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

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 15-149
	)	
Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership	)	
	)	
For Consent To Assign or Transfer Control of Licenses and Authorizations	)	

COMMENTS OF THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are filed in response to the Commission's request for comments concerning the agency's review of the transfer of control of licenses in connection with the proposed acquisition of Time Warner Cable, Inc. (TWC), and Bright House Networks (BHN) by Charter Communications, Inc. These comments do not specifically endorse or oppose the proposed merger. Rather, they set out basic principles by which the Commission should evaluate all mergers, and they provide insights into the way this merger should be considered in view of those principles. Above all, the Commission's review should be guided by rigorous economic analysis with the focus on consumer welfare benefits.

At all times it should be kept in mind that the proposed Charter/TWC/BHN merger is a "non-horizontal" merger. Commission precedents recognize that non-horizontal mergers typically do not pose anticompetitive threats. Charter, TWC, and BHN do *not* compete head-to-

[*] These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

head. They serve different consumers in different geographic markets. Therefore, under the proposed merger, consumers will *not* lose a choice among video service providers or broadband providers. Subscribers in the markets served by any of the merging entities will have exactly the same number of choices of providers after the merger as before if it is approved. Furthermore, Charter/TWC/BHN poses no likely harm of foreclosure involving video programming because none of these entities have significant ownership interests in national video content. It appears all but certain that the merger would not enable new Charter to withhold affiliated video programming from competing MVPDs or OVDs.

Charter/TWC/BHN likely would bring at least three significant benefits to consumers. First, the merger likely will enable acceleration of all-digital video service upgrades to more consumers than would be the case without the merger. Not all of TWC's or BHN's footprints have been converted from analog to all-digital channels. The merger likely will accelerate the pace of that important analog to digital technology transition.

Second, consumers will also likely benefit from more rapid deployment of high-speed broadband Internet services. Within one year of closing, New Charter plans to increase broadband speeds from 15 Mbps to 60 Mbps throughout TWC's and BHN's all-digital footprints and continue TWC's plans for 300 ultra-high-speed deployments.

And third, Charter/TWC/BHN likely will produce more competitive inter-regional and nationwide enterprise broadband service offerings. Further increasing facilities-based competition in the business enterprise market is consistent with the Commission's policy objectives. In fact, the proposed merger likely will further advance existing competition in the so-called "special access" services market far more than wrong-headed pleas for the Commission to re-regulate special access services. Larger geographic scale makes business enterprise offerings more attractive to businesses with multiple locations that are looking for simpler, streamlined services.

It is in light of these basic characteristics and likely effects that the Commission, foremost, should undertake an analysis that is rooted in consumer welfare principles. Mergers and acquisitions constitute a critical component of free market competition. They are entrepreneurial activities involving calculated risk-taking in a free market process. Efficiency gains and profits are by-products of successful mergers and benefit consumers by strengthening innovative and competitive capabilities.

Compelling justification should be required before government restricts the entrepreneurial freedom of businesses to combine or reorganize. Otherwise, bureaucratic decision-making needlessly and harmfully displaces the marketplace business judgments by competitors possessing critical knowledge about market opportunities and consumer preferences. Commission-imposed regulatory conditions that freeze or otherwise condition pricing options, programming content or lineup decisions, offerings of various service features and functions, network management capabilities, or other business and engineering judgments limit freedom to innovate and develop new products and services.

In light of these considerations, any claimed harms must be demonstrated by compelling evidence before the Commission interferes with the entrepreneurial freedom and business judgments that lead to proposed mergers. Requiring clear and convincing evidence of harm helps prevent market competitors from opportunistically manipulating or unduly influencing the merger review process. And, in the event the Commission determines any of the claimed harms rise to the level of impairing consumer welfare, it must target narrowly any remedies imposed to address such harms.

In the case of this proposed Charter/TWC/BHN merger, the presence of competitive choices in the broadband marketplace, including cross-platform facilities-based alternatives, makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

The dynamism that characterizes the advanced telecommunications marketplace – that is, the market for digital, IP-enabled, cross-platform services such as wireline and wireless broadband Internet access services as well as multichannel video program distributor (MVPD) services – must inform the Commission's analysis of Charter/TWC/BHN's likely competitive effects.

Data contained in the *Sixteenth Video Competition Report* (2015) indicates combined shares of cable multichannel video programming distributors (MVPDs) equaled about 53.9% of MVPD subscribers at the end of 2013. Combined shares of Direct Broadcast Satellite (DBS) MVPDs accounted for approximately 33.9% of subscribers. And telco MVPDs accounted for 11.2% of MVPD subscribers. Indeed, following the AT&T/DirecTV merger, the largest MVPD is no longer a cable operator.

