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

In the Matter of	)	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.	)	MB Docket No. 10-56
For Consent to Assign Licenses or Transfer Control of Licensees	)	

REPLY COMMENTS OF RICHARD A. EPSTEIN
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These reply comments are submitted by Richard A. Epstein, Free State Foundation Distinguished Adjunct Senior Scholar, in response to the Commission's request for comments in connection with its review of the transfer of control of licenses resulting from a proposed joint venture between General Electric (GE), the current majority owner of NBC-Universal (NBCU), and Comcast Corporation (Comcast). These reply comments focus on the Joint Petition to Deny of the Consumer Federation of America, Consumers Union, Free Press, and the Media Access Project filed on June 21, 2010, and the Declaration of Dr. Mark Cooper filed on the same date.

I. INTRODUCTION AND SUMMARY

The FCC is now considering whether to approve, and if so on what terms, the proposed merger between Comcast and NBC-Universal (NBCU). Many powerful and influential

* These comments express the views of Richard A. Epstein, Distinguished Adjunct Senior Scholar, The Free State Foundation. The views expressed do not necessarily represent the views of the Board of Directors, staff, or others associated with the Free State Foundation.

consumer groups have opposed this merger on the ground that it is inimical to the public welfare. In these comments, I take issue with that contention in order to explain why, whatever the economic merits of this merger, there are no principled public interest grounds on which to oppose the merger's consummation. In order to make this case, these reply comments are divided into two sections. The first section takes advantage of a 10-year retrospective to show how these consumers groups made similar dire and misguided criticisms of the AOL-Time Warner merger. The current objections from these same consumer groups repeat many of these same errors. Errors of this magnitude do not just happen by chance.

They are dependent upon systematic analytical mistakes that are the subject of the second part of these remarks. These mistakes fall into three categories. The first mistake that these consumer groups make stems from their utter failure to develop a consistent framework by which to evaluate whether any merger is in fact in the public interest. Their second major error derives from their decision to adopt a narrow and rigid definition of the relevant economic market that ignores all the dynamic marketplace developments brought about by technological innovation and consumer demand. The third major mistake of the consumer groups is that they assume that the only strategies that matter are those adopted by Comcast and NBCU. In any complex market, however, the gains that these two players can obtain are limited by the powerful counterstrategies that are available to other market participants, including suppliers, customers and competitors. In the end, therefore, the opponents of this merger cannot provide a coherent and compelling account of why this merger ought to be stopped. By far the better approach for the FCC is to allow the merger to go through and then to be on the alert for any improper trade practice that the FCC is then in a position to enjoin on the basis of a showing of actual consumer harm. One does not have to share the optimistic views that Comcast and NBCU have advanced in order to approve of this merger.

Before turning to my substantive comments, it is appropriate to make a comment about the scope of this particular inquiry in relation to broader industry regulation. The FCC has some power to add conditions to any merger that it approves. That kind of power is, in general, perfectly appropriate in cases where it requires one of two companies to a merger to divest itself of assets in certain submarkets where the surviving firm might acquire undue market power. But that form of regulation should not be used to subject a single company to regulations that should be adopted, if at all, only for the entire industry, and then only after some opportunity for notice and comment on the proposed regulation. Just that position was taken by the Free State Foundation in its initial comments in this proceeding when it urged the FCC not to engage in the unseemly and unwise practice of "regulation-by-condition."[1] In particular, I strongly endorse on grounds of administrative transparency and regulatory consistency this observation of FSF: "Too often, 'regulation-by-condition' has been a method by which the Commission has imposed policies on merging parties that the Commission should only be imposed, if at all, through rulemaking."[2]

The soundness of this FSF position is confirmed during this proceeding as countless special interests have implored the FCC to impose on the applicants all manner of extraordinary and intrusive conditions. These proposals include major initiatives ranging from the adoption of a net neutrality mandate to various new program access requirements. It is critical for the FCC to exercise a strong measure of institutional self-restraint so that these collateral initiatives do not end up siphoning off all the gains that this merger might produce if allowed to go forward in its

[1] See Comments of the Free State Foundation, MB Docket 10-56, June 21, 2010, at 11-12.
[2] Id,. at 12.

current form. There is no place in this proceeding for so-called "voluntary" conditions that do not bear on those competitive concerns that are uniquely and specifically tied to the distinctive features of this merger. General rulemaking provisions are the only proper vehicle for setting up industry-wide rules. Any *ad hoc* restrictions could easily distort the competitive balance between rival firms that is so critical to the consumer welfare in this dynamic industry.

