yes	70%	71%	70%
No	20	21	21

Overwhelming support for net neutrality rules

"Companies like Comcast, AT&T, Charter/Time Warner Cable, and Verizon provide home internet access. Today those internet service providers are prohibited from slowing or blocking websites or video services like Netflix. Do you agree that it is necessary for internet service providers to continue to follow these rules?"

	All voters	Republicans	Trump voters
Agree	75%	72%	75%
Disagree	14	15	15

Voters like the internet the way it is under net neutrality
"Do you want the internet to be the internet or do you want the internet to be more like cable?"

	All voters	Republicans	Trump voters
Be the internet	79%	76%	78%
More like cable	9	10	9

Agreement that internet service is a utility and should be regulated like one under net neutrality
"Now I'm going to ask you about a series of statements that have been made in the debate over net neutrality. After each statement, please tell me if you strongly agree, somewhat agree, somewhat disagree, strongly disagree or have no opinion..."

"Internet service is a necessity like water or power at your home."

	All voters	Republicans	Trump voters
Total Agree	71%	72%	69%
Total Disagree	23	24	25

"Internet should be treated like any other utility such as gas or electric service."

	All voters	Republicans	Trump voters
Total Agree	53%	58%	58%
Total Disagree	30	28	28

<u>Near universal consensus in favor of principles of net neutrality</u>

"People should be able to access any websites they want on the internet, without any blocking, slowing down, or throttling by their internet service provider."

	All voters	Republicans	Trump voters
Total Agree	87%	90%	88%
Total Disagree	6	6	7

"Internet service providers should treat all websites and content equally."

	All voters	Republicans	Trump voters
Total Agree	86%	86%	86%
Total Disagree	7	9	9

<u>Voters reject changes to net neutrality that could empower the liberal media</u>

"Companies that own cable news networks like CNN and MSNBC should be allowed to control your access to conservative websites."

	All voters	Republicans	Trump voters
Total Agree	12%	12%	14%
Total Disagree	79	83	82

<u>Republicans agree with President Trump's position to block AT&T – Time Warner merger, break up Comcast</u>

"President Trump said during the campaign that he would block the AT&T – Time Warner merger. Do you agree or disagree with the President's position?"

	All voters	Republicans	Trump voters
Agree	42%	57%	60%
Disagree	33	20	18

"President Trump also said that we should 'break up Comcast'. Do you agree or disagree with the President's position?"

	All voters	Republicans	Trump voters
Agree	33%	47%	50%
Disagree	41	26	22

Voters concerned about how changes to net neutrality will impact small business
"More main street businesses are relying upon the internet to sell their services and goods. They typically have their own websites and use social media to advertise and boost their sales. How concerned would you be if companies like Comcast, AT&T and Verizon could discriminate against main street businesses on the internet?"

	All voters	Republicans	Trump voters
Total Concerned	79%	79%	80%
Total Not Concerned	15	16	15

"Do you agree that small businesses like local hardware stores and restaurants should have their websites run slower than bigger national chains that can afford to pay more for paid prioritization, or a fast lane?"

	All voters	Republicans	Trump voters
Total Agree	19%	24%	27%
Total Disagree	72	67	66

Voters strongly disapprove of ISP's selling private data, browser history to advertisers
"Recently Congress voted to allow internet service providers like Comcast and AT&T to sell your private data and browser history to advertisers and other companies. Do you approve or disapprove of this action?"

	All voters	Republicans	Trump voters
Total Approve	12%	15%	17%
Total Disapprove	83	81	80

"Cable companies are looking to find new revenue sources. Would you support or oppose their selling your personal data and browser history to advertisers - which would allow cable companies to charge websites like Netflix and Twitter more for access to their networks?"

	All voters	Republicans	Trump voters
Total Support	10%	12%	15%
Total Oppose	86	83	82

(/multimedia/image/att-time-warnerjpg/)

DOJ must carefully review AT&T-Time Warner merger

Jeff Sessions' Justice must weigh the scales

By Jenny Beth Martin (/staff/jenny-beth-martin/) -
Thursday, September 21, 2017

ANALYSIS/OPINION:

For good reason, Americans are distrustful of the consolidation of power - and it matters little whether that concentration of power occurs in government or in the private sector. Corporate monopolies are just as insidious to Americans as all-too-powerful government, and the two each pose a threat to individual liberty.

The potential merger of AT&T and Time Warner is exactly the type of consolidation of corporate power that makes Americans uncomfortable.

AT&T announced last year that it would purchase Time Warner for more than $85 billion, and since then, the response from politicians and everyday Americans has been one of concern about the sheer magnitude of this giant media conglomeration.

Already two of the largest media corporations in the United States, AT&T and Time Warner have immense control over what airs on television and how Americans consume content online. AT&T, which bought satellite giant DirecTV in 2015, is the largest pay-TV provider in the nation. It is also the country's third-largest wired Internet provider, and the second largest cell phone company. Time Warner, meanwhile, owns HBO, the

second-biggest movie studio, and top cable networks such as TBS and TNT.

Politicians across the entire spectrum have voiced a variety of concerns about the proposed merger, and have raised valid questions about the merger's potential impact on the market, on consumer access, and even on democracy.

Then-candidate Donald Trump announced his opposition to the proposed merger last year "because [the merger puts] too much concentration of power in the hands of too few." That concentration of power in too few hands is particularly pernicious when it comes to something as foundational to our democracy as access to news.

Politicians have also raised a red flag about limiting competition. Sens. Mike Lee and Amy Klobuchar, who head up the Senate Judiciary Committee's antitrust subcommittee, have spoken out about the need to review this potential merger. In a joint letter, the two senators pointed out that as a result of the merger, "… AT&T would be both a distributor of and competitor to many content providers (HBO, for example, competes with premium channels such as STARZ and Showtime; CNN competes with MSNBC; and small independent content providers compete with Time Warner's content)."

In a hearing last December, Sen. Lee also posed the question of whether the merger would lead to diminished quality of offerings to consumers, an often-overlooked side effect of monopolistic conglomerations. As he noted: "The potential anticompetitive favoritism that the combined firm could bestow on its own products is not limited to price or access, but extends to the quality of the offerings as well."

The Department of Justice is currently reviewing the details of the proposed merger, but one of the more interesting aspects of this merger deal is that the Justice Department is operating without President Trump's nominee, Makan Delrahim, to serve as Assistant Attorney General for Antitrust. Mr. Delrahim, had he been confirmed this summer on schedule, would have served as overseer of the entire merger review.

The reason Mr. Delrahim has not yet started his work at the Justice Department comes down to one senator's efforts to block his confirmation. Massachusetts Sen. Elizabeth Warren is holding up Mr. Delrahim's nomination, in part, because she fears he would favor this potential merger between AT&T and Time Warner.

Americans understandably dislike monopolies, but we also have a profound distaste for dysfunction in government. The Democrats' playbook of blocking President Trump's nominees fully eight months into his presidency has devastating consequences for democracy.

Ms. Warren says she is blocking Delrahim's confirmation to thwart the merger of the two companies, but what she is actually doing is thwarting the will of the American people who elected Trump, and consequently want his nominees in their posts.

The merger between AT&T Time Warner remains unpopular. In fact, in a poll conducted by Civis Analytics (http://tfreedmanconsulting.com.routing.wpmanagedhost.com/wp-content/uploads/2017/08/Polling_Access-Memo_Final_20170802.pdf) in June, "64 percent of Americans, including 65 percent of Democrats, 64 percent of Republicans, and 63 percent of Independents" oppose the merger.

Mr. Lee has chosen to use his position on the subcommittee on antitrust to raise thoughtful questions about the potential perils and pitfalls of this merger. Ms. Warren, on the other hand, has used this merger to advance the Democrats' obstructionist agenda, undermining the election results by preventing President Trump from filling vital positions within his administration.

Americans have a dim view of Big Government, preferring, instead, that government retain a limited function. One of the essential roles that government should perform, however, is carefully reviewing giant mergers. Ms. Warren's blocking of Makan Delrahim serves nobody's interests, but showcases how dysfunction in our government is another threat to democracy.

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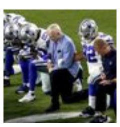

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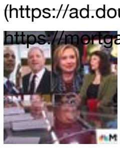
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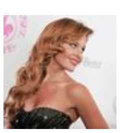
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Christians in Hollywood (/multimedia/collection/christians-hollywood/)

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

February 6, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Pai,

I write to provide comment on the proposed Federal Communications Commission (FCC) rule on "Promoting the Availability of Diverse and Independent Sources of Video Programming" released on September 29, 2016.[1]

Millions of Americans rely on their cable, satellite or telecommunications provider to watch entertainment, news and other programming. Given the importance of this industry, the Subcommittee undertook an investigation into potential anticompetitive behavior among distributors and networks. After reviewing confidential documents from many of the largest cable and satellite providers and conducting dozens of interviews with television distributors and networks alike, I found that unconditional most favored nation (MFN) clauses and overly restrictive alternative distribution method (ADM) clauses may be limiting the number of choices that consumers have for viewing and purchasing content.

If adopted, the FCC's proposed rule will prohibit certain types of MFN and ADM contract provisions as a means of removing "marketplace obstacles that may hinder independent programmers from reaching consumers."[2] Based on the Subcommittee's investigation, I believe that by limiting both unconditional MFN clauses and overly restrictive ADM clauses, the FCC's rule will succeed in removing these obstacles and facilitate competition in an industry increasingly dominated by only a few large companies.

I. Background

Cable, satellite and telecommunication television providers are collectively known as multichannel video programming distributors (MVPDs), and range in size from large companies such as Comcast and DirecTV, which have millions of subscribers, to local cable operators that may only have several thousand. Additionally, a growing number of Americans consume

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[1] Federal Communications Commission, Proposed Rule, *Promoting the Availability of Diverse and Independent Sources of Video Programming* (September 29, 2016) (FCC 16-129).

[2] Federal Communications Commission, Proposed Rule, *Promoting the Availability of Diverse and Independent Sources of Video Programming* (September 29, 2016) (FCC 16-129).

content that is distributed online, known as Over-the-Top (OTT) content, by online video distributors (OVDs). MVPDs do not generally produce the content that television viewers actually watch. Rather, MVPDs are the pipeline to viewers for content produced by separate companies. For example, movie and television studios hire producers, writers, and actors, among others, to develop programming.[3] Programming is protected by copyright, and content owners and producers sell the rights to use their content in exchange for financial compensation, typically referred to as a licensing fee or royalty.[4]

In 2012, there were seven companies that accounted for roughly 95% of all television viewing hours in the United States.[5] In addition to owning studios that develop content, all of these companies also own broadcast and cable networks that purchase the content. Each programming company frequently provides MVPDs with multiple networks. For instance, the Walt Disney Company (Disney) provides content from the ABC broadcast network, the ESPN sports network, and the Disney Channel entertainment network, among many others. Relatively rarer are "independent networks," which are not owned by or affiliated with a major broadcaster, MVPD, or media conglomerate company.

After licensing content from a variety of content creators, programmers aggregate the content into networks. Cable and broadcast network owners negotiate with distributors, including cable, satellite, and other types of distributors, regarding the distribution rights for the networks. MVPDs develop packages with multiple channels by negotiating with companies for carriage of their networks. When these negotiations are successful, the MVPD and the programmer agree to a multi-year television programming contract (also known as a carriage, affiliation, or retransmission agreement)[6] that outlines how much the MVPD will pay the network in order to carry the programming for each of the MVPDs subscribers (a "per subscriber rate" or "net effective rate").[7] Since each MVPD and programmer negotiate the terms of these contracts separately, the contracts include non-disclosure provisions and are considered

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[3] Government Accountability Office, *Video Marketplace, Competition is Evolving and Government Reporting Should Be Reevaluated* (June 2013) (GAO-13-576) (p. 2).

