Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF HANCE HANEY
SENIOR FELLOW
DISCOVERY INSTITUTE

The Commission has requested comments regarding the joint applications submitted by Comcast Corp. and Time Warner Cable, Inc. on April 8, 2014 for permission to transfer of control of various FCC licenses and and authorizations so that the companies can merge and better serve consumers.[1]

I. THE MERGER WILL NOT REDUCE COMPETITION

The Department of Justice and the Federal Trade Commission review proposed mergers to evaluate whether they will “substantially lessen competition.”[2] There is no doubt that a merger between Comcast and Time Warner Cable satisfies this test. As these companies have correctly observed, they serve “almost entirely distinct” geographic areas; therefore, since Comcast and Time Warner Cable are not direct competitors, a merger would not result in any reduction in competition, nor would it increase market share, in any geographic product market.[3] Accordingly, from an antitrust perspective, there can be no debate that this merger should be approved.

Former Commissioner Harold Furchtgott-Roth notes that neither the Clayton Act nor the Communications Act provide specific authority for review of mergers by the FCC.[4] In determining whether transfers of control of FCC licenses and authorizations between merging communications firms serve the "public interest," the FCC has taken it upon itself to conduct a broader inquiry than strict antitrust issues, including "spectrum aggregation, universal service, localism and diversity."[5] Here it should be noted that the purpose of the broader review by the FCC is firmly rooted in the past, when cable and telephone services were furnished by government-sanctioned monopolies utilizing facilities based in completely distinct technologies. Not only are monopoly franchises are a thing of the past, but modern broadband platforms have also rendered previous technology distinctions meaningless. Firms that could only provide cable, telephone or mobile voice service utilizing a single-purpose technology in the past can now offer voice, video and data services from a single platform. These economies of scope have facilitated a highly competitive broadband market. Now the distinction between fixed and wireless broadband is blurring. Efforts to improve industry performance based on legacy distinctions could prove harmful to the broadband ecosystem as a whole.

It should also be noted that when the FCC conducts a merger review it is not necessarily limited to "spectrum aggregation, universal service, localism and diversity." Since neither Congress nor the Commission have ever clearly defined what the term "public interest" means, as a practical matter it means whatever a minimum of three of the current five commissioners want it to mean—and this creates uncertainty for investors, lenders and others.

The risk of FCC error is particularly acute given that, as Furchtgott-Roth points out, "the FCC's denial of a license transfer [or approval subject to inappropriate conditions] has, as a practical matter, little or no court review."[6]

As a result of this combination of factors, there can be serious and unintended consequences when the Commission attempts to use the license transfer process to promote otherwise worthy-sounding objectives, such as "spectrum aggregation, universal service, localism and diversity." Specifically, there is a danger that the Commission could inhibit investment, innovation and competition, as the late Professor Alfred E. Kahn warned.

> The industry is obviously no longer a natural monopoly and wherever there is effective competition—typically and most powerfully, between competing platforms—land-line telephony, cable and wireless—regulation of the historical variety is both unnecessary and likely to be anticompetitive. In particular, it is likely to discourage the heavy investment in the development and competitive offering of new platforms, and in increasing the capacity of the Internet to handle the likely astronomical increase in demands on it for such uses as on-line medical monitoring and diagnosis, video transcription and gaming.[7]

The FCC's merger review process definitely qualifies as "regulation of the historical variety," and the Commission should take great care to act with humility and caution. Broadband providers have invested more than $60 billion per year on average in recent years,[8] and the market is still extremely dynamic as network providers, device manufacturers, app developers, content providers and others continue to improve existing products and services, bring new innovations to market and experiment with business models. The Commission needs to be forward-looking, and, for one thing, avoid foreclosing opportunities for investment and innovation by rejecting mergers on ideological grounds (*i.e.,* for the purpose of trying to promote a market structure that consists of a larger number of smaller firms). The Department of Justice has cautioned the Commission against such an approach.

> Broadband is a cornerstone of growth and innovation in the 21st century economy. American citizens want and deserve the best possible services and a choice of providers. As part of the development of a broadband plan, the Commission should evaluate what strategies will best promote the development of an affordable and innovative broadband infrastructure in the United States.
>
> These broad goals are best served by promoting competition in broadband markets. In practice, this does not mean striving for broadband markets that look like textbook markets of perfect competition, with many price-taking firms. That market structure is unsuitable for the provision of broadband services, which involve very substantial fixed and sunk costs. Rather, promoting competition is likely to take the form of enabling additional entry and expansion by wireless broadband providers, applying other appropriate policy levers, and spurring competition among broadband providers by improving the information available to consumers about the service offerings in their areas.[9]

Ideally, the Commission should limit the review of license and authorization transfers to whether the applicant is qualified and able to provide the service according to the terms of the license or authorization and let the Department of Justice and the Federal Trade Commission worry about competition. "Spectrum aggregation, universal service, localism and diversity" should all be addressed in rulemaking proceedings applicable to the entire industry.