Today's video market offers consumers IP-based HD-capable MVPD provided set-top boxes, multi-room DVR and home networking solutions, cloud-based user interfaces, mobile applications, gaming consoles, Internet-connected smartphones and table computers, and home monitoring systems are among features available to consumers. Streaming apps and mobile platforms also provide many consumers access to cable programming. And MVPDs also make content available to Smart TVs and video game consoles.

The online video distributor (OVD) market segment has been a powerful disruptor and growth engine. Subscription-based OVDs such as Netflix, HuluPlus, and Amazon Prime enable consumers access to video content through third-party media streaming devices, video game consoles, smart TVs, desktop computers, tablets, and smartphones. OVD subscriptions total 100 million or more – roughly equal to the MVPD subscriptions reported at the end of 2013.

The rise of OVDs coincides with the emergence of the streaming media devices. These are Internet-capable devices, and they are provided by firms unaffiliated with MVPDs and, specifically, unaffiliated with the merger applicants herein. Among U.S. broadband households, almost 20% have a streaming media device – whether the Roku 3, Amazon Fire TV, or Apple TV. Estimated global sales of streaming media devices will reach 86 million in 2019. And a new report in *Broadcasting & Cable* on October 12, 2015, says this: "Consumers with visions of streaming video dancing in their heads will have a new batch of over-the-top devices available to them this holiday season. Those choices will run the gamut with respect to pricing and capabilities, starting on the low end with the new (but more-capable) Google Chromecast adapter; to new players from Roku, Amazon and Apple; to higher-end products from TiVo and Nvidia." To be sure, OVDs and media streaming devices constitute video market segments in competition with the MVPD and MVPD-provided device market segments that include the merger applicants.

The rapid growth and ubiquity of broadband functions and applications have made that market a potent source of dynamism in the 21st century economy. As of mid-2014, wireline broadband networks with download speeds of 25 Mbps or more had been deployed to 85.3% of the U.S. population, and wireline networks with speeds of 10 Mbps or more had been deployed to 92.9% of the U.S. population. Wireless broadband networks with download speeds of 10 Mbps or more had been deployed to 98.2% of the population. Indeed, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitor to wireline broadband. Average LTE speeds range between 30 and 40 Mbps, enabling a wide range of video viewing functionalities. Far and away, most consumers now have wireless access to high-capacity wireless broadband services capable of streaming HD video.

Given the horizontal nature of the merger and the dynamic state of today's video and broadband marketplaces, the Charter/TWC/BHN merger's potential consumer welfare-enhancing benefits likely outweigh any possible harms. The probability seems very low that Charter/TWC/BHN would create any problematic market power scenario or cause likely consumer harm. As already pointed out, the merging parties lack material ownership interests in nationwide video programming networks. This lack of vertical integration – that is, the lack of video programming to be delivered through its cable video service – reduces merger-specific foreclosure concerns to about zero. For that matter, however outdated and unnecessary they may be in today's marketplace, program access rules are already in place to address any claimed anticompetitive harms from foreclosure in video programming.

Nor does the merger pose any recognizable potential that the combined entity would withhold affiliated video from competing OVDs or interfere with consumer access to OVD services. The merging parties' lack of vertical integration renders such concerns irrelevant. For that matter, the new Charter would not possess market share sufficient to ever succeed in such a strategy. The combined Charter/TWC/BHN would result in a broadband market share of only 21% of the nation's subscribers. Even assuming for the sake of argument that the new Charter had the means to attempt foreclosure, it almost certainly would lose public goodwill and customers to its many rivals who would hold themselves out as offering unfettered access to the Internet.

II. Competitive Conditions in the Video and Broadband Markets Should Dictate the Commission's Merger Analysis

Under the terms of a complex deal involving the exchange of nearly $90 billion in cash and stock, both Time Warner Cable (TWC) and Advance/Newhouse Partnership – which owns Bright House Networks (BHN) – will become wholly owned subsidiaries of the new Charter Communications. Combined, the new Charter will have approximately 24 million total customers across 41 states. This includes approximately 19.4 million broadband subscribers. New Charter would be the second-largest provider of wireline broadband services, with a 21% market share. Also, new Charter would have approximately 17.4 million video service subscribers, making it the third-largest MVPD, with a 17% market share.

Of course, transactional details and market share numbers hardly tell the whole story. Charter/TWC/BHN takes place in the context of dynamic video and broadband markets. The proposed merger should therefore be considered in light evaluation of those markets' underlying competitive conditions and processes for delivering new generations of products and services. A forward-looking evaluation should emphasize the critical role of those market conditions most conducive to continuing investment and innovation rather than static considerations such as market share estimates. The dynamism that characterizes the advanced telecommunications marketplace – that is, the market for digital, IP-enabled, cross-platform services such as wireline and wireless broadband Internet access services and as well as MVPD services – should inform the Commission's analysis of Charter/TWC/BNH's likely competitive effects.