[4] Government Accountability Office, *Statutory Copyright Licensing, Implications of a Phaseout on Access to Television Programming and Consumer Prices are Unclear* (November 2011) (GAO-12-75) (p. 4).

[5] The seven companies were: CBS, Discovery Communications, Disney, NBC Universal, News Corporation, Time Warner, and Viacom. Government Accountability Office, *Video Marketplace, Competition is Evolving and Government Reporting Should Be Reevaluated* (June 2013) (GAO-13-576) (p. 6-7).

[6] Retransmission agreements specifically refer to contracts for the carriage of local television broadcast stations, rather than cable networks.

[7] In some cases, particularly with respect to new untested networks, MVPDs may not pay to carry the network, or the programmer may pay the MVPD to carry the network so that the programmer can build an audience and generate advertising revenue.

confidential and extremely sensitive. Through its investigation, the Subcommittee had rare access to review these agreements.[8]

II. Growth in Online Content Availability

Over the past several years, companies have explored making video content, including programming traditionally provided via MVPD subscription services, available over the internet. OVDs vary in terms of their business models, including whether they provide access to content that has previously aired on networks, access to original content, access to real-time content that is offered on traditional television networks, or some combination of this programming.

While recent estimates of households subscribing to video services from MVPDs range as high as 89%, the growth in OTT content has posed a potential challenge to MVPD dominance.[9] To date, there has been an increase in the number of households that have stopped subscribing to MVPD-provided video services (referred to as "cord-cutters"), households that reduced their cable packages ("cord-shavers"), and households that have never subscribed to such services ("cord-nevers.")[10] Industry stakeholders differ regarding the extent to which consumers have replaced MVPD-provided video services with programming provided over the

[8] These agreements and other confidential MVPD and programmer documents provide the basis for findings and examples. Out of respect for the sensitivity of the information provided, these documents are identified as "Internal PSI documents."

[9] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015) (para. 135); "Although MVPDs have traditionally considered other MVPDs their foremost rivals, MVPDs increasingly see themselves competing with OVDs for viewers, subscription revenue, and advertising revenue." Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report (May 6, 2016) (para. 61);

[10] In 2015, the Pew Research Center reported that 15% of Americans surveyed had canceled paid cable or satellite service, and that many of these cord cutters stated that affordability, as well as the availability of content from the internet and other sources, were factors in their decision to cancel paid television service. Cord cutters, when combined with the percent of Americans surveyed who have never subscribed to cable or satellite service (9%), amount to 24% of Americans surveyed that do not receive cable or satellite service at home. Pew Research Center, *Home Broadband 2015* (December 21, 2015) (online at: http://www.pewinternet.org/2015/12/21/2015/Home-Broadband-2015/PDF) (p. 3, 7); *See also*, Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report (May 16, 2016) (para. 61).

internet.[11] Nonetheless, MVPDs have taken steps to address the competitive pressures introduced from OVDs, including providing their subscribers with access to online content through TV Everywhere platforms, and including contractual provisions that limit distribution of content over the internet.[12] To this end, MVPDs and programmers negotiate limits on the distribution of programming via the internet through ADM provisions.

III. Use of Most-Favored Nation Provisions

When networks and MVPDs negotiate the terms of program carriage, they typically include MFN provisions in their agreements. MFN provisions are used in a variety of industries, and are used by one party to promise that it will give the other party at least as favorable contractual terms as it gives any other counterparty.[13] For example, if a programmer and an MVPD sign an agreement that includes an MFN regarding the price of programming, then the programmer is restricted from offering another MVPD a lower price for the same programming. If it does so, it must offer the first MVPD the lower price as well.

MFN provisions vary with respect to their scope and the conditions under which they apply. For example, MFN provisions can be size-based, non-size-based, or by-name. Non-sized based MFNs are also known as universal MFNs because they prevent the programmer from offering any other distributor a better rate, regardless of the distributor's size. A programmer who signs an MFN with one MVPD must offer that MVPD the best rate it offers any other MVPD, regardless of any size discrepancies between MVPDs. In contrast, sized-based MFNs refer to restrictions that are determined by a minimum or a maximum number of subscribers. For example, a sized-based MFN could require that a programmer offer the MVPD the same rate it offers any other provider with an equal or fewer numbers of subscribers. On the other hand, a by-name provision would include or exclude the names of companies to which the MFN applies. An example of a by-name provision would be an MFN between a provider and an MVPD that specifically allowed one MVPD to license the provider's programming at a lower price than it was provided to the MVPD.[14]

[11] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015) (para. 215).

[12] TV Everywhere platforms are an additional service option provided with a traditional MVPD subscription. Using these services, MVPD subscribers can access certain movies and television shows online via a variety of devices including personal computers, mobile devices, and televisions. Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015) (fn. 22).

[13] Johnathan Baker and Judith Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Vol 27, No. 2 (Spring 2013).

[14] Internal PSI document.

An MFN provision can also specify which economic and non-economic terms in the agreement receive the MFN protection. For example, an economic MFN could apply to the per subscriber rate the MVPD pays the programmer, or to other economic provisions, such as the amount of volume discounts offered to the MVPD (agreements may offer a lower per subscriber rate as the number of subscribers served by the MVPD increases).

Non-economic terms of an MFN provision may cover "any material non-economic term, provision, covenant or consideration, that is more favorable to such third party than [to the signatory MVPD]....,"[15] though some contracts specifically outline which sections fall under the MFN provision. For example, a contract may indicate an MFN on terms related to packaging, advertising time, content, technology, systems, auditing rights, or distribution rights.[16] Of particular interest are the technology or ADM MFNs that specifically relate to the distribution of content over the internet. These MFNs control how content is distributed and to ensure that programmers do not distribute content through a third party unless the provider also has the same terms for distribution. Specific terms may include the amount of content, the file format, refresh rates, advertising rights, the number of subscriber profiles allowed to view content, and fast forward disabling.[17]

Finally, MFNs can be conditional or unconditional with respect to what steps the MVPD must take in order to benefit from an MFN offer. Conditional MFNs require that in order to receive the benefit of a lower rate or better term offered to a competitor, the MVPD must also accept any conditions tied to the offer of a better rate or term. For example, if a programmer offered another MVPD a reduced per subscriber rate conditioned on the programmer's network being offered on a better tier, or receiving some other material benefit, then the protected MVPD would have to match that term in order to receive the benefit of the reduced rate. On the other hand, an unconditional MFN does not require the protected MVPD to match any improved terms in order to receive the reduced rate offered to competitors.

A. MFNs Can Hinder Competition in Markets

Researchers and policymakers have noted that MFNs can provide benefits for markets, but have cautioned that these benefits should be weighed against the ways in which MFNs can hinder competition in markets.[18] With respect to market benefits, researchers have noted that MFNs may: 1) help address negotiating problems where one party benefits from delaying the transaction in order to receive an increased price; 2) lower prices in markets where a supplier can

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[15] Internal PSI document.

[16] Internal PSI document.

[17] Internal PSI document.

[18] MFNs may harm competition by facilitating coordination, decreasing incentives to bargain, raising rival company entrant costs, and increasing seller bargaining power. Jonathan Baker, American University Washington College of Law, *Presentation: Competitive Harm from MFNs: Economic Theories* (Sept. 10, 2012).

keep the prices they charge different buyers secret; and 3) provide brand protection by ensuring that programmers do not offer the same programming to another distributor at a drastically reduced rate.[19] Similarly, MVPDs and programmers have noted the benefits of MFNs in addressing negotiation problems and facilitating entry for some firms. For example, one large programmer noted that MFNs can give a level of comfort to distributors that are the first to pursue a new distribution outlet, technology, or method of doing business.[20] Another programmer stated that MFNs were initially used to provide some protection to MVPDs that were carrying new networks.[21] Additionally, MVPDs state that it can be difficult to determine the cost and value of new independent networks and how many subscribers will be gained based on concepts and business plans of unproven independent networks.[22] Thus, an MFN can protect MVPDs who take a risk on carrying the network by ensuring that competitors do not obtain more favorable terms once the network is launched.

Despite these supposed benefits, researchers and policymakers contend that MFNs can harm competition by: 1) excluding competitors and 2) facilitating collusion and reducing price competition. The result of such anti-competitive outcomes can be limited competition, increased prices, and limited innovation. While economic analyses and case law have supported the proposition that horizontal agreements between competitors can have anticompetitive effects; analyses of vertical agreements (such as MFNs between a buyer and a supplier) can be more complicated.[23] As such, it is important to understand the particular effect that MFNs may have on the market in the MVPD industry.

1. MVPDs Have Used MFNs and Affiliation Agreements to Exclude Potential Rivals in the Past

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[19] Smith Johnathan Baker and Judith Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Vol 27, No. 2 (Spring 2013); Bill Toth, *How Parallel Most Favored Nation Clauses in Television Industry Exclude Competitors and Stifle Innovation*, The Columbia Science and Technology Law Review (Fall 2013); Stephen Smith, *When Most Favored is Disfavored: A Counselor's Guide to MFNs*, Antitrust, Vol 27, No. 2 (Spring 2013).

[20] Permanent Subcommittee on Investigations, Interview of Disney Programming Distribution official (Oct. 20, 2015) (p. 9).

[21] Permanent Subcommittee on Investigations, Interview of Company Programming Distribution official (Oct. 15, 2015) (p. 3). The Subcommittee conducted dozens of interviews over the course of its investigation. Because of the sensitivity of MFNs in carriage negotiations, several companies requested that their participation in the investigation be kept confidential.

[22] Government Accountability Office, *Media Programming, Factors Influencing the Availability of Independent Programming in Televison and Programming Decisions in Radio* (March 2010) (GAO-10-369) (p. 20).

[23] Fiona Scott-Morton, *Contracts that Reference Rivals*, Department of Justice Presentation at Georgetown University Law Center Antitrust Seminar (April 5, 2012).

In the past, the Department of Justice (DOJ) has taken action to prevent cable companies from using MFNs in a manner that would exclude new entrants to the market. For example, in 1993, DOJ filed a complaint alleging that cable operators had used MFN clauses in their agreements with programmers to restrict market entry by new satellite competitors.[24] In this case, subsidiaries of the seven largest cable companies at the time, as well as other cable companies and a subsidiary of General Electric formed a joint venture partnership called Primestar to launch their own satellite service. DOJ alleged that this partnership was formed to raise barriers to entry by other satellite providers by "restraining the availability of partner-controlled or owned programming to possible entrants, discouraging other, non-defendant programmers from making their programming available to other [satellite] entrants ..., and facilitating a coordinated retaliatory response by the ... defendants to [satellite] entry by others." The defendant cable companies, in addition to being major cable service providers, also held companies that supplied popular cable programming, such as HBO, Showtime, Cinemax, MTV, BET, Nickelodeon, E! Entertainment, CNN, The Discovery Channel, and Lifetime. The partnership agreement between the joint venture companies included an MFN clause that required partner programmers to offer programming to Primestar at terms no less favorable than provided to other distributors, and to provide Primestar at least three years in which to accept the programming. Under the MFN, any partner in the joint venture that supplied programming to a new satellite provider would have had to notify all the other partners in the joint venture (thereby enabling a retaliatory response), as well as offer the same terms to Primestar. DOJ noted that due to the size of the cable companies involved in the joint venture (collectively controlling access to a majority of cable households), any cable programmer who provided programming to a satellite competitor "would do so only at the risk of coordinated retaliation from the [cable operator defendants]."

In 1994, DOJ and the defendants agreed to a consent decree that prevented the defendants from enforcing provisions of the partnership agreements that affected the availability or price of programming to any provider of subscription television, or from retaliating against any party that supplied programming to other providers of subscription television service. In response to concerns that cable companies would restrict satellite entrants' ability to access programming from cable-affiliated networks, FCC passed program access rules.[25]

2. MFNs Have Become Ubiquitous in MVPD Carriage Agreements, and Are Used By Large Programmers and Distributors

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[24] *United States v. Primestar Partners, L.P.*, 1994 U.S. Dist. LEXIS 14978 (S.D.N.Y. Apr. 4, 1994).