II. THE MERGER WILL PROMOTE COMPETITION

Broadband services involve "very substantial fixed" costs and are subject to "large economies of scale," as the Department of Justice has pointed out.[10] Communications policy should allow firms to exploit economies of scale—which allow them to decrease the average cost of serving every customer by adding more customers at lower incremental costs. In so doing, a larger firm can place itself in a better position to undertake the heavy investment necessary to promote innovation and competition that will yield more choices and ultimately lower prices for consumers.

Comcast and Time Warner Cable estimate that this transaction should result in cost savings and other synergies worth approximately $1.5 billion within three years, and recurring every year thereafter.[11] They believe this is a conservative estimate and does not take into account future revenue-generating opportunities.[12]

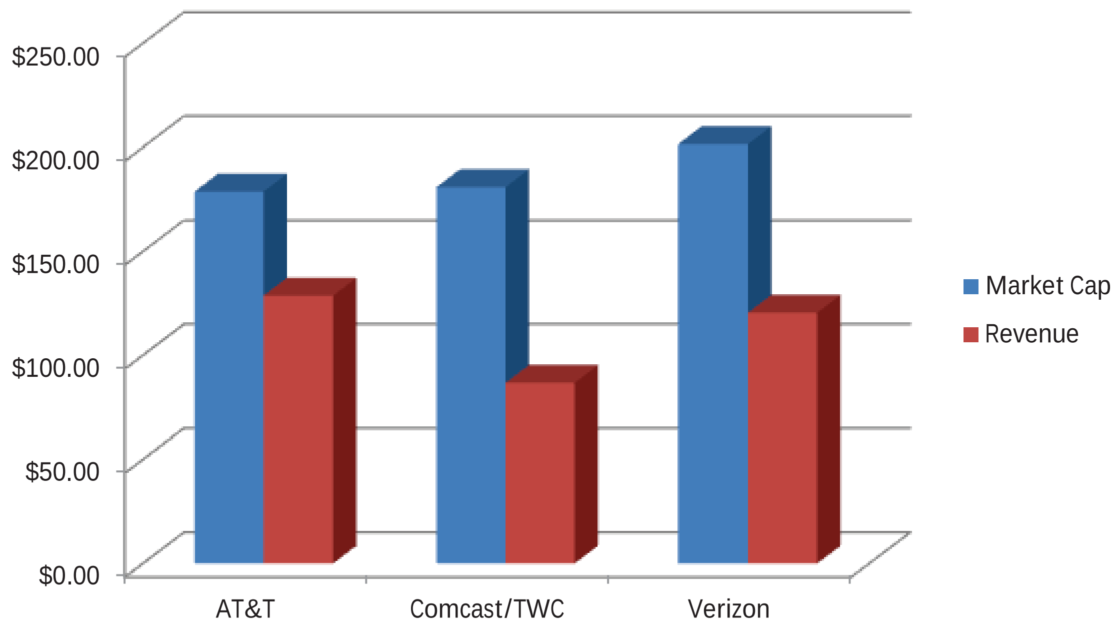
Whereas Comcast has already transitioned to all-digital technology that's "necessary to free up the additional bandwidth needed to provision higher speeds," Time Warner Cable's transition is complete in only approximately 17 percent of it's footprint.[13] Comcast and Time Warner Cable believe that the combined company will be better positioned to upgrade the Time Warner systems as a result of "Comcast's stronger balance sheet, together with efficiencies generated by the transaction, and Comcast's experience in converting its own plant to all-digital over a compressed time frame…"[14]

Considering both the ability to generate at least $1.5 billion in increased earnings within three years and every year thereafter from cost savings and other synergies that can be invested in additional broadband network capacity as well as the expanded range of business opportunities that scale efficiencies will position the combined company to exploit in the future, a merger between Comcast and Time Warner Cable will clearly promote competition in the market for broadband services.

III. THE COMBINED ENTITY WILL NOT BE "TOO BIG"

Comcast's current market capitalization ($140.17 billion) is smaller than AT&T ($178.92 billion) and Verizon ($201.62 billion) until Time Warner Cable ($40.93 billion) is added. Comcast and Time Warner Cable have a combined market capitalization of $182.07 billion, which is comparable to AT&T and Verizon. In terms of revenue, AT&T ($128.75 billion) and Verizon ($120.55 billion) are considerably ahead even after Comcast ($64.66 billion) and Time Warner Cable ($22.12 billion) are combined ($86.78 billion).