Entrepreneurial investment, technological innovation, and market competition continue to transform the markets for video and broadband services. These comments touch on some highlights of those innovative, disruptive forces in order to supply the critical analytical reference point for reviewing Charter/TWC/BHN.

Today's Dynamic Video Services Market

Early 1990s bottleneck assumptions regarding cable services have been obliterated by successive waves of innovation and competitive entry in the video services market. The video consumer experience of the early 1990s centered on a single local cable operator supplying a limited number of analog cable channels. But today's video consumer experience is decidedly different. The last two decades of heavy entrepreneurial investment, innovative breakthroughs in transmission and viewing technologies, new market entrants relying on rival service platforms, disruptive business models, and changing consumer habits have ushered in a myriad of new product and service options for consumers.

Data contained in the *Sixteenth Video Competition Report* (2015), as well as more recent developments in the market, offer ample evidence of the video market's dynamism.[1] Consider first the options for MVPD services now available to consumers. Data contained in the *Sixteenth Report* indicates combined shares of cable MVPDs equaled about 53.9% of MVPD subscribers at the end of 2013.[2] Also, combined shares of the two DBS MVPDs accounted for approximately 33.9% of MVPD subscribers at the end of 2013.[3] Entry by AT&T's U-Verse, Verizon's FiOS, and CenturyLink's PrismTV has further enhanced competitive choice for consumers. All telco MVPDs accounted for some 11.2% of MVPD subscribers at the end of 2013.[4] Indeed, following the AT&T/DirecTV merger, the largest MVPD is no longer a cable operator.[5]

The dynamism of what today's video marketplace offers consumers is also reflected in the increasingly wide range of device options for access video content. IP-based HD-capable

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[1] Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report, MB Docket No. 14-16 (2015) ("*Sixteenth Report*").
[2] *Id.* at 10, ¶ 25.
[3] *Id.* at 11, ¶ 26.
[4] *Id.* at 11, ¶ 27.
[5] *See* Parkes Associates, Press Release: "Parks Associates: Amazon, Apple, Google, and Roku Dominate Streaming Media Device Market With 86% of Sales," (Aug. 20, 2015), available at: http://www.marketwired.com/press-release/parks-associates-amazon-apple-google-roku-dominate-streaming-media-device-market-with-2049258.htm.

MVPD provided set-top boxes, multi-room DVR and home networking solutions, cloud-based user interfaces, mobile applications, gaming consoles, Internet-connected smartphones and table computers, and home monitoring systems are among features available to consumers. Streaming apps and mobile platforms also provide many consumers access to cable programming. And MVPDs also make content available to Smart TVs and video game consoles.

The online video distributor (OVD) market segment has been a powerful disruptor and growth engine. Subscription-based OVDs such as Netflix, HuluPlus, and Amazon Prime enable consumers access to video content through third-party media streaming devices, video game consoles, smart TVs, desktop computers, tablets, and smartphones. The *Sixteenth Report* cited an estimate that, "as of 2013, more than 53 million U.S. households watched online programming with at least one Internet-connected device, including computers, game consoles, streaming media players, television sets, and Blu-ray players, with an average of 4.8 such devices per online viewing household."[6]

Media outlets report that Netflix now has more than 65 million subscribers.[7] This spring, it was reported that HuluPlus had close to nine million subscribers.[8] And earlier this year, it was reported there are perhaps 40 million or more Amazon Prime subscribers.[9] Thus, OVD subscriptions total 100 million or more – roughly equal to the MVPD subscriptions reported at the end of 2013.[10] The Commission has observed an important indicator of OVDs' growing competitiveness with MVPD services: OVD investment in original video content.[11] Netflix,

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[6] *Sixteenth Report*, at 142 ¶ 299 (internal cite omitted).
[7] Tenzin Pema, "Netflix Now Boasts More Than 65 Million Subscribers," *Reuters* (August 15, 2015), at: http://www.huffingtonpost.com/2015/07/16/netflix-subscribers_n_7808782.html
[8] Joan E. Solsman, "Hulu closes in on 9 million paid subscribers," CNET (April 29, 2015), at: http://www.cnet.com/news/hulu-closes-in-on-9-million-paid-subscribers/#.
[9] Patrick Seitz, "Amazon Prime now tops Netflix in U.S. subscribers," *Investors.com* (January 27, 2015), at: http://news.investors.com/technology-click/012715-736533-amazon-prime-has-more-subscribers-than-netflix.htm
[10] *See Sixteenth Report*, at 10, ¶ 39.
[11] *Id.* at 109-110, ¶¶ 232-233; *id*. at 152, ¶ 316.

Hulu Plus, and Amazon Prime have all added original content.