[25] Federal Communications Commission, *Commission Affirms Program Access Rule on Exclusive Contracts for Satellite Programming* (Docket 92-265) (Dec. 15, 1994).

Some researchers and industry representatives have found that MFNs can raise anticompetitive concerns when they are used by dominant firms, or they are widely used throughout an industry.[26] Both of these scenarios apply to the cable industry.

Today, the cable industry is both concentrated with respect to distribution, and with respect to development of programming.[27] In interviews with Subcommittee staff, representatives for programmers and MVPDs noted that MFN agreements have become ubiquitous in carriage agreements, particularly in agreements with large MVPDs.[28] Subcommittee staff confirmed this through reviews of non-public documents provided by MVPDs.[29] For example, two of the top MVPDs in terms of number of households served noted that most of their agreements with programmers include MFNs.[30] Specifically, one MVPD disclosed that 85% of its agreements contain one or more MFN provisions. The other MVPD identified MFN provisions in its agreements with at least 162 networks.[31] Most of these agreements included economic and non-economic provisions, including MFNs on the rate paid for the network. Based on the subcommittee's review of documents, MFNs were included in agreements with large programming groups, as well as smaller independent programmers; however, the ability to obtain MFNs may be dependent on the leverage of the MVPD. For example, representatives of smaller MVPDs told the Subcommittee that they are usually unable

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[26] Johnathan Baker and Judith Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions,* Antitrust, Vol 27, No. 2 (Spring 2013); Bill Toth, *How Parallel Most Favored Nation Clauses in Television Industry Exclude Competitors and stifle Innovation,* The Columbia Science and Technology Law Review (Fall 2013); Stephen Smith, *When Most Favored is Disfavored: A Counselor's Guide to MFNs,* Antitrust, Vol 27, No. 2 (Spring 2013).

[27] FCC estimated that approximately 38 percent of U.S. homes have access to at least four MVPDs. In its most recent annual report on competition, the FCC identified 94 national networks affiliated with the top six cable MVPDs (and 44 HD networks). In particular, Comcast had ownership interests in 52 national networks (24 in HD), Time Warner Cable had ownership interests in four national networks (two in HD), Cox had ownership interests in six national networks (three in HD), Bright House had ownership interests in 26 national networks (12 in HD) and DIRECTV had affiliation with six national networks (three in HD). Federal Communications Commission, "In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming," Seventeenth Report (May 6, 2016).

[28] Permanent Subcommittee on Investigations, Interviews of Officials from Multiple Programming Companies (Sept. 28, 2015; Oct. 8, 2015; Oct. 22, 2015).

[29] These documents included agreements and contracts that are rarely seen by the public due to their sensitive nature.

[30] Internal PSI Documents.

[31] Internal PSI Documents. The documents provided to the Subcommittee were partially redacted, so it is possible there are more agreements that contain MFN provisions.

to secure MFNs in their agreements with programmers.[32] Additionally, at least one programmer was also subject to unconditional MFNs in which the protected MVPD could receive the benefit of a reduced rate or better contract term without having to match any concessions that its competitors made in order to gain the more beneficial term.[33] Finally, some MFNs apply to MFN provisions themselves, meaning that if another MVPD receives a more beneficial MFN from a programmer, then the programmer must offer the better MFN to the protected MVPD.

3. MFNs and Affiliation Agreements May Reduce Competition in Video Distribution by Establishing Price Floors and Limiting Price Competition

Researchers and regulatory agencies have noted that MFNs can result in higher—not lower—prices, particularly if their use becomes ubiquitous in an industry, as it has in the cable industry.[34],

By requiring sellers to give the MFN-protected buyer the lowest price it offers to any buyer, an MFN discourages the seller from offering a discounted price to any other buyers. This can effectively set a price floor for the product.[35] The Subcommittee found that many MFN

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[32] Permanent Subcommittee on Investigations, Interview of Independent Telephone and Telecommunications Alliance member officials (Oct. 30, 2015). In addition, *see* Senate Judiciary Committee, *Hearing on The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond, American* Cable Association Testimony (113th Cong.) (June 24, 2014): "I would say from the other side as a smaller operators who often don't get MFN deals…when they negotiate with programmers and they sometimes try to ask for different types of deals -- creative deals, deals that might address their particular circumstances, programmers often tell them I can't do that. And the implication is it's because they will implicate MFN provisions that are in larger providers' deals."

[33] Permanent Subcommittee on Investigations, Interview of Company Programming Distribution official (Oct. 7, 2015) (p.2).

[34] Jonathan Baker, American University Washington College of Law, Presentation "Competitive Harm from MFNs:Economic Theories" (Sept. 10, 2012); Stephen Smith, *When Most Favored is Disfavored: A Counselor's Guide to MFNs,* Antitrust, Vol 27, No. 2 (Spring 2013); Bill Toth, *How Parallel Most Favored Nation Clauses in Television Industry Exclude Competitors and Stifle Innovation*, The Columbia Science and Technology Law Review (Fall 2013).

[35] For example, in a complaint filed against Delta Dental of Rhode Island, the DOJ alleged that Delta Dental, which served 35—40% of people with dental insurance in Rhode Island, had MFN agreements with about 90% of the state's practicing dentists, used MFNs to restrict dentists from lowering prices and from participating in other insurers' discounted plans. In this case, these agreements restricted the dentist from charging non-Delta Dental patients less than the fees established for Delta Dental patients. If the dentist did offer non-Delta Dental

provisions require networks to compare all deal terms and provide annual MFN certification letters to MVPDs that often include "give backs" based on new deals with other MVPDs. Through these certification letters, MFNs can effectively force networks to inform MVPDs about what their competitors are doing, as well as provide them additional concessions. The result has been called identical to collusion—except that MVPDs don't have to collude, since the MFNs require the programmers to perform that function for them. Additionally, MFN provisions can be enforced through the use of audits by third parties. The relatively small group of "independent auditors" used by multiple MVPDs may also provide "clues" and/or direction to another MVPD as to what their competitors are doing and on which networks to focus audit resources.[36]

Researchers have also noted that by using an MFN, sellers are committing to compete less aggressively since they are unable to offer discounts. Buyers may be less likely to bargain aggressively for two reasons: (1) they feel that the MFN protects them from paying more than their competitors and thus may be more willing to accept supra competitive prices; and (2) as the use of MFNs grows, a buyer is less likely to negotiate aggressively, since its competitors will receive any benefit it manages to obtain.[37] A former MVPD executive stressed the need to reevaluate the use of MFNs in the cable industry, stating that, "more often than not, the MFN results in inflated rates for content that might not otherwise survive in a free-market environment (yeah, you may be overpaying, but so is everyone else)."[38]

Despite the longstanding use of MFNs and the counterargument that these provisions keep programming costs down, MVPDs have repeatedly highlighted the increase in programming costs as one reason for the increasing cost of video subscription services.[39] In fact, in its assessment of competition in the cable industry, FCC cited data showing that MVPD

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patients services at lower prices, he or she would have to offer the same price for all Delta-Dental patients. Delta Dental of Rhode Island consented to a final judgement in which it agreed to refrain from using MFN clauses in their agreements with participating dentists. *U.S. v. Delta Dental of Rhode Island*, Civil Action No. CA 96 113(D.R.I. 1996).

[36] Internal PSI document.

[37] Bill Toth, *How Parallel Most Favored Nation Clauses in Television Industry Exclude Competitors and stifle Innovation*, The Columbia Science and Technology Law Review (Fall 2013); Johnathan Baker and Judith Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Vol 27, No. 2 (Spring 2013); Stephen Smith, *When Most Favored is Disfavored: A Counselor's Guide to MFNs*, Antitrust, Vol 27, No. 2 (Spring 2013).

[38] MFN Clause Favors No One in Carriage Negotiations.

[39] http://www.nbcnews.com/business/business-news/cable-satellite-tv-costs-will-climb-again-2016-n484531; Permanent Subcommittee on Investigations, Interview of Comcast official (March 26, 2015); Permanent Subcommittee on Investigations, Interview of TWC official (March 17, 2015); Permanent Subcommittee on Investigations, Interview of Charter official (March 13, 2015); Interview of DirecTV official (March 3, 2015); Permanent Subcommittee on Investigations, Interview of Dish official (March 16, 2015).

programming expenses as a percent of MVPD video revenue have risen from 34.6 percent in 2006, to 44.6 percent in 2013. FCC also reported that the average monthly price for basic cable service and expanded basic service increased 4.2% and 3.3% respectively, from 2013 to 2014.[40]

4. MFNs, Combined with the Use of Bundling Arrangements and Other Contract Provisions, May Inhibit Competition from Independent Programmers and Internet Distributors

Economists and industry representatives have found that MFNs may work to exclude smaller rivals and new entrants to the market, thereby limiting innovation that may benefit consumers. This may be exacerbated by other practices that are enforced through affiliation agreements between MVPDs and programmers, including channel bundling and restrictions on alternative distribution methods. In the carriage agreements the Subcommittee reviewed, MVPDs typically purchased a "bundle" of channels from larger programmers, which included popular "must-have" networks, as well as niche, new, or less popular networks.[41] Economists have argued that because an MVPD is purchasing multiple channels, they receive discounts on the "must-have" channel, and consumers gain a net benefit from a cheaper per-channel price than they would if channels were offered on a stand-alone basis.[42]

That said, MVPDs may react to the additional costs incurred from MFN-induced price floors, along with the requirement that they carry multiple niche networks, by limiting their carriage of or fees for independent programmers. One former MVPD executive stated that the "unspoken reality is that the MFN, coupled with the tying of services, is what keeps underperforming and unneeded networks in prime channel locations while struggling independents, with genuine grassroots followings, remain off air."[43] For example, in 2013, Cablevision sued Viacom for imposing substantially higher license fees (described in the

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[40] Federal communication Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015) (p. 57); Federal Communications Commission, "In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming," Seventeenth Report (May 6, 2016) (p. 30).

[41] Bill Toth, *How Parallel Most Favored Nation Clauses in Television Industry Exclude Competitors and stifle Innovation*, The Columbia Science and Technology Law Review (Fall 2013); Subcommittee Review of Affiliation Agreements.

[42] Gregory S. Crawford and Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Markets,* American Economic Review (2012).

[43] Ken Tolle, *MFN Clause Favors No One in Carriage Negotiations,* Television Week (March 17, 2008).

complaint as a 10-figure penalty) for its core networks (Nickelodeon, Comedy Central, BET, and MTV network) unless Cablevision agreed to carry a dozen other Viacom-owned networks.[44] In

the complaint, Cablevision stated, "Cablevision has identified other general programming networks that Cablevision would prefer to distribute in place of the Suite Networks, including new networks it has not carried in the past as well as HD versions of networks Cablevision already carries in SD. Viacom's tie-in, however, forecloses Cablevision from carrying such other general programming networks." Cablevision provides some examples of networks it has delayed launching due to the bundling arrangements required by Viacom, including an independent arts network, and networks targeted toward African Americans and older viewers.

Today, new and independent networks face challenges in financing high cost operations amid considerable uncertainty regarding whether they will secure carriage on enough MVPDs to be viable.[45] The Subcommittee found that even when independent channels manage to gain carriage on an MVPD's system, they tend to receive subscriber fees far below those received by channels that receive fewer viewers, but that are associated with a large media company, and may have been negotiated as part of a bundle. MFNs can limit independent networks and MVPDs in achieving optimal negotiated results. For instance, an independent network may be willing to accept a less penetrated tier of service for a higher subscriber fee—but an unconditional MFN will give other MVPDs the right to re-tier unilaterally without having to accept the condition of paying the accompanying higher fee. Conversely, a network may be willing to accept a more highly penetrated tier of service (*e.g.*, expanded basic) or a more favorable channel neighborhood at a lower rate, but an unconditional MFN will give other MVPDs the right to the lower rate without the other obligations.[46]

New networks, even from the largest programming conglomerates, often offer an extended "free" service for their channels to an MVPD in return for inclusion of the network in the MVPD's new OTT wireless package, as a promotional offering to drive viewership. However, when a small or independent network uses these tactics, large MVPDs can demand free service for all the platforms on their MVPD systems (*i.e.*, without providing the negotiated extensive wireless distribution) based on unconditional MFNs. Similarly, with an MFN in place, independent networks may not be able to agree to a period of free carriage for new OTT services

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[44] *Cablevision Systems Corp. v. Viacom Intl. Inc.* Civil Action No. 13 CIV 1278 (LTS) (JLC) (S.D.N.Y. 2014).