II. THE DISMAL TRACK RECORD OF THE CONSUMER GROUPS

On April 26, 2000, in connection with their "petition to deny" filed with the Commission, a coalition of consumer groups issued a dire warning that the then proposed merger between AOL and Time Warner "would fuse the country's largest online company with the world's biggest media and entertainment conglomerate."[3] The petition to deny was signed by the same groups and many of the same people[4] who now oppose the proposed merger between Comcast and NBCU. Ten years ago, the consumer groups' petition to deny predicted dire consequences as a result of the AOL/Time Warner merger. The business success and social harm that were said to arise from the merger were treated as inexorable and inevitable. Here is what the consumer groups had to say then:

> · The merger would allow two enormous firms to dominate the markets for broadband and narrowband Internet services, cable television, and other entertainment services, which could leave consumers with higher prices, fewer choices, and the stifling of free expression on the Internet.
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> · The business links between AOL Time Warner and telecommunications giant AT&T would create cross ownership problems that violate antitrust merger guidelines and the FCC's public interest principles.
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> · AOL was once a vigorous advocate for rules to require that cable wires be left open to competitors to provide Internet services. Now that AOL stands to become the owner of

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[3] See Press Release, "Consumer and Public Interest Groups Ask FCC to Block AOL-Time Warner Merger," April 26, 2000,

[4] The signatories were Mark Cooper, Consumer Federation of America; Gene Kimmelman, Consumers Union; Andrew Jay Schwartzman, Media Access Project; Jeff Chester, Center for Media Education.

cable properties, it has changed its view, arguing that open access should be more limited and merely voluntary.[5]

Somehow the inevitable and inexorable never happened. What did happen was this. The merger went through. In 2000, AOL paid about $164 billion to get Time Warner, and the merger turned out to be an economic fiasco, one of the worst deals on record. In 2009, the two companies separated, only now the dominant player was not AOL, but Time Warner. A quick online search about the split (not possible a decade ago) promptly produced a short and insightful article by Paul Weinstein that spells out the sources of AOL's decline.[6] In 2000, AOL was the leader in dial-up online services that led to content that was found exclusively on AOL sites. But dial-up services were already on the way out. They soon gave way to more powerful technological advances and new business models that allowed consumers to reach all sorts of sites at the click of a button.

With the advent of Google, Yahoo, and similar websites, advertisements became the revenue engine, and this transformation devastated the AOL business model that relied heavily on subscriber fees. A subscriber fee model doesn't work when they are no subscribers, and subscribers dwindled fast as users, who treated advertisements as an additional benefit, deserted AOL in droves. At one time, AOL was a destination site for chat rooms and message boards. But, as Weinstein relates, and even I know, the rise of Facebook, Hulu, Twitter, and YouTube has produced and made available to the public new and unimagined technologies and services, with far greater subtlety and reliability than those of the previous generation. Add into the mix such new devices as iPhones and it is clear that any claim of permanent market power is a costly illusion that no savvy technology company can afford to mistake for reality. And apart from

[5] Press Release, supra note 1.

[6] Paul Weinstein, AOL Time Warner Split Leaves AOL Behind, December 10, 2009, available at: http://technorati.com/business/article/aol-time-warner-split-leaves-aol/

these market shifts, it is not easy to merge two large companies in the hopes of obtaining synergies between two far flung empires that work under different cultural metrics.

The failed AOL-Time Warner merger is thus an object lesson for those who think that they can predict future developments in dynamic markets. This object lesson has, however, been lost on the so-called consumer groups whose new Joint Petition to Deny the Comcast-NBCU merger applications contains the same dire predictions as those made a decade before, supported by the same shoddy and melodramatic analysis. Thus at the outset the June 21 Joint Petition proclaims:

> This is the first major media merger since the deployment of broadband technology capable of distributing video content. If consummated, Comcast and NBCU ("Applicants") would control two national broadcast networks, multiple local broadcast stations, a movie studio, cable networks, Internet properties, a cable operator, and a broadband service provider. Comcast is already the nation's largest cable operator, largest broadband service provider, and one of the leading providers of regional cable sports and news networks. Allowing it to acquire one of the nation's premier video content producers would enable Comcast to extend its existing market power, especially with respect to emerging platforms. The result would be higher prices, fewer programming and provider choices, and diminished media diversity. It would inhibit innovation in budding markets and encourage other similarly situated companies to follow suit. This transaction is unprecedented in its scope. Approval would allow a single company to own a huge array of popular content and enable it to exert undue influence over how that content – and the content produced by competitors – is distributed over the airwaves, cable, and Internet. Control over any one of these elements would be sufficient to warrant rejection of the merger application. Taken together, they overwhelmingly require that result.[7]