Market Capitalization and Revenue Comparison
(In billions)



Source: *Wall Street Journal* (Aug. 24, 2014)

The combined entity would not have excessive market share, as some critics claim.[15] According to Comcast, the company would serve fewer than 30% of video subscribers, about 35% of wired broadband connections and a little over 15% of both fixed and mobile wireless broadband consumers when the merger is complete.[16]

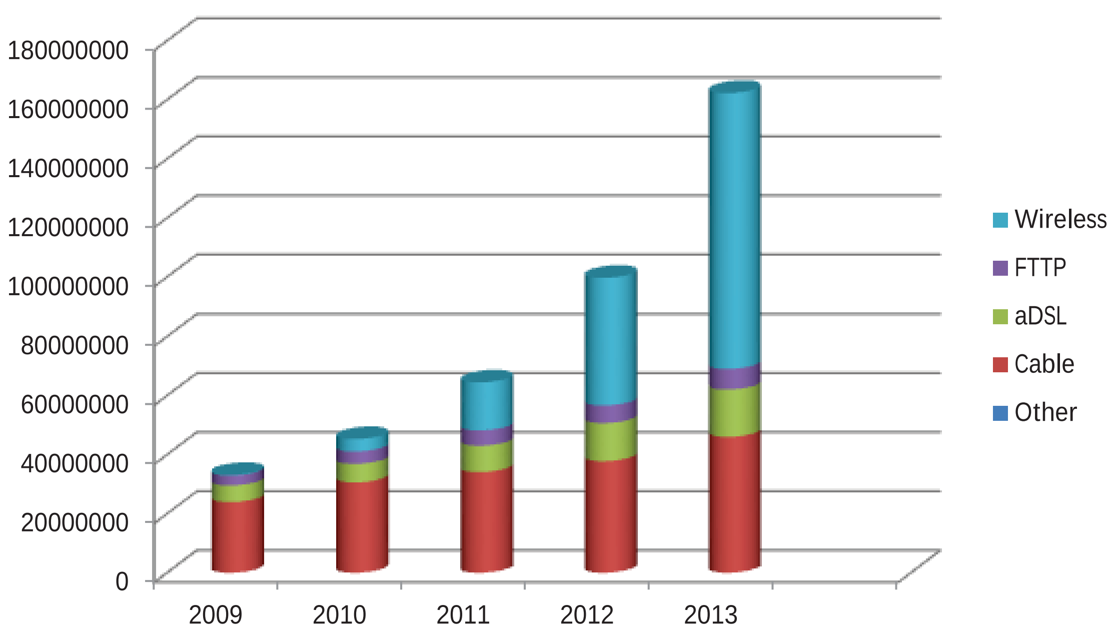
In any event, these market definitions (*i.e.,* cable, fixed broadband, mobile broadband, etc.) are rapidly becoming obsolete as an analytical tool for the Commission's use in evaluating mergers such as this one. Although mobile wireless broadband services have been significantly slower and more expensive than cable modem, DSL and FTTP broadband services in the past, they are catching up. Not only that, but according to the most recent Form 477 summary issued by the Commission, mobile broadband services are the fastest growing of all broadband services (measured by the number of connections), and the most popular overall (despite differences in terms of cost and speed).

Whereas cable modem broadband connections at least 3 Mbps downstream increased 92% from June 2009 through June 2013, mobile wireless broadband connections increased 41,528%.[17]

Broadband Connections
at Least 3 Mbps Downstream and 768 kbps Upstream
(In thousands)

	June 2009	June 2013	
Cable Modem	**23,958**	**46,014**	**+92%**
Mobile Wireless	**224**	**93,247**	**+41,528%**
Other	**9,150**	**24,469**	**+167%**
Total	**33,332**	**163,730**	**+391%**

Broadband Connections
at Least 3 Mbps Downstream and 768 kbps Upstream
by Technology 2009-2013

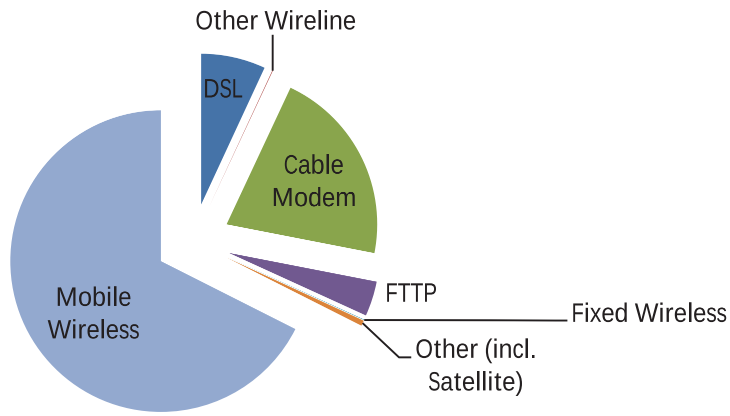


In the category of broadband services at least 10 Mbps (but not more than 25 Mbps) downstream, mobile wireless has a 52% market share compared to 31% for cable modems.[18]