[45] Government Accountability Office, *Media Programming, Factors Influencing the Availability of Independent Programming in Televison and Programming Decisions in Radio* (March 2010) (GAO-10-369) (p. 20-21). According to a report cited by GAO, Fox News Network had invested over $150 million by the time it launched in 1996, but it was expected to lose up to $400 million in the next 5 years.

[46] Internal PSI document.

without MVPDs demanding that they receive free carriage for their primary (cable or satellite) services.[47]

With regard to the effect that MFNs have on rival distributors, representatives of smaller MVPDs told Subcommittee staff that they are often unable to obtain MFNs. For example, in testimony before the Senate Judiciary Committee on the AT&T-DirectTV merger, a representative from a trade association representing smaller MVPDs stated: "I would say from the other side as smaller operators who often don't get MFN deals…when they negotiate with programmers and they sometimes try to ask for different types of deals -- creative deals, deals that might address their particular circumstances, programmers often tell them 'I can't do that'. And the implication is it's because they will implicate MFN provisions that are in larger providers' deals." This statement conforms to the Subcommittee's review of MFNs, which often indicated that certain MFN provisions applied in situations in which the programmer was negotiating with smaller MVPDs.

5. MFN and ADM provisions may make it more difficult for new OTT providers to enter the market

Currently MVPDs consider OVDs to be competitors and may use MFNs and other contract terms to address this new avenue of competition. For example, during an audit of a programmer, an MVPD instructed the auditor to review the programmers' agreements with an OTT provider, as well as their agreements with traditional MVPDs, to determine whether the programmer had given any distributors a better deal in violation of the MFN.[48] In addition, the Subcommittee found emails in which MVPDs indicated concern about the potential for OTT distribution to compete with their product. For example, in one confidential email, an MVPD representative asks a programmer who is launching its own OTT service, "One question I forgot to ask is whether you plan to engage in a widespread marketing campaign for X? Since the product will potentially encourage cord cutting, it will be helpful for us to understand how it will be marketed and whether our customers are going to be encouraged to buy the product."[49] The Subcommittee also reviewed another confidential email that reinforced the potential for OVDs to disrupt the traditional cable market. In the email, an MVPD representative contacts a programmer regarding the decision of a third-party studio to sell content directly to Netflix, stating that "these kinds of deals will kill your [the programmer's] business," and indicating that the MVPD was considering dropping the network because, "the real issue is substitution. This

[47] Internal PSI document.

[48] During an audit of one programmer's agreements with competing services, the MVPD asked the auditor to review that programmer's agreements with an OVD provider. *See* Internal PSI Document.

[49] Internal PSI document.

kind of arrangement incents us to buy shows directly from [the studio] and forego the less efficient and likely much more expensive endeavor of buying the linear network at all."[50]

Many carriage agreements include ADM provisions that explicitly limit the ability of programmers to provide content to online distributors. For example, contracts may require the programmer to wait a certain amount of time before offering content via online distribution. However, in order for OTTs to become viable options for consumers seeking an alternative to traditional MVPD service, access to high-valued programming is important.[51] Based on our limited review it appeared that in some cases, independent and smaller programmers were subject to more stringent restrictions with respect to their ability to provide content to OVDs. For example, agreements between MVPDs and smaller programmers often include a "hold back" period that prohibits the programmer from offering content over the internet for periods ranging from three to twelve months after it airs on the MVPD's system, thereby eliminating the programmer's ability to offer its linear network in real-time via an OVD or its own website. Even after the hold-back period expires, the agreements often state that any content provided over the internet must not be branded or contain the logo of the network.[52] In addition, the Subcommittee found evidence of MVPDs contacting programmers to require that they not live-stream major events, although the programmers argued that this limited streaming fell within the bounds of the agreement.[53]

Additionally, programmers' incentive to provide content to OVDs is also somewhat constrained because programmers may have a vested interest in the traditional MVPD distribution model, particularly since this model has enabled programmers to package many networks onto households' cable packages.[54] For example, when Verizon announced a new TV package that would give consumers the option to purchase a slimmer base channel package and then choose among various additional "channel packs" (such as sports, kids, news, lifestyle), ESPN sued Verizon, claiming that putting the ESPN channel into an ad-on package, rather than the base package, violated its existing licensing agreement. According to press reports, radio and television channels owned by parent company Disney refused to air ads for the new Verizon

[50] Internal PSI documents.

[51] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report (May 6, 2016) (Para. 153).

[52] Permanent Subcommittee on Investigations, Interview of Company Programming Distribution representative (Oct. 19, 2015) (p.13).

[53] Internal PSI document.

[54] Government Accountability Office, Video Marketplace, Competition is Evolving and Government Reporting Should Be Reevaluated (June 2013) (GAO-13-576) (p. 7).

service.[55] At a recent conference, Disney's Chief Financial Officer noted the importance of bundling to the company, stating that that OVDs would have to buy the package of products Disney sells and offer a service that "looks very much like the existing MVPD offers." Indeed, SlingTV, which was the first OTT service to offer Disney-owned ESPN (commonly considered a must-have channel, and the most expensive channel on basic cable), also carries a number of other networks owned by Disney, such as ESPNU, Fusion, and FYI, among others. In fact, 21% of the channels provided on Sling TV are owned by Disney.

The net effect of MFNs and other contractual agreements, combined with MVPD and larger programmers' potential interest in maintaining a status quo, may make it difficult for OVD start-ups to offer a service that is substantially different in terms of price and packaging from traditional MVPD services, but still offers the benefits consumers may be attracted to. For example, the FCC cited reports that Intel abandoned efforts to launch an OTT linear service in large part due to the costs of obtaining programming.[56] The FCC noted that "content owners require content distributors to guarantee a minimum number of subscribers during a multi-year agreement, obligating the distributors to incur large fixed costs for content up front. Intel's CEO Brian Krzanich concurred that while Intel had good technology, as a start-up it lacked the scale to acquire content."[57]

Beyond price and channel availability, OTTs may struggle to gain access to other features important to consumers, such as the ability to record programming (which is not uniformly available on Sling's offered networks) or access Video on Demand. Despite these obstacles, on March 14, 2016, Sony launched the only linear OTT service (PlayStation Vue) that is not associated with a traditional MVPD (in contrast to Dish's Sling).[58] In addition, options such as recording programs and accessing content on demand are available. Sony offers three different packages, ranging in price from $29.99 to $49.99 per month (in addition to the cost of an internet connection capable of successfully delivering the service). While Sony provides an interesting

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[55] Dan Frankel, Verizon: Disney ad blackouts slowed growth of skinny bundle to 9Ksubs in Q2, FierceCable (July 22, 2015) (online at: http://www.fiercecable.com/story/verizon-disney-ad-blackouts-slowed-growth-skinny-bundle-9k-subs-q2/2015-07-22).

[56] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015).

[57] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report (April 2, 2015).

[58] However, it is worth noting that Sony owns the third-largest movie studio in the United States.

example of how an OTT may be able to compete with MVPDs, it is a relatively new service, and it appears that its efforts to offer an even more innovative product may have been constrained.[59]

IV. Conclusion

It is clear from the Subcommittee's review of how MFNs and ADM clauses affect video programming, that these provisions may be enforcing the status quo and preventing innovation and competition. While the Subcommittee did not specifically review all unconditional MFNs it is evident from our review that these provisions may be posing unreasonable restrictions on new and small companies hoping to enter the video programming market. Similarly, unreasonable ADM restrictions may be halting the progress that OTT providers have been making in securing rights to programming and creating products that would benefit consumers. The rule proposed by the FCC is a much-needed step that may help level the playing field for small and new programmers by removing one of the many obstacles they face in trying to enter the video programming market. I hope that the FCC considers the long-term effects that both of these contractual provisions will have on innovation in the video programming market and make a final decision that will benefit consumers and innovation alike.

If you have any questions related to this comment, please contact Jackson Eaton of the Subcommittee Staff at jackson_eaton@hsgac.senate.gov with any questions.

Sincerely,

Claire McCaskill
Ranking Member

cc: Rob Portman
Chairman
Permanent Subcommittee on Investigations
United States Senate

[59] http://www.theregister.co.uk/2014/11/17/sony_unveils_guts_of_ott_service_so_far_for_playstations_only/ and http://www.multichannel.com/blog/bauminator/sony-s-ott-tv-play-priced-sell/384493.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company	)	MB Docket No. 17-179
and Sinclair Broadcast Group	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	
	)	

REPLY OF PUBLIC KNOWLEDGE

I. INTRODUCTION AND SUMMARY

Public Knowledge files this Reply in the above-captioned proceeding in response to Sinclair Broadcast Group, Inc.'s ("Sinclair") and Tribune Media Company's ("Tribune") (collectively, "Applicants") Consolidated Opposition To Petitions To Deny ("Opposition").[1] In their opposition to the consumer groups, independent programmers, competitive broadband carriers, and cable and satellite operators who petitioned the Federal Communications Commission ("FCC" or "the Commission") to deny this transaction, the Applicants largely repeat their initial arguments while casting aspersions on the motivations of petitioners who pose

[1] *See* Applicants' Consolidated Opposition To Petitions To Deny, MB Docket No. 17-179 (filed Aug. 22, 2017) ("Sinclair-Tribune Opposition").

legitimate public interest harms that would result from this merger. Neither the Applicants' initial application[2] nor their Opposition address these public interest harms.

The Applicants have not met their burden of proof to demonstrate that the transaction would serve the "public interest, convenience, and necessity."[3] Instead, they have further demonstrated the public interest harms that would result from the merger. The Applicants brand themselves as a savior of local broadcasting by touting their plan to become a national network. Sinclair's plan to become a national network, along with its centralized news model, directly contradicts the Commission's public interest mandate to promote broadcast localism. The Applicants also misconstrue the retransmission consent regime and admit they would maximize their post-transaction leverage to charge higher fees, ultimately harming consumers. Finally, the record demonstrates the proposed transaction would delay the repack of the 600 MHz band during the ATSC 3.0 transition. The Applicants have not demonstrated the merger creates any public interest benefits, nor have they rebutted the clear public interest harms outlined by Public Knowledge and several other petitioners. The Commission should reject their application.

II. THE RECORD DEMONSTRATES THE PROPOSED TRANSACTION WOULD HARM BROADCAST LOCALISM

A. The Applicants Confuse Their Desire To Be A National Network As A Commitment To Broadcast Localism.

The Applicants contend that the only way to save local broadcasting is through consolidation – essentially preserving the façade of local broadcasting while eliminating local

[2] Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations, Comprehensive Exhibit, at 2-4 (filed July 19, 2017) ("Sinclair-Tribune Application").
[3] 47 U.S.C. § 310(d).

ownership and local news coverage.[4] Specifically, the Applicants argue that the transaction will allow Sinclair to compete with over the top content distributors and cable operators for national programming by creating efficiencies and increasing its geographic reach.[5] The Applicants also tout Sinclair's Washington D.C. News Bureau as a public interest benefit that will provide an alternative viewpoint on the news compared to ABC, NBC, and CBS.[6] These assertions make it quite evident Sinclair wants to be a national network. However, Sinclair's plan is inconsistent with the Commission's public interest mandate to promote broadcast localism. The Commission has long established that broadcasters must serve the needs and interests of the communities to which they are licensed.[7] In doing so, the Commission has adopted rules such as the network-affiliate rules to give local broadcasters more control over programming and ensure communities have access to a critical source of local news and information.[8] The Applicants' touted public interest benefits of increased national news and programming do nothing to promote broadcast localism. As evidenced in the record and discussed in the next section, Sinclair's history of replacing local programming in favor of central casting and 'must-run' segments are in direct contradiction of broadcast localism.