The rise of OVDs coincides with the emergence of the streaming media devices. These are Internet-capable devices, unaffiliated with MVPDs. Among U.S. broadband households, almost 20% have a streaming media device – whether the Roku 3, Amazon Fire TV, or Apple TV. Meanwhile, 8% of U.S. broadband households have a smaller stick device for streaming media to TVs or PCs. It is estimated that global sales of streaming media devices will reach 86 million in 2019. And a new report in *Broadcasting & Cable* on October 12, 2015, says this: "Consumers with visions of streaming video dancing in their heads will have a new batch of over-the-top devices available to them this holiday season. Those choices will run the gamut with respect to pricing and capabilities, starting on the low end with the new (but more-capable) Google Chromecast adapter; to new players from Roku, Amazon and Apple; to higher-end products from TiVo and Nvidia." OVD services and many streaming devices integrate with MVPDs to offer complementary services. But OVDs and media streaming devices also constitute market segments in competition with MVPD and MVPD-provided device market segments.

Today's Dynamic Broadband Services Market

The rapid growth and ubiquity of broadband functions and applications have made that market a potent source of dynamism in the 21st century economy. By the time DBS was entering the video services market, what we now know as broadband services was rare. "In 1994, few consumers had Internet access at home, and if they did have access it was likely via a 14 kbps or 28 kbps dial-up modem."[12] And in 2003 broadband was deployed to only 15%-20% of Americans. However, by June, 2012, "98% of Americans had access to wired or wireless

[12] FCC – Omnibus Broadband Initiative, "Broadband Performance," *Technical Paper No. 4*, at 11, available at: http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-broadband-performance.pdf.

broadband at combined advertised download speeds of 3 Mbps or greater and upload speeds of 768 kbps or greater."[13]

Those availability and speed numbers further improved. As of mid-2014, wireline broadband networks with download speeds of 25 Mbps or more had been deployed to 85.3% of the U.S. population, and wireline networks with speeds of 10 Mbps or more had been deployed to 92.9% of the U.S. population.[14] Also, as of that same date, wireless broadband networks with download speeds of 10 Mbps or more had been deployed to 98.2% of the population.[15]

Indeed, next-generation wireless network upgrades continue to increase speeds and capacity of wireless networks, making wireless an increasingly viable competitor to wireline broadband. Average LTE speeds range between 30 and 40 Mbps, enabling a wide range of video viewing functionalities.[16] Far and away, most consumers now have wireless access to high-capacity wireless broadband services capable of streaming HD video. Mobile consumption of digital media through apps and mobile web browsing has already surpassed desktop-based digital media consumption, 60% to 40%.[17] Future developments in next-generation technology will enable continued growth, with increasing choices and sources of value for consumers in the wireless market.

The rapid emergence and advancement of cross-platform rivalry converging on digital, IP-enabled video and broadband services should be matched by a merger review analysis that is

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[13] *See* NTIA, *U.S. Broadband Availability: June 2010- June 2012* (May, 2013), available at: http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.
[14] *See* NTIA, National Broadband Map (data as of June 30, 2014), available at: http://www.broadbandmap.gov/summarize/nationwide.
[15] *See id*.
[16] *See, e.g.*, Lynn La, "4G LTE Showdown: How Fast is Your Carrier?" CNET (Aug. 5, 2014), available at: http://www.cnet.com/news/4g-lte-showdown-how-fast-is-your-carrier/.
[17] *See* Sarah Perez, "Majority of Mobile Digital Media Consumption Now Takes Place In Mobile Apps," Techcrunch.com (Aug. 21, 2014) (summarizing ComScore's "The U.S. Mobile App Report" (2014)), available at: http://techcrunch.com/2014/08/21/majority-of-digital-media-consumption-now-takes-place-in-mobile-apps/.

forward-looking and emphasizes the continuing disruptions and breakthroughs that will drive the market for advanced telecommunications services forward.

III. Charter/TWC/BHN Promises Likely Consumer Welfare-Enhancing Benefits

Several Commission precedents recognize the kinds of cost savings that can result from mergers. Cost savings and other efficiency gains achieved through economies of scope and scale from mergers typically benefit consumers – whether through rapid innovation, accelerated deployment of advanced products and services, or reduced prices.

From a consumer welfare standpoint, Charter/TWC/BHN appears almost certain to benefit consumers. In this case, with combined resources and enhanced efficiencies through scale economies and overhead cost savings, the merged entity will likely bring at least three significant benefits to consumers.