To be sure, this transaction is indeed "the first major media merger since the deployment of broadband technology capable of distributing video content." But that is hardly reason to ignore the lessons of the earlier AOL-Time Warner, which was every bit as novel in its own time – as these consumers groups trumpeted at the time. The FCC should not ignore the identity of

[7] Joint Petition, Summary.

these overwrought messengers when it weighs the full-throated denunciation of the consumer groups' petition to deny. The petition to deny should be disregarded in toto as a piece of self-aggrandizement by consumer groups whose interests do not align in any serious way with the consumer groups they purport to represent.

III. THE PETITION TO DENY CONTAINS FUNDAMENTAL ERRORS

With these preliminaries out of the way, it is useful to address the mistakes that make it highly likely that this Comcast-NBCU petition to deny will be as far off-base as the abortive effort of these groups to block the AOL-Time Warner was a decade before. Three such errors stand out. The first is the petition's utter lack of a conceptual coherent framework. The second is that it mistakenly relies on static and narrow definitions of the relevant market. The third is that it ignores or understates the counterstrategies available to other parties.

No Conceptual Framework. The first glaring mistake of the petition is that it does not articulate any clear framework for analysis of the competitiveness of the marketplace. A sound framework would begin with the modest proposition that the FCC should not be turned into a covert bureau for managing industrial policy. The risks of that approach are evident in light of the huge changes in the communications and information services marketplace that have occurred in the last decade. Centralized regulatory authorities have neither the insight nor the entrepreneurial expertise to make judgments as to which projects, or which mergers, are likely to succeed or fail on business grounds.

The sensible strategy in the face of that long-term institutional ignorance is to take a position of general deference toward private sector actors whose money and expertise give them the right incentives to make the correct judgments. If, therefore, the regulatory authorities should have great confidence that a business strategy will fail because it overstates its efficiencies and misunderstands the market, their right response is to bite their lips and say nothing. They are more likely to be wrong than the parties to the venture, who, as was the case with AOL-Time Warner, may well be wrong themselves. But the effort to weed out the bad projects puts a huge pall on all projects. The real social losses, in many cases, are from those unidentified business mergers that aren't allowed to take place, even though they had the capacity to transform the market for the better.

The scope, then, of the proper marketplace competition inquiry is limited to determining whether the restrictive impacts of a proposed merger are large enough to outweigh its purported efficiency gains. The reason why this problem gives rise to a social question is that the parties to the merger will count both increased market power and added efficiencies as private gains. But on the social calculus, the restrictive elements of the merger count as a social loss and not a social gain. The issue therefore is to try to figure out how to disentangle the socially negative from the socially positive components of any merger. In doing this, it is in general a mistake for the FCC to doubt that private parties can gain from mergers. These efficiency gains are often present in the form of operating synergies that may be difficult to explain or justify to outsiders. At the same time, it is appropriate for a regulator to go slow in condemning mergers for their supposed anticompetitive properties.

On this score, the most salient division is between horizontal and vertical mergers, where the risk of collusion and additional market concentration is greater with the former than the latter. One mistake of the consumer groups' petition to deny is that it regards the vertical threats as being equally severe as the horizontal ones, even though it is far more difficult to explain how these vertical alliances systematically produce net social inefficiencies. On the positive side, these arrangements eliminate some of the difficulties in coordinating the different stages of production and distribution, which could easily lead to the lack of coordination between the different stages of production and distribution. On the negative side, it is alleged that these arrangements produce market exclusives or territorial divisions of market.