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[4] *See* Sinclair-Tribune Opposition at 5-7.
[5] *See id*.
[6] *See id.* at 10.
[7] *See* Broadcasting and Localism: FCC Consumer Facts, https://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf.
[8] *See, e.g.,* 47 C.F.R. § 73.1125(a)(1), (e).

B. Sinclair's History of Central-Casting Is Well-Documented And Goes Against The Interests Of Broadcast Localism.

Several petitioners cite to Sinclair's practices of central casting and forcing broadcast affiliates to air must-run segments as direct evidence of their efforts to undermine localism.[9] These practices not only substitute local programming for centrally originated programming but also appear intended to mislead viewers into believing the segments are locally produced content.[10] Sinclair seeks to minimize the evidence in the record by claiming it only forces a small number of stations to air this centrally originated programing disguised as local programming.[11] Nevertheless, Sinclair does not deny it engages in these practices. The Commission should treat any practice of central casting as an attempt to disguise a national perspective with a trusted local voice.

Central casting gets to the core of what the Commission's broadcast localism principles seek to prevent. Indeed, the FCC's chain broadcast rules prohibit two or more connected stations from simultaneously running the same program.[12] If the merger is approved, Sinclair could potentially run "pseudo-networks" – controlling the local programming of hundreds of broadcast stations, ultimately undermining the value consumers are supposed to derive from their local broadcast stations. The Commission should take heed that Sinclair makes no promises to eliminate these practices should the Commission approve the transaction.

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[9] *See* Petition to Dismiss or Deny of DISH Network LLC, MB Docket No. 17-179, at 47-56 (filed Aug. 7, 2017) ("Dish Petition"); Petition to Deny of Free Press, MB Docket No. 17-179, at 24-26 (filed Aug. 7, 2017) ("Free Press Petition"); Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179, at 27-29.
[10] *See* Dish Petition at 7; *see also* Free Press Petition at 24.
[11] *See* Sinclair-Tribune Opposition at 16.
[12] See 47 U.S.C. § 303(i); see also 47 U.S.C. § 153(10).

III. THE APPLICANTS MISCONSTRUE THE RETRANSMISSION CONSENT REGIME AND ADMIT THE TRANSACTION WOULD GIVE SINCLAIR INCREASED BARGAINING POWER

A. The Retransmission Consent Regime Is A Congressionally-Mandated Regime Intended To Serve The Public Interest.

The Applicants contend that retransmission consent is not a transaction-specific issue because the regime is based on the free market.[13] Specifically, the Applicants reason that the free market dictates the rates cable providers pay for broadcast programming, and the Commission has no authority to intervene.[14] This rationale misconstrues the public interest purpose and intent behind the retransmission consent regime. The retransmission consent marketplace was originally created to protect the rights of local broadcasters, who often lacked leverage against monopoly cable companies.[15] Because communities only had a single cable provider for multichannel video services, Congress recognized "the importance of local broadcast stations as providers of local news and public affairs programming."[16] Without a framework in place, Congress was concerned communities would lose out on programming that specifically addressed their interests and concerns.[17] Therefore, the ultimate goal of retransmission consent was to enhance the public interest by ensuring consumers still had access to local programming.

In addition to the Congressional purpose and intent behind retransmission content, Section 325 of the Communications Act mandates the Commission ensure the basic cable rates consumers pay are not affected by retransmission consent negotiations between cable providers

[13] *See* Sinclair-Tribune Opposition at 27-28.
[14] *See id.* at 27-28, 36-37.
[15] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014,* Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10238 ¶ 2 (2015).
[16] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at 5, ¶ 8 (Sept. 5, 2005).
[17] *See id.*

and broadcasters.[18] The Commission also has rulemaking authority to ensure all entities negotiate in good faith,[19] which it has exercised in the past.[20] The statutory framework was designed for the FCC to make certain the retransmission consent regime served the public interest; however, as discussed in the next section, its current rules do not reflect the problems with today's marketplace.

B. The Applicants Falsely Claim The Current Retransmission Consent Regime Serves The Public Interest.

Despite claiming that retransmission consent is not a transaction-specific issue, the Applicants go on to attest that the current regime serves the public interest.[21] The Applicants contend, that the market is healthy because local broadcasters can use revenues to maintain and expand their programming.[22] However, the Applicants largely ignore the myriad of problems in the current regime caused by large broadcasters that use their leverage to demand higher fees from MVPDs.[23] Programming blackouts that result from failed negotiations between broadcasters and cable operators are one such problem. The Applicants attempt to minimize prior programming blackouts caused by Sinclair and Tribune by citing to their rarity and short durations.[24] The Applicants nonchalant attitude toward programming blackouts illustrates their inability to understand how programming blackouts harm the public interest and should give the Commission cause for concern that the transaction would increase Sinclair's leverage to demand higher retransmission fees, potentially causing addtional programming blackouts. As discussed

[18] *See* 47 U.S.C. § 325(b)(3)(A).
[19] *See* 47 U.S.C. § 325(b)(3)(C).
[20] *See, e.g., Amendment of the Commission's Rules Related To Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).
[21] *See* Sinclair-Tribune Opposition at 28.
[22] *See id*.
[23] *See* Public Knowledge et al Petition at 7-8.
[24] *See* Sinclair-Tribune Opposition at 38.

below, Sinclair essentially concedes the transaction would allow it to raise retransmission fees to the detriment of the public interest.

C. The Applicants Admit The Transaction Would Allow Sinclair To Raise Retransmission Consent Rates

The Applicants state that the current retransmission consent market allows parties to respond to their private interests and negotiate accordingly.[25] Further, the Applicants explain that the consolidation of several cable operators has allowed MVPDs to demand lower retransmission fees.[26] The Commission should treat this rationale as a direct admission that Sinclair would use its newfound bargaining leverage to demand higher rates. If Sinclair believes, the market allows it to attain the best deal for itself by maximizing its bargaining leverage, the Commission must apply its public interest mandate to determine what effect a post-transaction Sinclair will have on consumers when it comes to potentially higher cable rates or programming blackouts.

IV. THE RECORD DEMONSTRATES THE PROPOSED TRANSACTION WOULD DELAY FUTURE REPACK UNDERMINING EFFORTS TO CLOSE THE DIGITAL DIVIDE

The Applicants attest that Sinclair has no desire to delay the repack of the 600 MHz band. In fact, the Applicants claim that Sinclair has urged the Commission to adopt a plan that leads to the shortest repacking period.[27] The Applicants' sudden change of heart contradicts Sinclair's history of repeatedly urging the FCC to delay the repack in favor of ATSC 3.0 deployment.

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[25] *See id*. at 31.
[26] *See id*.
[27] *Id.* at 42.

Indeed, Sinclair has consistently claimed the Commission's 39-month timeline for repack is too burdensome and should be extended.[28]

If Sinclair's own incentives and prior advocacy is not enough, the record demonstrates the proposed transaction would give Sinclair added leverage to delay the repack.[29] The sheer size of the merger will allow Sinclair to single handedly delay the repack timeline. Allowing Sinclair to control over 200 broadcast stations that are being repacked would lead to delays if the company refused to comply. Indeed, the repacking process "must take into account the complex interference relationships among television stations in adjacent markets."[30] Therefore, if one station decides not to comply, the entire repacking process can be jeopardized.

Sinclair argues that next-generation television, using the ATSC 3.0 standard, promises a wealth of new consumer-friendly features.[31] The record makes clear Sinclair has consistently touted the benefits of ATSC, indicating it will use its leverage to promote ATSC 3.0 deployment.[32] However, ATSC should not come at the expense of delaying the repacking

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[28] *See* Comments of Sinclair Broadcast Group, Inc., GN Docket NO. 12-268, at 7 (filed Jan. 25, 2013) (claiming that a rush to complete the repack would "squander the opportunities for broadcasters to deploy, at their option and to the benefit of the American public, new technology at the time of repacking."); Comments of Sinclair Broadcast Group, MB Docket No. 16-306, at 2 (filed Oct. 31, 2016) (claiming that the Commission is "perpetuat[ing] the fiction that all stations can be repacked within 39 months…."); Reply Comments of Sinclair Broadcast Group, MB Docket No. 16-306, GN Docket No. 12-268, at 1-2 (filed Nov. 15, 2016) (stating that the Commission's repack timeline "assumes conditions that are better than ideal, including the flawless performance of all stakeholders….").

[29] *See* Comments of T-Mobile USA Inc., MB Docket No. 17-179, at 8-13 (filed Aug. 7, 2017) ("T-Mobile Comments); Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179, at 8-17 (filed Aug. 7, 2017) ("CCA Petition").

[30] T-Mobile Comments at 9

[31] *See Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC 1670, 1702, ¶ 3 (2017).

[32] *See* T-Mobile Comments at 5-6 (outlining Sinclair's substantial investment in ATSC).

process. Any delay in the repacking schedule would interfere with deployment schedules in the 600 MHz spectrum band and postpone valuable connectivity benefits to consumers.

V. CONCLUSION

For the foregoing reasons, Public Knowledge respectfully requests that the Commission deny the Applicant's proposed transaction. The Applicants failed to meet their affirmative burden to demonstrate the contemplated merger will serve the public interest.

Respectfully Submitted,

/s/ Yosef Getachew
Public Knowledge
1818 N St. NW, Suite 410
Washington, D.C. 20036
(202) 861-0020

August 29, 2017

PARTY

Public Knowledge is a nonprofit public interest organizaiton that promotes freedom of expression, an open internet, and access to affordable communictions tools and creative works. Working to shape policy on behalf of the public interest, Public Knowledge frequenlty advocates for pro-competitive media policies before the FCC.

DECLARATION of Public Knowledge

I, Yosef Getachew, declare under penalty of perjury that:

1. I have read the foregoing Reply.

2. I am a Policy Fellow at Public Knowledge, an advocacy organization with members, including viewers of broadcast stations owned by Sinclair and Tribune, who in my best knowledge and belief, will be adversely affected if the Commission approves the merger. Public Knowledge's members who rely on mobile broadband will also be adversely affected if the Commission approves the merger.

3. Public Knowledge members will have fewer diverse and independent programming choices and pay higher cable prices as a result of the proposed transaction. Public Knowledge members will also be harmed from the delay in mobile broadband deployment.

4. In my best knowledge and belief, Public Knowledge members will be directly and adversely affected if the Commission allows the proposed merger of Sinclair and Tribune to proceed.

5. The allegations of fact contained in the Reply are true to the bet of my personal knowledge and belief.

Executed August 29, 2017

/s/ Yosef Getachew

Yosef Getachew
Policy Fellow
Public Knowledge

CERTIFICATE OF SERVICE

I, Yosef Getachew, hereby certify that on the 29th day of August, 2017, I caused a true and correct courtesy copy of the foregoing Reply via email to the following:

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/s/ Yosef Getachew
Yosef Getachew

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company	)	
and Sinclair Broadcast Group	)	MB Docket No. 17-179
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

ERRATUM

The enclosed submission includes Declarations of Standing from Public Knowledge, Common Cause, and United Church of Christ, OC Inc. corresponding to their Petition to Deny. The Declarations of Standing were inadvertently omitted from the initial filing.

Respectfully Submitted,

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August 8, 2017

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company	)	
and Sinclair Broadcast Group	)	MB Docket No. 17-179
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

PETITION TO DENY OF PUBLIC KNOWLEDGE, COMMON CAUSE, AND UNITED CHURCH OF CHRIST, OC INC.