Broadband Connections
10 Mbps – 25 Mbps by Technology
(In thousands)
June 2013

Mobile Wireless	**38,198**	**52%**
Cable Modem	**22,920**	**31%**
DSL	**7,524**	**10%**
FTTP	**4,080**	**6%**
Other	**747**	**1%**
Total	**73,469**	**100%**

Broadband Connections
10 Mbps - 25 Mbps Downstream and 768 kbps Upstream
by Technology as of June 30, 2013



Although cable modem services do dominate the broadband market at the highest speed tiers [above 25 Mbps downstream], that is the smallest segment of the market. There were more than 246 million connections in the under-25 Mbps market segment that is dominated by mobile wireless at the end of June, 2013 versus less than 30 million connections in the above-25 Mbps segment that is dominated by cable modems.[19]

The bottom line is that at the present time Comcast and Time Warner Cable in particular, and broadband-over-cable modem providers in general, face significant competition from broadband-over-mobile wireless providers and others given the fact that most consumers do not choose to take broadband at the highest speeds. Moreover, broadband-over-cable modem providers will face increasing pressure in the above-25 Mbps segment, particularly as a result of ongoing improvements in mobile wireless technology and as additional spectrum becomes available.

CONCLUSION

For the foregoing reasons, the Commission should expeditiously approve the applications of and not impose onerous conditions.

Respectfully Submitted,

/s/ Hance Haney

Hance Haney
Senior Fellow
Discovery Institute

3213 Duke St. No. 812
Alexandria, VA 22314

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The views expressed herein are those of the author and do not necessarily reflect those of the Discovery Institute.

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1 Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable, Inc., Charter Communications, Inc., and Spinco To Assign and Transfer Control of FCC License and Other Authorizations (Public Notice), MB Docket No. 14-57 (Jul. 10, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-986A1.pdf.

2 "Frequently Asked Questions About Transactions," *Federal Communications Commission,* accessed Aug. 23, 2014, http://www.fcc.gov/guides/mergers-frequently-asked-questions.

3 In the Matter of Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, *Applications and Public Interest Statement of Comcast Corp. and Time Warner Cable, Inc.* (Apr. 8, 2014), *relevant portion available at* http://apps.fcc.gov/ecfs/document/view?id=7521098024, 138.

4 Harold Furchtgott-Roth, "Assessing Competition in the Wireless Sector: How DoJ Can Clear Away the Fog From Proposed Mergers," *Engage,* Vol. 13, Issue 2 (July 2012) *available at* http://www.hudson.org/content/researchattachments/attachment/1073/20120928_furchtgottrothengage13.2.pdf, 109 (Furchtgott-Roth also suggests that parallel reviews by DoJ or the FTC and the FCC have "many potential unintended consequences that could undermine a DoJ/FTC court challenge.").

5 *Frequently Asked Questions, supra* note 2.

6 *Assessing Competition, supra* note 4.

7 Alfred E. Kahn, "Network Neutrality," *AEI-Brookings Joint Center for Regulatory Studies* (Mar. 2007) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=973513, at 1.

8 "Four Years of Broadband Growth," *The White House* (June 2013), *available at* http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf, 5 ("In fact, since President Obama took office in early 2009, nearly $250 billion in private capital has been invested in U.S. wired and wireless broadband networks.")

9 In the Matter of Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, GN Docket No. 09-51, *Ex Parte Submission of USDOJ* (Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.pdf, 29-30.

10 *Id.*, 7, 11, 29.

11 *Public Interest Statement, supra* note 3, 27.

12 *Id.*

13 *Id.,* 32.

14 *Id.,* 28.

15 *See, e.g.,* Testimony of Gene Kimmelman, President and CEO, Public Knowledge, before the Committee on Commerce, Science and Transportation, United States Senate (Jul. 16, 2014), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=f222afa5-0a55-4768-9fc7-d952b21f40ee ("As a result of the merger, Comcast will control nearly 50 percent of high speed Internet access in this country, over 30 percent of Multi-Channel Video Programming Distributor (MVPD) subscribers and almost 60 percent of cable subscribers. Comcast will also have a significant presence in 16 out of 20 of the largest DMAs in the country." (footnotes omitted.))

16 Keynote address of David L. Cohen, Executive Vice President, Comcast Corp., before the Technology Policy Institute's Aspen Forum (published Aug. 19, 2014) *available at* https://www.youtube.com/watch?v=KF2oEKMJA5c.

17 "Internet Access Services: Status as of June 30, 2013," *Federal Communications Commission* (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf, Table 7.

18 *Id.,* Table 10.

19 *Id.*