In his June 21 Declaration, for example, Dr. Mark Cooper, whose work I have already criticized,[8] puts forward the following account of why the proposed Comcast-NBCU merger is dangerous in connection with an initiative known as TV Everywhere, which essentially says that those persons who wish to get access to certain TV programs via the Internet must agree to accept cable service as well. He writes:

> TV Everywhere has a simple business plan, under which TV programmers like TNT, TBS and CBS will not make content available to a user via the Internet unless the user is also a pay TV subscriber through a cable, satellite, or phone company. The obvious goal is to ensure consumers do not cancel their cable TV subscriptions. But this plan also eliminates potential competition among existing distributors. Rather than Comcast offering Xfinity to all Americans, including those living in Cox, Cablevision and Time Warner Cable regions, it is only available in Comcast regions. The other distributors will do the same, meaning that the incumbent distributors will not compete with one another outside of their "traditional" regions.[9]

The most obvious observation here is that the new initiative offers Internet access to video programming that previously has not been available, and it thus offers at least some

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[8] Richard A. Epstein, "The Dogmatic Posture of a Consumer Advocate: A Second Response to Mark Cooper," *Perspectives of FSF Scholars*, Vol. The Free State Foundation, March 15, 2010, available at http://freestatefoundation.org/images/The_Dogmatic_Posture_of_a_Consumer_Advocate.pdf; Richard A. Epstein, "The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper," *Perspectives of FSF Scholars*, The Free State Foundation, February 12, 2010, available at, http://freestatefoundation.org/images/The_Comcast_and_NBCU_Merger.pdf.

[9] Cooper Declaration, at 3.

enhanced benefits over the current state of affairs, assuming these plans survive in a dynamic marketplace. It is important to make two other observations as well. The first is that the plan of action that the above-quoted passage imputes, without evidence, to Comcast and its current competitors most likely violates current antitrust laws because it involves a consensual division of markets between defendants, whereby each agrees not to enter the territory of another. On the other hand, it is most decidedly *not* an antitrust violation for each party with a dominant position in any given territory to choose on its own not to enter the territory of a competitor.[10] If, however, these parties were to be tempted to implement such an agreement, they almost certainly would be guilty of an antitrust violation irrespective of whether the Comcast/NBCU merger goes through.

The second point is that the proper social response to this Everywhere TV initiative is not a prohibition of the merger, but only a restriction on the claimed anticompetitive practice itself—but *if and only if* the FCC could show that it has an anticompetitive effect. The great danger of a merger ban is overbreadth: it kills off all efficiency gains in the effort to prevent one distinctive practice, which may or may not be illegal, and may or may not be implemented in accordance with the supposed fears. There is no reason to move in advance on matters this inchoate. It is quite sufficient to wait until such practice occurs, and then to intervene only if it can be shown to have untoward effects. The packages that firms offer to all of their customers are public knowledge, which negates any risk of concealment. The proper response, if such practices materialize, is to evaluate them on their merits, especially if they contain horizontal restraints. The prospect is a feeble ground on which to enjoin a merger, which necessarily has

[10] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

many other consequences.

Narrow Definitions of the Relevant Market. Throughout its entire analysis of this merger, the Joint Petition offers a static and narrow definition of the relevant market. Its references to market share apply to the cable market, and do not include satellite or Internet access. It makes no reference to new modes of access, e.g. cell phones, or electrical connections, or some device as yet unknown, that could supply competition to the parties involved in this merger. In effect, it makes the same mistakes that are found in the petition to deny filed by Dr. Cooper and his co-petitioners against the AOL/Time Warner merger. The use of these unrealistic market definitions makes it appear that the parties to the transaction have, in effect, greater influence and power than they really do.

The larger point is this: technological advances always tend to undercut market segmentation. The days are long gone when telegraph and telephone could be treated as separate markets. It was only 15 years ago, just before the passage of the 1996 Telecommunication Act that everyone in the industry thought that the last mile monopoly for local exchange carriers was a fixed feature of the telecommunications universe. Now, of course, land-lines are in decline, and cellular phones and VoIP (among other technologies) have become major competitors in the market—only these devices are not just phones any more. They have complex platforms with extensive video capabilities. They can access in the Internet to pay bills, and within short order deposit checks to local accounts. Thousands of new applications are available on these platforms, with new ones available every day. We know for certain that numerical calculations of market share based on static assumptions are biased upward relative to the future state of affairs—even if we do not know how the market *redefinition* will play itself out. It is just fine for the petition to deny to proclaim the virtues of dynamic innovation. But it is just wrong for it to insist that blocking this merger will do anything to propel the forward the process of dynamic innovation.

No Discussion of Counterstrategies. One of the reasons why analysis of marketplace competition is so difficult is that no single firm or group of firms operates in a vacuum. Each firm that tries to develop its best strategy has to be aware that all of its current rivals, all potential new entrants, all suppliers, and all consumers have the ability to implement strategies of their own. These counterstrategies place a powerful limitation on the ability of any player in a fluid market to dominate the landscape.