First, the merger likely will enable acceleration of all-digital video service upgrades to more consumers than would be the case without the merger. Not all of TWC's or BHN's footprints have been converted from analog to all-digital channels. According to the merging parties, "New Charter will transition Time Warner Cable and Bright House Networks' cable systems to all-digital networks within 30 months of the close of the Transaction."[18] This would accelerate the pace of that important technology transition. Absent the merger TWC "expects to be all-digital in only about half of its footprint by the end of 2015."[19]

Second, consumers likely will benefit from more rapid deployment of high-speed broadband Internet services. Within one year of closing, New Charter plans to increase base speeds for its broadband services from 15 Mbps to 60 Mbps throughout TWC's and BHN's

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[18] Charter Communications, Inc., *et. al*., In the Matter of Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent To Assign or Transfer Control of Licenses and Authorizations, *Public Interest Statement*, MB Docket No. 15-149 (June 25, 2015), at 3, available at: https://transition.fcc.gov/transaction/charter-twc-bhn/charter-twc-bhn-public-interest.pdf. *See also id*. at 21-24.
[19] *Id.* at 24.

footprints that are currently all-digital.[20] Meanwhile, it will continue TWC's current plans for select 300 ultra-high-speed broadband deployments.[21]

Third, Charter/TWC/BHN likely will produce more competitive inter-regional and nationwide enterprise broadband service offerings. The ability to offer services to business enterprises on a larger geographic scale makes such offerings more attractive to businesses with multiple locations that are looking for simpler, streamlined services. Commission precedents have recognized the important benefits that come from a "broader service footprint" that creates increased "ability to compete, particularly for enterprise customers that have operations extending" across territories served by the merging parties.[22]

IV. Any Regulatory Intervention Must Be Backed by Strong Evidence of Likely Market Power and Consumer Harm

For important public policy reasons, the Commission should find compelling evidence of potential market power and consumer harm before it prohibits or imposes any restrictive conditions on proposed mergers such as Charter/TWC/BHN.

First, mergers and acquisitions constitute a critical component of free market competition. Indeed, mergers are as genuine a part of market competition as wholesale and retail sales of products and services. Mergers are entrepreneurial activities involving calculated risk-taking. They are undertaken by acquiring entities in a free market process in which those entities seek to improve their competitive position. Typically, mergers are pursued in order to seize unrealized or hoped-for market opportunities. Profits resulting from such mergers are the by-

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[20] *Id*. at 19.
[21] *Id*. at 23.
[22] Memorandum Opinion and Order ("Time Warner Cable/Insight Order"), In the Matter of Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc., WC Docket No. 11-148, at ¶ 24 (released January 31, 2012)(Media Bureau), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-12-113A1.pdf.

product of competitive success. Mergers depend on entrepreneurial freedom. And compelling justification is required before government intrusion into this facet of competition is considered.

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

Third, "Most mergers enable firms to reduce their costs or compete more effectively. The cost savings come mainly through increased economies of scale, which occur when a firm does a larger volume of business. Mergers can also create economies of scope, which occur when a firm does a larger volume of business."[23] The production of compelling evidence is necessary to support any Commission finding that the proposed merger would produce a contrary outcome. The Commission's own precedents also recognize that "efficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products."[24] Further, the Commission has recognized that "an increased ability to provide voice, data, and video packages is likely to make the merged company a stronger company overall, and

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[23] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) at 207.
[24] *Memorandum Opinion and Order* ("*Adelphia Order*"), In the Matter of Applications of For Adelphia Communications Corporation, Time Warner Cable Inc. and Comcast Corporation, For Consent to Assignment and/or Transfer of Control of Licenses, MB Docket No. 05-19, at 107, ¶ 243 (released July 21, 2006), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-105A1.pdf.

a stronger competitor in the multichannel video service market."[25] The Commission's precedents also conclude there are public benefits in facilitating broadband goals by spurring "greater broadband demand, deployment and adoption."[26] And the Commission has affirmed that combinations can increase deployment of next-generation technologies and can make other products and services upgrades more readily and widely available.[27]

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

Fourth, where a proposed merger will take place within the context of a marketplace characterized by ongoing competition, the less likely it is that a proposed merger will undermine

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[25] Memorandum Opinion and Order ("*CenturyLink/Qwest Order*"), In the Matter of Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control, WC Docket No. 10-110, at ¶ 39 (released March 18, 2011), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-47A1.pdf. *See also, e.g*., Memorandum Opinion and Order ("*Time Warner Cable/Insight Order*"), In the Matter of Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc., WC Docket No. 11-148, at ¶ 23 (released January 31, 2012)(Media Bureau), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-12-113A1.pdf.

[26] *See, e.g*., *Memorandum Opinion and Order* (*"Comcast/NBCU Order"*), In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, at ¶ 233, (January 20, 2011), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf; *CenturyLink/Qwest*, at ¶ 37.

[27] *See, e.g*., *Memorandum Opinion and Order* ("*T-Mobile/MetroPCS Order*") In the Matter of Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc., For Consent To Transfer of Control of Licenses and Authorizations, WT Docket No. 12-301, at ¶ 74, available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-13-384A1.pdf.

consumer welfare. As indicated in Section II, the markets for video and broadband services are dynamic and vibrant. The presence of competitive choices, including cross-platform facilities-based alternatives, makes it all the more essential that any Commission intervention be based on a compelling evidentiary showing that competition will somehow fail to protect consumers.