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August 7, 2017

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I. INTRODUCTION AND SUMMARY

Public Knowledge, Common Cause, and United Church of Christ, OC Inc. file this Petition to Deny in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice regarding the applications of Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") (collectively, "Applicants") to transfer control of Tribune to Sinclair.[1] The applications should be denied. Because the Applicants have not demonstrated that the transaction will serve the public interest, they have not met the requisite burden of proof. In fact, the Applicants fail to make a convincing case that the transaction will provide any public interest benefits at all. To the contrary, the record as it stands shows that this merger would bring about numerous and significant public interest harms, including harms to broadcast localism, retransmission consent leverage, delays in mobile broadband deployment, and stifled innovation in the 600 MHz spectrum band and in TV White Spaces. Because the evidence shows that this merger would harm consumers and the public interest, the Commission should block it.

II. THE APPLICANTS HAVE NOT MET THE BURDEN OF PROOF

The Applicants have the burden of proving the proposed merger serves "the public interest, convenience, and necessity."[2] The Commission's public interest analysis embodies a "deeply rooted preference for preserving and enhancing competition in relevant markets … and

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[1] *See* Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose *Ex Parte* Status for the Proceeding, MB Docket No. 17-179, *Public Notice*, DA 17-647 (rel. July 6, 2017);
[2] 47 U.S.C. § 310(d).

ensuring a diversity of information sources and services to the public."[3] While "[t]he FCC's actions are informed by competition principles," its "'public interest' standard is not limited to purely economic outcomes."[4] Therefore, the Applicants must show that the transaction will not harm the public, frustrate the goals of the Communications Act, harm competition, or otherwise break the law.[5] The Applicants must also demonstrate that the transaction will result in positive public interest benefits, not merely attempt to rebut claims of harms to the public interest.

Based on their initial application, the Applicants have not met this burden. The proposed merger of the Applicants presents harms to the public interest in broadcast localism, retransmission consent, and next-generation TV technologies, specifically the Advanced Television System Commission ("ATSC 3.0") digital broadcast standard, and mobile broadband deployment. In their three pages outlining putative public interest benefits,[6] the Applicants fail to meet their burden of proof by making no effort to address these public interest harms. As a result, the initial application should be rejected.

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[3] *Applications of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion & Order, 26 FCC Rcd 4238, 4248 ¶ 23 (2011) ("*Comcast-NBCU Order*").

[4] Jon Sallet, FCC Transaction Review: Competition and the Public Interest, FCC Blog (Aug. 12, 2014), http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public- interest.

[5] *See Comcast-NBCU Order*, 26 FCC Rcd at 4247 ¶ 22 (explaining that the Commission "must assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's Rules.").

[6] *See* Sinclair-Tribune Application at 2-4.

III. THE PROPOSED MERGER WOULD NEGATIVELY IMPACT BROADCAST LOCALISM

A. The Commission Has Established Broadcast Localism As Important to the Public Interest.

The Commission has long established that broadcasters must serve the needs and interests of the communities to which they are licensed.[7] In the early days of radio broadcasting, the Federal Radio Commission ("FRC") recognized that local interests should play an important part when deciding to grant a license to a broadcaster.[8] Shortly after its creation, the FCC considered a broadcast applicant's familiarity with a local area in determining whether to grant a license.[9] Today, when the FCC awards licenses to provide broadcast service, it does so using local licenses relating "to the principal community or other political subdivision which it primarily serves."[10] The Commission requires broadcasters to provide service within certain technical parameters to ensure that members of its community can receive the service.[11] Further, full-power broadcast TV stations must keep their main studio in or near its community of license and

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[7] *See* FCC, Broadcasting and Localism: FCC Consumer Facts, https://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf.
[8] *See* 1931 FRC Ann. Rep. at 84 (General Order 28 issued by the FRC in 1928 and revised in 1930, protected localism by ensuring the main studio of each licensee was located inside of the "borders of the city, state, District, Territory, or possession in which it is located."); *see also* 1928 FRC Ann. Rep. at 168 (stating that "there should be a provision [of frequencies] for stations which are distinctly local in character and which aim to serve only the smaller towns in the United States without any attempt to reach listeners beyond the immediate vicinity of such towns.").
[9] *See* H.K. Glass and M.C Kirkland (New), Eustis, F.L., for Construction Permit, Lake Region Broadcast Company (New), Lakeland, F.L., for Construction Permit, Robert Louis Sanders (New), Palm Beach, F.L., for Construction Permit, Hazlewood, Inc. (New), West Palm Beach, F.L., for Construction Permit, *Statement of Facts and Grounds for Decision*, 2 FCC Rcd 365, 372 (Mar. 3, 1936).
[10] *See* 47 C.F.R. § 73.1120.
[11] *See* 47 C.F.R. § 73.1125(a)(1), (e).

calls from citizens in the community to the station must be toll-free.[12] These rules exist because broadcast programming continues to remain a critical source of news and local information for communities. According to the Pew Research Center, about 23 million Americans watch the local evening news and 12 million view early morning local news.[13] Local news also plays an important role in shaping voters' opinion of political candidates and informing the electorate.[14] Thus, local broadcasting remains critically vested in the public interest to respond to the needs and interests of the community.

As part of its efforts to promote broadcast localism, the Commission has adopted rules specifically designed to give local broadcasters more control over their programming. For example, the FCC's network affiliate rules protect broadcast stations against interference by national and regional networks, including prohibiting network exclusivity agreements, prohibiting stations from optioning airtime to networks, and granting stations the right to preempt network programming for programming the station believes is of "greater local or national importance."[15]

Further, the Commission adopted numerous pro-localism principles in its *2008 Declaratory Ruling* on a petition from the Network Affiliated Stations Alliance.[16] These policies

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[12] *See* 47 C.F.R. § 73.1125.
[13] Katerina Eva Matsa, State of the News Media 2016, Pew Research Center (June 2016), at 28, http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf.
[14] *See* Jeffrey Gottfried, Michael Barthel, and Elisa Shearer, The 2016 Presidential Campaign – a News Event That's Hard to Miss, Pew Research Center (Feb. 4, 2016), *available at* http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/.
[15] *See* 47 CFR § 73.658(a),(d)-(e).
[16] *See* Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling, *Declaratory Ruling*, 23 FCC Rcd 13610 (2008).

grant broadcasters increased autonomy and control over programming and other critical decisions pertaining to serving the community.[17]

Lastly, the Commission has promulgated chain broadcasting rules to further limit the ability of networks to control the programming of affiliated broadcast stations. Chain broadcasting is defined as the "simultaneous broadcasting of an identical program by two or more connected stations."[18] The FCC's rules "provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks."[19] The Commission concluded that chain broadcasting hindered stations in developing a local program service.[20]

These limitations on network control over broadcast affiliates reaffirm that broadcasters are public trustees and required to serve the needs of their local communities. The proposed transaction would likely increase Sinclair's control over local broadcast affiliates, in direct violation of the Commission's public interest commitment to localism.

B. The Proposed Merger Would Give Sinclair Control Over a Substantial Amount of Broadcast Stations Harming Broadcast Localism.

If completed, the proposed merger would give Sinclair control over more than 200 local broadcast stations, reaching more than 70 percent of the country.[21] This level of control would

[17] *See id*. at ¶¶ 6, 8-9.
[18] *See* 47 U.S.C. § 303(i); *see also* 47 U.S.C. § 153(10).
[19] *NBC v. US*, 319 U.S. 190, 196 (1943).
[20] *See id*. at 203.
[21] Sinclair-Tribune Application, Comprehensive Exhibit, at 4-6; *see also* Sydney Ember and Michael de la Merced, Sinclair Unveils Tribune Deal, Raising Worries It Will Be Too Powerful, NY Times (May 8, 207), *available at* https://www.nytimes.com/2017/05/08/business/media/sinclair-tribune-media-sale.html?_r=0.

not only put Sinclair over the Commission's national ownership cap,[22] but would also violate the Commission's public interest commitment to broadcast localism.

By its own admission, Sinclair believes that centralized news operations for national and international news is an effective cost-savings model.[23] Further, it is well-documented that Sinclair engaged in the practice of "central casting" – substituting centrally originated programming for local programming.[24] Central casting gets to the core of what the Commission's localism principles seek to prevent. Indeed, the FCC's chain broadcast rules prohibit two or more connected stations from simultaneously running the same program. The principles the Commission adopted in its *2008 Declaratory Ruling* granting broadcast affiliates more control and autonomy would also be violated. Indeed, if Sinclair is allowed to merge, the company could potentially run "pseudo-networks" – controlling the local programming of hundreds of broadcast stations.

The Applicants assert Sinclair's commitment to localism is demonstrated by investments in the news and local programming of newly acquired stations; however, the Applicants fail to make any assurances that it will not engage in central casting, or that the newly acquired stations will have autonomy.[25] Given the unprecedented amount of control Sinclair would have over

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[22] *See* 47 C.F.R. § 73.3555(e)(1).
[23] *See* Comments of Sinclair Broadcast Group, Inc., Broadcast Localism, MB Docket No. 04-233, at 6 (filed April 28, 2008) (stating that "centralized news operations … which consolidate the production of national and international news, can result in cost savings allowing broadcasters to reallocate resources to stations for the provision of additional and more in-depth local news.") (emphasis omitted).
[24] *See, e.g.,* Jim Rutenberg and Micheline Maynard, *TV News that Looks Local*, *Even if it's Not*, New York Times (June 2, 2003), *available at* http://www.nytimes.com/2003/06/02/business/tv-news-that-looks-local-even-if-it-s-not.html; Jeffrey Layne Blevins, *Sinclair's proposed purchase of Tribune Media is bad news for Des Moines*, azcenteral (June 29, 2017), *available at* https://www.azcentral.com/story/opinion/columnists/2017/06/29/sinclairs-proposed-purchase-tribune-media-bad-news-des-moines/439884001/.
[25] *See* Sinclair-Tribune Application, Comprehensive Exhibit, at 2.

affiliated broadcasters post-merger and its past practices of central casting, the Applicants have not shown that the transaction will serve the public interest by promoting the Commission's longstanding commitment to broadcast localism. In fact, Sinclair's past practices make clear that it is likely to engage in actions that are contrary to the public interest and broadcast localism.

IV. THE PROPOSED MERGER WOULD FURTHER EXACERBATE THE BROKEN RETRANSMISSION CONSENT REGIME

A. Broadcasters Already Abuse the Retransmission Consent Regime.

The current retransmission consent regime, where cable operators must negotiate in good faith with broadcasters to carry their programming, already gives undue power to broadcasters. The retransmission consent marketplace was originally created to protect the rights of local broadcasters, who often lacked leverage against monopoly cable companies.[26] However, the marketplace has changed.

While cable operators are still dominant, consolidation among programmers and broadcasters, along with increasing video programming competition, has turned carriage negotiations from routine business to high-stakes negotiations. Consequently, retransmission consent fees have increased over the years, with SNL Kagan projecting those fees will reach $11.6 billion in 2022.[27]

As a result, large broadcasters are able to extract enormous sums of money from cable operators, turning the retransmission consent process into an additional revenue stream.[28] When

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[26] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10238 ¶ 2 (2015).
[27] *See* Mike Farrell, Kagan: Retrans Fees to Reach $11.6b by 2022, Multichannel News (June 29, 2016), *available at* http://www.multichannel.com/news/networks/kagan-retrans-fees-reach-116b-2022/406026.
[28] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, 30 FCC Rcd at 10239-40 ¶ 3 (2015).

retransmission consent negotiations come to a standstill, large broadcasters are able to blackout their programming.[29] The FCC's rules do not prevent broadcasters from timing the expiration of contracts to coincide with marquee programming events, such as the Super Bowl, or other events of significant public interest. This timing only enhances large broadcasters' leverage over the retransmission consent process forcing cable providers to comply or lose their subscribers.[30] The millions of customers whose access to must-have sports, entertainment, and news programming cut off are collateral damage in the broadcasters' game of high-stakes brinksmanship.