One historical example of this process concerns the antitrust violation of predation, whereby a single firm or group of firms seeks to lower prices in order to drive out competitors, after which it hopes to recoup its losses by charging supracompetitive prices. This strategy has been reputed to allow a dominant firm to drive its competitors from the marketplace. Yet the reason it is so rarely encountered is that everyone understands that it cannot succeed given the counterstrategies that are open to other parties. Once the prices go down, the demand for the product goes up. At some point, the single producer represents the increasing portion of its cost curve, which means that the size of the loss on each unit sale increases with each added unit. The rival firms withdraw from the market, or perhaps secretly buy units from the dominant firm for later use. The moment the supposed predator tries to raise its prices, the old firms come back into the market under the high price umbrella that the predator now creates. Perhaps some new firms join it as well. The economic picture thus requires the predator to bear the certainty of short term losses in order to acquire the remote possibility of some long term gain. No wonder the law has finally narrowed the cases in which these anticompetitive theories can even be considered. The logic of the basic situation is so powerful that it is usually pointless to take evidence about the so-called distinctive features of any case. A rule of *per se* legality, or something verging on it, is the best way to proceed.

The situation is more complex still with a wide range of other practices. One of the many oddities of the Cooper Declaration is his criticism of the common practice to market music by albums instead of individually. To think of this as a restrictive practice that forces hapless customers to buy the chaff with the wheat is an odd way to view the situation. The practice was completely universal in earlier stages, and was thought to be an advance because it took advantage of the increased capacity of the long-playing record. Small record producers as well as large ones used this new vehicle. The simple explanation is that in a world in which music has to be implanted in a tangible medium, it is far cheaper to sell multiple short numbers on a single album than to sell them on an *a la carte* basis. If the old 45 RPM records had a B-side to them, that was probably better than leaving the backside blank. Exactly how many good songs should be bundled with bad ones is a tricky call, assuming that one can say with confidence which songs are which. But surely the higher the fraction of good content, the larger the number of unit sales, and the higher the price for the entire set. There may be some unilateral effort to take advantage of whims and tastes, but any effort by antitrust or regulatory authorities to unravel these mysteries is likely to cause more harm than good. In any event, the bundling technique does not work with online sales, and it has thus been replaced by *a la carte* transactions. The delivery of content depends critically on the technologies able to deliver it. There is no reason for the FCC to scrutinize these shifting patterns under an antitrust-like lens.

The same conclusion applies to the common argument that vertical mergers lead to some powerful form of exclusion by various firms. The Joint Petition, for example, cites a 1995 set of remarks by Christine Varney, now the head of DOJ's Antitrust Division, on the dangers of vertical mergers:

> Vertical mergers can create or raise entry barriers that lead to higher prices or lower quality or innovation for consumers. For example, in industries with extensive networks, many firms already have market power through their ownership of established networks or installed bases involving huge sunk costs. Vertical mergers can, in certain instances, increase those barriers to entry even more, raising costs and reducing innovation and quality for consumers.[11]

The quoted passage appears to express a very one-sided view of the matter by ignoring the positive prospects of vertical mergers with real efficiency gains. But Dr. Cooper artfully quotes Ms. Varney's words out of context. The paragraph before the quoted passage that Cooper omitted shows a more balanced view of the overall situation. It reads:

> Vertical integrations are usually mergers of noncompeting companies where one's product is a necessary component or complement of the other's. Such mergers can achieve procompetitive efficiency benefits. Vertical integration can lower transaction costs, lead to synergistic improvements in design, production and distribution of the final output product and thus enhance competition. Consequently, most vertical arrangements raise few competitive concerns.[12]

The full passage casts the entire discussion in a very different light, because it raises the pressing question of how best to distinguish pro-competitive from anticompetitive mergers. Ms. Varney then goes on to identify the two types of vertical practices that might have anticompetitive effects – "foreclosure and facilitating collusion." I have already spoken about

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[11] Christine A. Varney, Commissioner, Federal Trade Comm'n, Remarks before the PLI 36th Annual Antitrust Inst.: Vertical Merger Enforcement Challenges at the FTC (July 17, 1995) *available at* http://www.ftc.gov/speeches/varney/varta.shtm.

[12] Id.

the second of these possibilities in connection with the horizontal division of markets, under which each incumbent agrees with its potential rivals to stay at home. The foreclosure theory is much more difficult to execute, if it can be executed at all, unless the firm has a virtual chokehold at one level of the distribution chain.