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

V. The Likely Consumer Welfare-Enhancing Benefits Outweigh the Harms

Significantly, Charter/TWC/BHN appears to pose no potential downsides for consumers. Particularly in light of the dynamic and competitive forces prevalent in the video and broadband Internet services market as well as the particulars of the proposed merger, the probability seems low that Charter/TWC/BHN would create any problematic market power scenario or cause likely consumer harm. The potential benefits to consumers from the proposed merger outweigh those unlikely harms.

Charter/TWC/BHN is a "non-horizontal" merger. Commission precedents recognize that such mergers typically do not pose anticompetitive threats. The *Adelphia Order* (2006) explained: "[s]ince there are almost no MVPD markets in which seller concentration will increase immediately as a result of the proposed transactions, traditional antitrust analysis of the effects of an immediate increase in seller market power does not apply."[28] That is, static market concentration measures do not apply to non-horizontal integrations.

Given the non-overlap between areas served by cable companies, it is little surprise that Cablevision's 2010 acquisition of Bresnan and Charter's subsequent acquisition of Bresnan in 2013 elicited no public opposition. Both transactions were approved by routine orders of the Media Bureau.[29]

In this case, the merging entities have little to zero overlap in the geographic scope of their operations. Charter, TWC, and BHN do *not* compete head-to-head. They serve different consumers in different parts of the country. If the merger is approved, no consumer will lose a choice among video service providers or broadband providers.

Even if static marked indicators were considered, they pose no source of concern. When it comes to video services, new Charter would have approximately 17.4 million video service subscribers nationwide. This would make new Charter the third-largest MVPD, with just a 17% market share, behind AT&T-DirecTV (26%) and Comcast (22%).[30] New Charter's nationwide MVPD share would be far below the twice Commission-imposed 30% caps on nationwide MVPD subscribership that the D.C. Circuit has twice invalidated as arbitrary and capricious.[31] (New Charter's share of the nationwide broadband market will be discussed below.)

Furthermore, Charter/TWC/BHN poses no likely harm of foreclosure resulting from the parties' financial ownership interests in video programming. In other words, it appears all but

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[28] *Adelphia Order*, MB Docket No. 05-19, at 40, ¶ 80.
[29] *See* In the Matter of Applications of Cablevision Systems, Corporation and Bresnan Communications, LLC, For Consent to Assign Licenses and Transfer Control of Licenses, Public Notice, MB Docket No. 10- 154 (released September 21, 2010)(Media Bureau), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-10-1782A1.pdf; In the Matter of Applications of Charter Communications, Inc. and Bresnan Broadband Holdings, LLC For Consent to Assign Licenses and Transfer Control of Licenses, Public Notice, MB Docket No. 13-77 (released May 14, 2013)(Media Bureau), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1088A1.pdf.
[30] *See* chart on pg. 20, *infra*.
[31] *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C.Cir. 2001); *Cablevision Systems Corp. v. FCC*, 597 F.3d 1 (D.C.Cir. 2010).

certain that the merger would not enable new Charter to withhold affiliated video programming from competing MVPDs or OVDs. To repeat, Charter/TWC/BHN merger is primarily a non-horizontal integration, and certainly not a vertical integration.

Charter has *no* significant ownership interests in nationwide video programming networks. Nor does BHN. TWC's programming interests are limited to a few local broadcast stations and regional sports networks. This lack of vertical integration – that is, the lack of video programming to be delivered through its cable video service – reduces merger- specific foreclosure concerns to about zero. Any concerns about new Charter withholding or unreasonably restricting a competitor MVPDs' access to its affiliated video programming are inapplicable.

For that matter, program access rules are already in place to address anticompetitive harms from foreclosure in video programming. The Commission's program access rules, while they may be unnecessary legacy regulatory relics, nevertheless make it unlawful for vertically integrated MVPDs "to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[32] Among other things, vertically integrated MVPDs are prohibited from discriminating between MVPDs in the sale of their programming.[33] Even if foreclosure concerns were posed by the Charter-TWC, the availability of this administrative remedy would provide an adequate backstop. Video programming-related, Commission-imposed conditions on this proposed merger's approval are certainly unjustifiable.

Nor does the merger pose any recognizable potential that the combined entity would withhold affiliated video from competing OVDs or interfere with consumer access to OVD

[32] 47 U.S.C. § 548(b).
[33] *Id*. at § 548(c)(2)(B).