B. The Proposed Merger Would Give Sinclair Increased Bargaining Power in Retransmission Consent Negotiations.

Given the increased number of broadcast stations it would own post-merger, the proposed transaction would give Sinclair increased bargaining power in retransmission consent negotiations. As discussed above, this increased bargaining power could lead to merger-specific increases in retransmission consent fees charged to cable providers, resulting in higher cable prices for consumers. Further, disputes in retransmission consent negotiations between Sinclair and cable operators could result in programming blackouts and service disruptions depriving consumers of their local programming.

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[29] *See id*.

[30] *See, e.g.*, Daniel Frankel, Super Bowl blacked out in at least 6 markets due to retrains disputes, ATVA says, FierceCable (Jan. 30, 2017), *available at* http://www.fiercecable.com/cable/super-bowl-blacked-out-at-least-6-markets-due-to-retrans-disputes-atva-says; Daniel Frankel, After 1-Day blackout, Dish and Tegna strike long-term retransmission agreement, *available at* FierceCable (Oct. 12, 2015), http://www.fiercecable.com/cable/after-1-day-blackout-dish-and-tegna-strike-long- term-retransmission-agreement; Joe Flint, Time Warner Cable loses 306,000 subscribers, cites fight with CBS, Los Angeles Times (Oct. 31, 2013), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-cbs-earns-20131031-story.html.

Indeed, Sinclair's prior retransmission consent disputes with cable and satellite providers have lead to massive programming blackouts affecting millions of consumers.[31] Further, the Commission has investigated and taken action against Sinclair in the past for improperly negotiating retransmission consent agreements involving broadcast stations it did not own.[32]

Imbalances in retransmission consent bargaining power continue to plague the video marketplace and harm consumers' ability to access local programming; the proposed transaction will only exacerbate this problem and harm consumers. The Applicants make no attempt to address Sinclair's prior abuses of its leverage as the owner of numerous broadcast stations in prior retransmission consent negotiations, nor do they explain how the proposed merger, which would further increase Sinclair's bargaining power, promotes, rather than harms the public interest.

V. THE PROPOSED MERGER WOULD ALLOW SINCLAIR TO DICTATE THE ATSC 3.0 TRANSITION TO THE DETRIMENT OF THE PUBLIC INTEREST

A. The Proposed Merger Would Allow Sinclair to Delay Future Repack Harming the Public Interest.

The Applicants claim that the proposed transaction will allow Sinclair to expedite the rollout of an ATSC 3.0 network, which, they argue, will serve the public interest.[33] However, the sheer size of the merger will actually harm the public interest by allowing Sinclair to single handedly delay the repack of the 600 MHz band. In prior proceedings, Sinclair has pressed the

[31] *See, e.g.,* Cynthia Littleton, Dish, Sinclair Reach Deal to End Massive Station Blackout, Variety (Aug. 26, 2015), *available at* http://variety.com/2015/tv/news/dish-sinclair-station-blackout-1201579292/ ("The blackout affected an estimated 5 million of Dish's 13.9 million subscribers.").
[32] *See Sinclair Broadcast Group, Inc.*, Consent Decree, 31 FCC Rcd 8576, 8579 ¶ 4(2016) (finding that "Sinclair negotiated retransmission consent on behalf of, or coordinated negotiations with, a total of 36 Non-Sinclair Stations….").
[33] *See* Sinclair-Tribune Application, Comprehensive Exhibit, at 2.

FCC to extend the repack deadline claiming that the agency's current timeline is burdensome to broadcasters.[34] Allowing Sinclair to control over 200 broadcast stations that would be part of the repacking process would lead to delays if the company refused to comply.

Next-generation television using the ATSC 3.0 standard promises a wealth of new consumer-friendly features, including sharper pictures, better mobile viewing, improved emergency alerts, new opportunities for community engagement, and novel interactivity with over-the air television viewers.[35] Although the Applicants cite to the benefits of ATSC, these benefits are in no way merger specific and the Commission should not consider them in its public interest evaluation of the transaction.[36] Indeed, Further, ATSC innovations should not come at the expense of delaying the repacking process. Any delay in the repacking schedule would interfere with deployment schedules in the 600 MHz spectrum and postpone valuable connectivity benefits to consumers. As wireless carriers attest, more wireless capacity is needed to meet the growing consumer demand for mobile data.[37] The Commission's incentive auction established a 39-month transition period for broadcast stations being repacked to transition to their newly assigned frequencies.[38] Delaying the repack and postponing the availability of this spectrum for mobile broadband will harm wireless carriers' ability to meet consumer demand,

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[34] *See* Reply Comments of Sinclair Broadcast Group, Post-Incentive Auction Transition, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, MB Docket No. 16-306, GN Docket No. 12-268, at 1-2 (filed Nov. 15, 2016).
[35] *See Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC 1670, 1702, ¶ 3 (2017).
[36] *See, e.g., Applications of SprintCom, Inc. Shenandoah Personal Communications, LLC, and NTELOS Holdings Corp. for Consent To Assign Licenses and Spectrum Lease Authorizations and To Transfer Control of Spectrum Lease Authorizations and an International Section 214 Authorization,* Memorandum Opinion and Order, 31 FCC Rcd 3631, 3647 ¶ 34 (2016) (stating that "each claimed benefit [of a proposed merger] must be transaction specific.").
[37] *See* Comments of T-Mobile, Inc., Authorizing Permissive Use of the "Next Generation" Broadcast Standard, GN Docket No. 16-142, at 4-5 (filed May 9, 2017).
[38] *See Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC 1670, 1702, ¶ 76 (2017).

bring new additional competition to the mobile broadband market, and deploy service in rural communities, helping achieve the Commission's stated goal of closing the digital divide.[39] The proposed merger threatens the FCC's ability to repack on timeline and the Applicants fail to commit that the repack will happen as planned post-merger. Therefore, the Applicants have not met their burden in establishing an ATSC 3.0 network would promote the public interest.

B. The Proposed Merger Could Allow Sinclair to Use ATSC 3.0 to Foreclose the Use of Public Spectrum.

In the ATSC 3.0 proceeding, Sinclair has aggressively pressed the Commission for valuable new spectrum rights.[40] If the Commission were to grants these sought after new spectrum rights to a post-merger Sinclair, that windfall would come at the public's expense. Allocating vacant broadcast TV spectrum to broadcasters, including Sinclair, would undermine the long-promised nationwide availability of TV White Spaces for rural broadband and other innovative new uses.[41]

Broadcasters, such as Sinclair, received their broadcast licenses for free, and for the express purpose of providing free over the air broadcasting to their local communities. The

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[39] Letter from Chairman Ajit Pai to Senator Tammy Baldwin (Feb. 21, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0303/DOC-343756A3.pdf; Remarks of Ajit Pai, Chairman, Federal Communications Commission (Jan. 24, 2017), at 2, https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf.

[40] *See* Reply Comments of Sinclair Broadcast Group, Authorizing Permissive Use of the "Next Generation" Broadcast Standard, GN Docket No. 16-142, at 13-14 (filed June 8, 2017) (stating that the "Commission should ... make vacant channels available to broadcasters, or to groups of broadcasters .. to improve service during the transition."); *see also* Comments of National Association of Broadcasters et al, Authorizing Permissive Use of the "Next Generation" Broadcast Standard, GN Docket No. 16-142, at 10-11 (filed May 9, 2017) ("[A]llowing broadcasters to use vacant in-band channels, subject to FCC approval and for the duration of the transition, could further help reduce viewer disruption. Such action would encourage innovation and help protect viewers while also maximizing the efficient use of scarce spectrum resources.").

[41] *See* Brad Smith, A rural broadband strategy: connecting rural America to new opportunities, Microsoft (Jul 10, 2017), *available at* https://blogs.microsoft.com/on-the-issues/2017/07/10/rural-broadband-strategy-connecting-rural-america-new-opportunities/.

Commission's interference protection rules for TV White Spaces devices were designed to protect broadcasters because a vital, free over the air television system promotes the creation and availability of news and diverse viewpoints. The interference rules were not designed to allow broadcasters to monetize their free spectrum for their private gain. Indeed, the Applicants make no promises or assert any willingness to utilize a potential spectrum windfall to safeguard consumers or return anything to the public interest.

VI. CONCLUSION

In view of the foregoing, Public Knowledge, Common Cause, and United Church of Christ, OC Inc. respectfully request that the Commission deny the Applicants proposed transaction. The Applicants fail to meet their affirmative burden to demonstrate the contemplated merger will serve the public interest.

Respectfully Submitted,

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August 7, 2017

PARTIES

Public Knowledge is a nonprofit public interest organization that promotes freedom of expression, an open internet, and access to affordable communications tools and creative works. Working to shape policy on behalf of the public interest, Public Knowledge frequently advocates for pro-competitive media policies before the FCC.

Common Cause is a nonpartisan, nationwide grassroots network of more than 900,000 members and supporters that has advocated open, honest, and accountable government for over 45 years. Because a vibrant informational ecosystem is critical to self-governance, Common Cause public interest communications policies that connect all Americans to the news and information they need to cast informed ballots.

The United Church of Christ, Office of Communication, Inc. (UCC OC Inc.) is the media justice ministry of the United Church of Christ, a faith community rooted in justice that recognizes the unique power of the media to shape public understanding and thus society. Established in 1959, UCC OC Inc. established the right of all citizens to participate at the Federal Communications Commission as part of its efforts to ensure a television broadcaster in Jackson, MS served its African-American viewers during the civil rights movement and continues to press for media justice and communications rights in the present day. The Cleveland-based United Church of Christ has almost 5,000 local congregations across the United States, formed in 1957 through union of the Congregational Christian Churches and the Evangelical and Reformed Church.

DECLARATION of Public Knowledge

I, Yosef Getachew, declare under penalty of perjury that:

1. I have read the foregoing Petition to Deny.

2. I am a Policy Fellow at Public Knowledge, an advocacy organization with members, including viewers of broadcast stations owned by Sinclair and Tribune, who in my best knowledge and belief, will be adversely affected if the Commission approves the merger. Public Knowledge's members who rely on mobile broadband and would benefit from TV White Space technologies will also be adversely affected if the Commission approves the merger.

3. Public Knowledge members will have fewer diverse and independent programming choices and pay higher cable prices as a result of the proposed transaction. Public Knowledge members will also be harmed from the delay in mobile broadband deployment and stifled innovation in the TV White Spaces.

4. In my best knowledge and belief, Public Knowledge members will be directly and adversely affected if the Commission allows the proposed merger of Sinclair and Tribune to proceed.

5. The allegations of fact contained in the Petition to Deny are true to the best of my personal knowledge and belief.

Executed August 7, 2017

/s/ Yosef Getachew

Yosef Getachew
Policy Fellow
Public Knowledge

DECLARATION OF Timothy O'Boyle

1. I, Timothy O'Boyle, am a full time Program Director at Common Cause, located at 805 15th St NW, Suite 800 in Washington, DC.
2. I reside at 2720 Wisconsin Ave NW #704 in Washington, DC.
3. I regularly view broadcast news, including WJLA.
4. I rely on local news to make informed decisions about current affairs, including local and national elections.
5. The proposed consolidation of Sinclair and Tribune stations, including WJLA, harms me by reducing the number of independent and competitive news sources available to me.
6. This Declaration has been prepared in support of the foregoing Petition to Deny.
7. This statement is true to my personal knowledge and is made under penalty of perjury of the laws of the United States of America.

Timothy Todd O'Boyle

August 7, 2017

Declaration of Earl Williams, Jr.

1. I, Earl Williams, Jr., am a member of the United Church of Christ. I am Chair of the board of directors of the UCC's media justice ministry, United Church of Christ, OC Inc.