Ms. Varney's illustration of a foreclosure effect was the Silicon Graphics case. It dealt with a situation where the FTC challenged the efforts of Silicon Graphics, which held 90 percent of the market for complex workstations for three-dimensional animation, to acquire two of the three firms that made software for these stations. The theory was that the acquisition of these two companies would require new entrants to develop entry at both levels, which could retard competition. Shortly thereafter the FTC obtained a consent decree that, among other things, required Silicon Graphics to create ways that other independent developers could create software for its equipment on nondiscriminatory terms, thereby blocking any foreclosure, *without* blocking either of these acquisitions.[13]

In all likelihood, Silicon Graphics agreed to a decree because it did little to cramp the business plan that it wanted to develop in other events. Why should it cut itself off from other

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[13] *See* Press Release, FTC Consent Agreement with Silicon Graphics, Inc. (Nov. 16, 1995), *avail- able at* http://www.ftc.gov/opa/1995/11/sil2g.shtm. The terms of the decree:

> Requires Silicon Graphics to maintain an open architecture and to publish its application programming interfaces so that software developers other than Alias and Wavefront can develop entertainment graphics software for use on Silicon Graphics workstations; requires Silicon Graphics to offer independent entertainment graphics software companies participation in its software development programs on terms no less favorable than it offers other types of software companies; requires Silicon Graphics to enter into a Commission- approved "porting agreement," by March 31, 1996, with an FTC-approved partner, by which Alias's two major entertainment graphics software programs (Animator and PowerAnimator and their successor programs) can be run on their porting partner's computer systems; and prohibits the release of nonpublic information from the platform partner porting the Alias software to those Silicon Graphics or Alias employees not participating in the porting process.

entrants? In looking at the arrangement, moreover, the greatest risk may well have been the increased concentration of existing software firms as the market shrunk from three players to two through the dual acquisition. But even this risk may have been overrated. The third of these software companies was acquired by Microsoft, which did have the power to enter the market at both levels. Even if Microsoft were not there, Silicon Graphics knew, as the consent decree makes apparent, that its refusal to deal with other software makers could expose it to the immediate loss of passing up superior technology from which it could garner greater gains. In addition, it also increased the risk that the new software entrant could combine with a new hardware entrant to produce a better combination, which could result in a rapid decline in both halves of its business.

Ms. Varney's speech, when taken in context, cuts *against* the view that a ban on a proposed merger should be the first line of attack against vertical mergers, or even vertical mergers with horizontal components. As she repeatedly stressed in her 1995 speech, any calculations about the long-term effects of mergers are not easy to make. Indeed, the more we know about the overall areas, the less confident we should be that we have, as Varney suggested fifteen years ago, the "tools" to make reliable judgments on all these question. Quite simply, new theoretical advances can cut either way. Sometimes, as with predation cases, they lead to greater clarity. But sometimes, as with mergers, they lead to greater uncertainty – which should make the regulatory authorities all the more cautious about interfering based on necessarily uncertain predictive judgments.

IV. CONCLUSION

At this point, there is little reason to belabor further all the far-fetched analogies and incomplete arguments that are found in the Joint Petition and in Dr. Cooper's declaration in support of denying the proposed merger. Many of its passages repeat mistakes that I addressed in my earlier comments on his work.[14] For now it is sufficient to conclude that, on the strength of this record, the long list of abstract fears that produced such an inaccurate picture of the AOL-Time Warner merger must continue to exert an undue influence over the joint petitioners. Whether this merger will work or fail, I cannot say. But, for the purposes of the competition analysis which should guide the Commission, it is not necessary to join in Comcast's and NBCU's rhapsodic depiction of their own merger. It is sufficient, and entirely proper, to conclude that the case for blocking it, or for imposed unwarranted conditions based on wholly speculative and mistaken grounds has not been made.

Respectfully submitted,

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[14] Richard A. Epstein, The Dogmatic Posture of a Consumer Advocate: A Second Response to Mark Cooper, *Perspectives from FSF Scholars*, The Free State Foundation, March 15, 2010, available at http://freestatefoundation.org/images/The_Dogmatic_Posture_of_a_Consumer_Advocate.pdf.; Richard A. Epstein, The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper, *Perspectives from FSF Scholars*, The Free State Foundation, , February 12, 2010, available at, http://freestatefoundation.org/images/The_Comcast_and_NBCU_Merger.pdf.