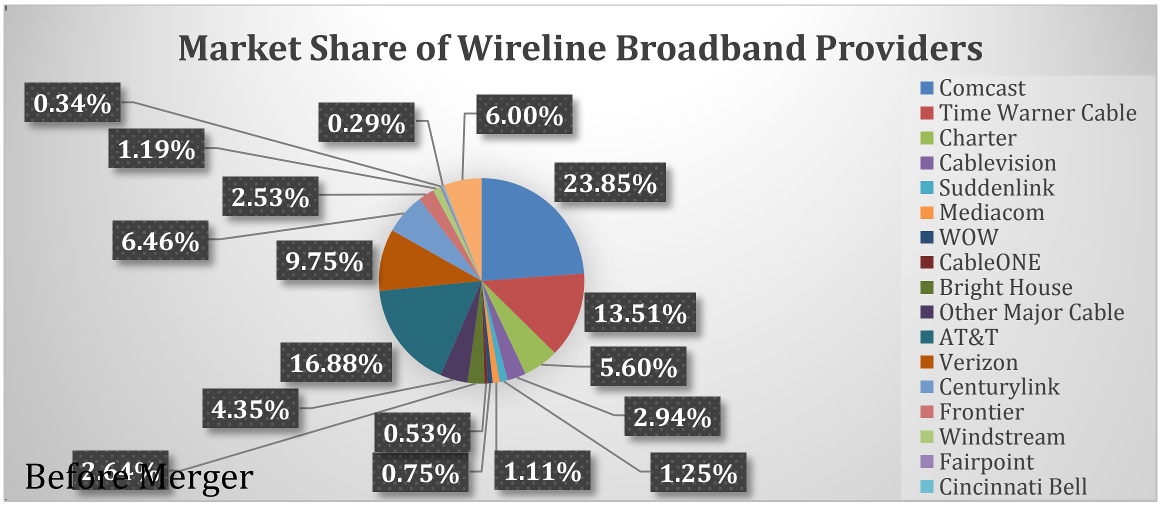
services. New Charter would not possess market share sufficient to ever succeed in such a strategy. If foreclosure were attempted, new Charter would almost certainly lose public goodwill and customers to its many rivals who would hold themselves out as offering unfettered access to the Internet. Of course, broadband providers don't block access or degrade consumer access to legal websites and services. It's bad business, likely undermining goodwill with the public and inducing loss of customers to competitors. An industry-wide consensus against blocking or significantly degrading access to legal content prevails regardless of whatever authority the Commission claims for itself through network neutrality regulations.

Charter/TWC/BHN differs in key respects from the proposed Comcast/TWC that was discouraged and effectively blocked by the U.S. Department of Justice. These differences make the likelihood of consumer benefits posed by Charter/TWC/BHN and the unlikelihood of harms posed by this proposed merger even more clear-cut.

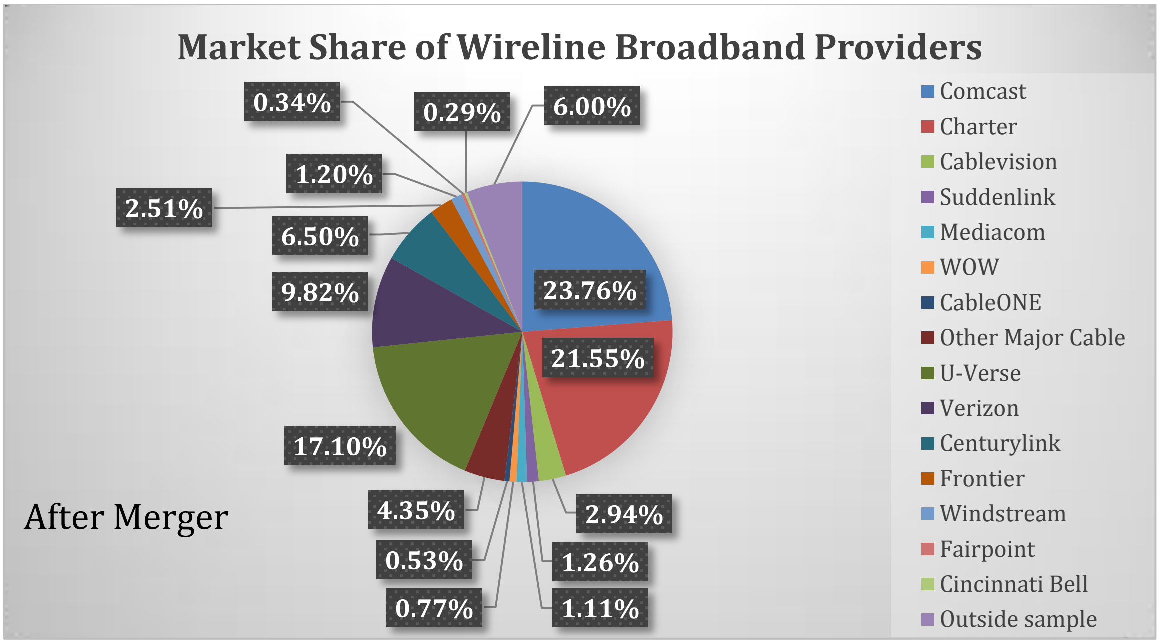
Public reports indicate three primary areas of concern led Comcast/TWC to be discouraged – and effectively blocked – by DOJ: (1) the extent of the combined entity's control over nationwide broadband Internet delivery; (2) the combined entity's use of its financial influence to strike exclusive cable deals to keep video programming off of other video platforms; and (3) the combined entity's potential to limit how programming is delivered through online streaming video services. Aside from whatever merit these concerns may or may not have had in the context of Comcast/TWC, none of those concerns are relevant here.