2. I reside at 19701 Fairmount Blvd, Shaker Heights, OH 44118.

3. I am a regular viewer of the stations serving the Cleveland-Akron (Canton), OH market, which includes WJW.

4. I, and viewers like me, will be harmed by Sinclair's acquisition of the Tribune-owned WJW because it will reduce the broadcaster's attention to the local needs of the Cleveland-Akron area. WJW is known for its attention to local issues and its independence. Sinclair has a track record of shuttering local newsrooms and consolidating news production in fewer areas and stations. I believe Sinclair's new presence in Cleveland-Akron would make local news coverage less responsive to my community's needs. I believe this would significantly reduce the quality and quantity of local news in my area.

5. This transaction will harm me, and viewers like me, because the scale of Sinclair's operation would violate the FCC's national audience cap. Viewers and community members nationwide will be harmed by the significant amount of market power Sinclair will hold if its proposed transaction is approved.

6. This Declaration has been prepared in support of the foregoing Petition to Deny.

7. This statement is true to my personal knowledge, and is made under penalty of perjury of the laws of the United States of America.

Earl Williams

Earl Williams, Jr.

August 7, 2017

CERTIFICATE OF SERVICE

I, Yosef Getachew, hereby certify that on the 7th day of August, 2017, I caused a true and correct courtesy copy of the foregoing Petition to Deny via email to the following:

Mace J. Rosenstein
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, D.C. 20001
mrosenstein@cov.com

Miles S. Mason
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036
miles.mason@pillsburylaw.com

David Roberts
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/s/ Yosef Getachew
Yosef Getachew

INVESTOR'S BUSINESS DAILY

COMMENTARY

The beauty and lifeblood of the First Amendment is that it encourages a diversity of opinions to compete in the marketplace of ideas. Yet, sadly, as we witnessed in the last presidential election and even more so today, America's consolidated corporate media monopolies have launched an all-out assault on democracy by trying to stamp out the expression of any ideas that don't fall in line with liberal-determined political correctness.

The latest front in this battle is now at the doorstep of the Department of Justice as it considers the proposed merger between media and information giants — AT&T and Time Warner — a merger which President Trump rightly slammed during the campaign. A decision on the merger, which could come any day now, is fraught with danger.

Currently, AT&T owns the No. 1 pay TV company (26 million subscribers), the No. 2 wireless company (134 million subscribers), the No. 3 internet service provider (16 million subscribers) and was

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the world's largest telecommunications company by revenue with $163 billion in revenue in 2016 alone.

For its part, Time Warner owns CNN, one of the world's largest news networks, three of the top five general entertainment cable networks in TBS, TNT and HBO — the leading premium-cable provider and the No. 2 movie studio, by box office revenue, in Warner Bros.

If approved, this media marriage would give two mammoth organizations an inordinate amount of power to control not only the information that flows onto our computers and televisions, but also the viewpoints that are expressed in that programming.

For example, this merger could give CNN even more influence and power than they enjoy today. Yes, I'm talking about the "Clinton News Network" that repeatedly presented fake and dishonest news designed to influence the 2016 presidential election outcome.

Additionally, networks like CNN paid for polling that continually marginalized Trump or likely Trump voters from their surveys. This allowed them to run with stories that grossly exaggerated Hillary Clinton's lead, a lead which Election Day proved did not exist. No doubt, the effect of this kind of polling shenanigans was intended to discourage Trump voters from participating in what was being presented at the time as a hopeless race.

If the merger goes through, AT&T's powerful reach into our homes and computers would give them the ability to increase the power of their own networks — like CNN. CNN and its biased news could gain higher visibility and AT&T could also make it more difficult or impossible for consumers to find conservative or more-balanced news alternatives. The last thing we need is a corporate giant that makes CNN and other networks it owns even more powerful.

In the waning weeks of the 2016 campaign, Donald Trump regularly went directly to the voters, bashing CNN and other outlets for presenting false narratives designed to influence the election outcome. It was this recognition of the power of the media monopolies over what the people learned about him and his campaign which led Trump to unequivocally state on Oct. 22 in Gettysburg, Pa., that news organizations were trying to "suppress my vote and the voice of the American people."

It was an explosive charge, but a correct one because it gets to the heart of the danger the massive media monopolies pose to American democracy in the 21st century.

In that same Gettysburg speech, President Trump called out the AT&T and Time Warner merger "as an example of the power structure I'm fighting."

President Trump clearly stated that under his administration the AT&T/Time Warner merger would be stopped because it was not in America's best interest. Now, he needs to keep his promise by telling his Justice Department to kill the deal because it puts too much power in the hands of a corporate media conglomerate and endangers free speech.

□ **Manning** is president of Americans for Limited Government.

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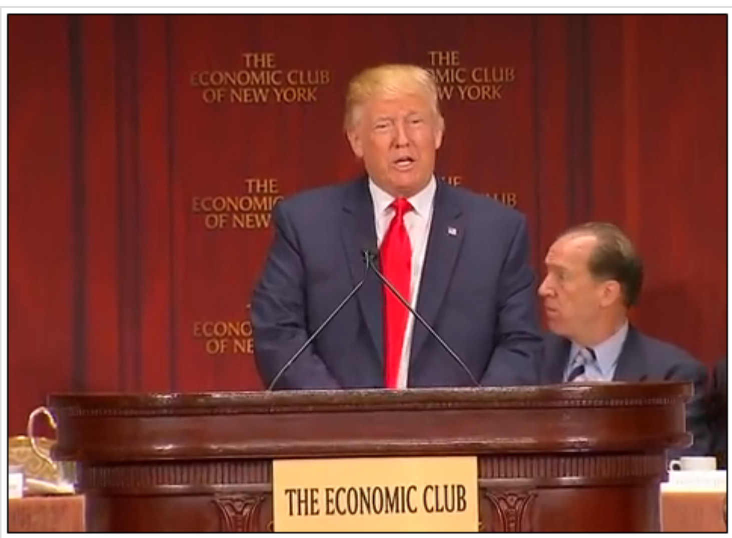
Trump needs to kill AT&T-Time Warner merger



By Rick Manning

America's media monopolies pose a threat to democracy. Most people know that President Donald Trump has engaged in a very public war of words with a variety of biased media outlets, like CNN, over their advocacy journalism which shreds any semblance of objectivity.

In the waning weeks of the 2016 campaign, the President regularly went directly to the voters bashing CNN and other outlets for presenting fake news designed to influence the election outcome. This recognition of the power of the media monopolies over what the people learned about him and his campaign led the President to unequivocally state on Oct . 22 in Gettysburg, Pennsylvania that news organizations were trying to, "suppress my vote and the voice of the American people."

President Trump recognized the impact that the conglomerate media companies were having on the electorate when in the same Gettysburg speech, he equated the consolidation of media into giant corporations by citing the proposed merger between AT&T and Time Warner, "As an

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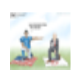
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example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in the hands of too few."

Trump was right in October of 2016, and now his Justice Department has the power to stop the AT&T and Time Warner merger in its tracks, and that is exactly what they should do.

The continued consolidation of media exposes the obvious problem where one entity can impose a political or cultural point of view on society as a whole simply by making it normal, acceptable, or seemingly outside the mainstream, on every entertainment outlet that people watch.

This inordinate power to control the information that flows onto our computers and through entertainment and advocacy news outlets that the consolidation of media has created highlights the dangers of allowing the AT&T-Time Warner merger to proceed.

Currently, AT&T owns the number 1 Pay TV company (26M subscribers), the number two wireless company with 134 million subscribers, the number three Internet Service Provider with 16 million subscribers and was the world's largest telecommunications company by revenue with $163 billion in revenue in 2016 alone.

For its part, Time Warner owns CNN, one of the world's largest news networks, three of the top five general entertainment cable networks in TBS, TNT and Adult Swim, HBO – the leading premium cable provider and the number two movie studio by box office revenue in Warner Bros.

If approved, AT&T's powerful reach into consumer's televisions, computers, and mobile devices means they could easily increase the power of their own offerings – like CNN. They could also make it more difficult or impossible for consumers to find conservative or more balanced news alternatives. The last thing we need is a corporate giant that makes CNN and other networks it owns even more powerful.

President Trump clearly stated that under his administration the AT&T/Time Warner merger would be stopped because it was not in America's interest. Now, he needs to keep his promise by telling his Justice Department to kill the deal as a bad, bad deal for free speech in America.

Rick Manning is the President of Americans for Limited Government

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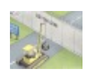
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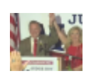
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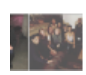
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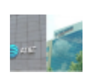
The AT&T-Time Warner Merger And The Assault On Free Speech

EDIT

Ken Blackwell, Contributor
Fellow of The National Academy of Public Administration and the Family Research Council

Trump's Warning: An AT&T/Time Warner Merger, Dangerous

09/21/2017 11:14 pm ET

One thing that is clear from President Trump's first several months in office is that powerful corporate media giants like CNN, the New York Times and others have become hopelessly more biased against him than ever.

Unfortunately, the power of these biased corporate media giants may only get more powerful under the pending mega-merger of AT&T and CNN's parent company, Time Warner. President Trump said last year that this deal would put "too much concentration of power in the hands of too few" and promised to block it; yet there's been dangerously little attention paid to a corporate marriage that would make two massive global media conglomerates even bigger. Grassroots conservatives remain hopeful that President Trump remembers his campaign pledge to stop this deal.

Many conservatives have warned about the dangers of this merger because of that concentration of power. My friend Larry Kudlow, a noted free market champion who would normally be loath to call for government to stop a merger, has raised significant concerns about one company controlling cable distribution and key channels. "In other words, owning the

content and owning the pipes may go too far," Larry said.

These companies already have tremendous power and influence – and a combination of the two raises major concerns. Aside from CNN, Time Warner and its honchos in Hollywood own the top premium cable network in HBO, the second-biggest movie studio, and highly-watched cable networks like TBS and TNT. AT&T, meanwhile, just bought satellite company DirecTV – making it the biggest TV provider in the country. Add in its wired Internet business and the fact that it serves 134 million cell phone customers, and the picture is clear that these companies shouldn't get to join forces.

AT&T and Time Warner will use corporate buzzwords like "synergy" and "vertically integrated" to argue that this deal is good for average Americans. In reality, it would give AT&T even more control over our TV and Internet experiences. For example, if it owned HBO, AT&T could also refuse to offer competing movie channels on an equal basis. As the owner of the distribution they could use their power to make their own channels more attractive and available to consumers and they could effectively choose not to carry any content that competes with Time Warner's broad slate of content.

Here's the worst part: Since Time Warner owns CNN, this could have hugely perilous effects on our news environment and your ability to choose what to watch. It's not hard to see how AT&T could discriminate against other channels – including

Angelina Jolie, Gwyneth Paltrow And Others Say Harvey Weinstein Harassed Them

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conservative voices – by putting them in a bad spot on your channel line-up and trying to make their shows hard to find. The AT&T/Time Warner combo could easily ensure that CNN is more accessible to consumers than competitors like Fox – to further increase CNN's power to push their liberal agenda.

Or, just like with entertainment networks, they could basically refuse to even carry smaller conservative channels like One America News, Newsmax, or The Blaze. DirecTV, in fact, only agreed to carry OAN and Newsmax this year after they announced their merger and thought it would be worth trying to buy off potential critics – and they still don't carry The Blaze. CNN's actions are already, in a word, deplorable – the mainstream media doesn't need any help in limiting access to viewpoints it doesn't like.

This stuff matters. As the media remains obsessed with ginned up controversies and coverage intended to undermine President Trump and conservative principles in general, there is not nearly enough awareness of the threat this deal poses – and how important it is that President Trump keep his promise to block, as he put it, deals like this that "destroy democracy."

Ken Blackwell served as a Domestic Policy Advisor to the Trump Presidential Transition Team.