For starters, Charter/TWC/BHN poses none of the broadband market share concerns that DOJ supposedly had in Comcast/TWC. Whereas Comcast/TWC would have resulted in a nationwide broadband consumer subscription market share of about 30%, Charter/TWC/BHN will result in a nationwide broadband market share of only 21%.[34] To put things in perspective, in *Time Warner Entertainment v. FCC* (2001) and *Comcast v. FCC* (2009), the D.C. Circuit invalidated Commission-imposed 30% caps on nationwide MVPD subscribership.[35] In both instances, the D.C. Circuit concluded the caps were arbitrary and capricious in light of the existing competition in the MVPD marketplace.[36] Competition has only increased since 2009.

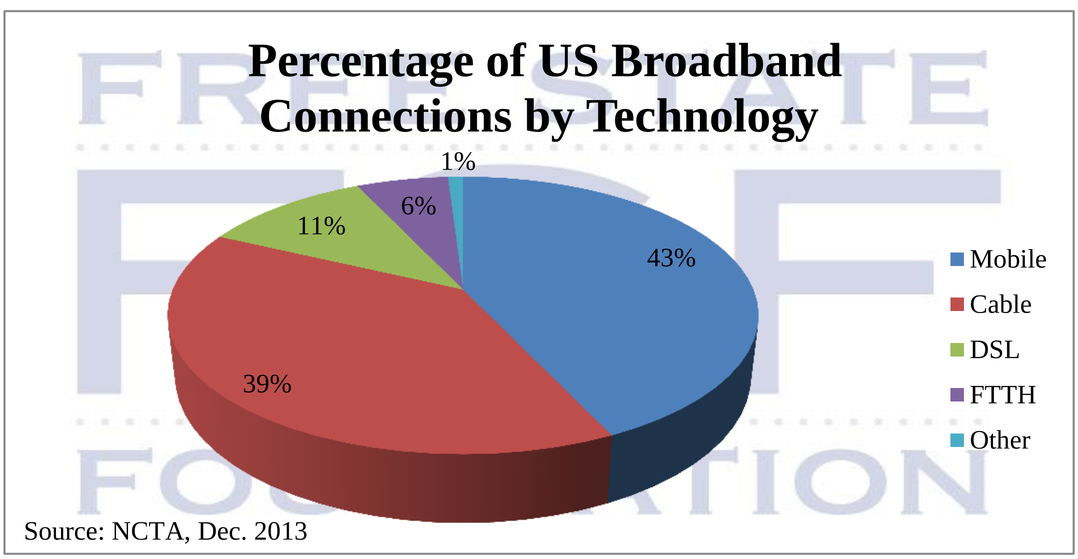
The following charts compare pre- and post-merger market share scenarios for the wireline broadband nationwide market[37]:



[34] *See* text accompanying note 37, *infra*.
[35] 240 F.3d 1126; 597 F.3d 1.
[36] 240 F.3d at 1132; 579 F.3d at 6-8.
[37] Analysis based on information contained in Leichtman Research Group, Press Release: "ABOUT 360,000 ADDED BROADBAND IN 2Q 2015" (Aug. 18, 2015), available at: http://www.leichtmanresearch.com/press/081815release.pdf.



Wireline is by no means the exclusive technology category or platform for delivering broadband services. This critical fact should come to mind whenever market share numbers for wireline or wireless market segments are considered. The next chart speaks to the reality of cross-platform competition, showing the composition of broadband Internet connections by technology platform:



In addition, Charter/TWC/BHN poses none of the anticompetitive foreclosure concerns that DOJ had relating to Comcast/TWC and competing OVDs. By virtue of its stakes in NBC-U, Comcast has extensive ownership of video programming. DOJ expressed concern that Comcast's ownership of video programming interests in NBC-U would give it the means and incentive to withhold video programming from competing MVPDs, or use those same ownership interests to restrict availability of programming to online video services. Leaving aside the merits of DOJ's concerns about Comcast, the lack of vertical integration in Charter/TWC/BHN renders such concerns irrelevant.

V. Conclusion

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

Respectfully submitted,

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