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Charter-Time Warner Cable Merger Promises Consumer Benefits: Should Boost Broadband and Competition

by

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Introduction

Any day now the FCC should formally begin its examination of the proposed merger between Charter Communications and Time Warner Cable. From a consumer welfare standpoint, the Charter-TWC transaction appears almost certain to benefit consumers. The potential upsides include accelerated digital video service upgrades, more rapid deployment of high-speed broadband Internet services, and more competitive inter-regional and nationwide enterprise broadband service offerings.

Combinations of personnel, institutions, and knowledge are everyday occurrences in the world of business enterprise. Hires of employees, formations of new business corporations or partnerships, and ventures into new lines of business all routinely involve the combining or merging of material, financial, and informational resources.

Mergers and acquisitions should be properly viewed in this broader context of entrepreneurial business decision-making. They are an important means of improving efficiencies by cutting costs and attracting business opportunities enabled by increases in scope and scale. Those improved efficiencies can enhance innovation and competitiveness to the benefit of consumers. Moreover, mergers made in the context of dynamic markets have heightened potential to accelerate innovation and enhance competitive choices for consumers.

The purpose here is not to endorse or oppose the Charter-TWC transaction. Instead, the purpose is to set out key competitive and public interest considerations surrounding Charter-TWC, especially the transaction's implications for consumers.

Here the potential downsides for consumers appear minimal, if not non-existent. Charter, TWC, and Bright House Networks – the merger actually involves all three – operate in different geographic territories. If the merger is approved, no consumer will lose a choice of video service or broadband providers. Neither Charter nor TWC or Bright House has significant ownership of national video programming networks. So the merger poses no likely concern that affiliated programing would be withheld from competing video service providers or online video service providers.

Charter-TWC therefore differs in important respects from the Comcast-TWC merger proposal. In that matter, the U.S. Department of Justice expressed concerns about Comcast gaining too much control over nationwide broadband Internet delivery. Also, DOJ expressed concerns about Comcast using its financial stakes in video networks to limit availability of programming to competing video subscription services, including Internet-based streaming video services.

One can certainly question whether the facts actually supported DOJ's concerns about Comcast, especially in light of the video market's dynamism. Even so, Charter-TWC involves a decidedly different set of facts. Anticompetitive concerns about Comcast-TWC simply don't apply to Charter-TWC. As an initial matter, national broadband market share is not a likely matter of concern in Charter-TWC. Whereas Comcast-TWC would have resulted in a nationwide broadband consumer subscription market share of about 30%, Charter-TWC would result in a nationwide broadband market share of about 21%. And those are numbers for wireline broadband only. The broadband market is much bigger. 43% of all broadband connections are now mobile, with next-generation wireless networks increasingly offering consumers three or more competitive mobile video viewing options.

Further, the lack of significant vertical integration between the cable services and video programming owned by Charter and TWC effectively eliminates any foreclosure fears. Charter-TWC would neither enable nor incentivize the combined entity to withhold video programming from competing MVPDs or OVDs.

It is indisputable that today's video market is dynamic. Successive advances in digital technology and convergence on IP-based networks enable innovative new services which are expanding sources of competitive pressures on competing video service providers. In reviewing the Charter-TWC proposal, this backdrop should prompt the Commission to emphasize prevailing forces of disruptive change over static market indicators about market share or concentration. At all times, with an eye on the potential competition-enhancing effects of non- horizontal mergers, the Commission's analysis should focus on the consumer welfare-enhancing benefits that Charter-TWC would likely bring.

Whatever the FCC ultimately decides regarding Charter-TWC, the proposed merger deserves a swift review. Mergers and acquisitions are a critical component of the entrepreneurial, competitive process. And in free markets characterized by dynamism – like today's advanced telecommunications marketplace – mergers can significantly benefit consumers. Viewed in this light, Charter-TWC has strong potential to enhance the welfare of consumers.

The Charter-TWC Transaction and its Dynamic Market Context

Under the terms of a complex deal involving the exchange of nearly $90 billion in cash and stock, both Time Warner Cable and Bright House Networks will become wholly owned subsidiaries 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 that ranks just behind Comcast (22%). Also, new Charter would have approximately 17.4 million video service subscribers. This would make new Charter the third-largest MVPD, with a 17% market share, behind AT&T-DirecTV (26%) and Comcast (22%).

Of course, those market share numbers hardly tell the whole story. Charter-TWC takes place in the context of a dynamic video and advanced telecommunications marketplace. Technological innovation has transformed the video services market. One-way analog video has been superseded by digital video in hi-definition – or even ultra HD, with time-shifting, whole homing, Internet-connected HD DVR, and mobility viewing options through Wi-Fi connections and hot spots. And video programming content has continued to grow in abundance and variety since the early 1990s.

Moreover, consumers now have significantly more choices than they did 20 or even 10 or 5 years ago. Cable providers that enjoyed a market share of over 90% of MVPD subscribers in the early-to-mid 1990s must now compete for subscribers. Entry into the video market by two national direct broadcast satellite (DBS) service providers – DirecTV and Dish, as well as by telco MVPD services – such as AT&T's U-Verse, Verizon FiOS, and CenturyLink's PrismTV, has reshaped the competitive landscape. Indeed, in its *Sixteenth Video Competition Report* (2015), the FCC estimated that, as of 2013, more than 99% of households had access to at least three competing MVPD providers and that approximately 35% had access to at least four competing MVPD providers. According to data cited in its Report, "combined shares of all cable MVPDs accounted for approximately 53.9 percent of MVPD subscribers at the end of 2013, down from 55.8 percent at the end of 2012." Meanwhile, "combined shares of the two DBS MVPDs accounted for approximately 33.9 percent of MVPD subscribers at the end of 2013, up from 33.8 percent at the end of 2012." And "all telco MVPDs accounted for approximately 11.2 percent of MVPD subscribers at the end of 2013, up from 9.8 percent at the end of 2012."

Consumer viewing habits are also significantly changing, with dramatic increases in adoption of subscription-based online video distributors (OVDs) like Netflix, AmazonPrime, and HuluPlus. Additional over-the-top (OTT) online video services are in the works, including services offered by HBO and Showtime. In addition, next-generation wireless networks are making streaming video available on smartphones and tablet devices outside the home.

The dynamism of the video market – in which successive advances in digital transmission technology and convergence on IP-based networks enables innovative new services and expands the sources of competitive pressures on competing video service providers – should prompt the Commission's review of Charter-TWC to focus more on prevailing forces of disruptive change than on the static market indicators about market share or concentration.

Given the parameters of the proposed merger, and the overall dynamic state of broadband and video markets, unmistakable evidence will be needed to demonstrate genuine threats to consumers from Charter-TWC. In the absence of clear market power concerns, mergers are highly unlikely to stifle the forces of innovation. Instead, mergers made in the context of dynamic markets have the potential to create service platforms and applications that accelerate innovation and enhance competitive choices for consumers.

Potential Benefits to Consumers Predominate in Charter-TWC Transaction

The FCC typically approves merger applications when the likely benefits outweigh the likely harms. When it comes to Charter-TWC the scales tip decidedly in favor of its benefits. From a consumer welfare standpoint, Charter-TWC appears almost certain to benefit consumers. Several FCC precedents recognize the kinds of cost savings that can result from mergers. 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 or Bright House'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." This would accelerate the pace of that important technology transition. For instance, absent the merger TWC "expects to be all-digital in only about half of its footprint by the end of 2015."

Second, consumers would also likely 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 and Bright House's footprints that are currently all-digital. Meanwhile, it will continue TWC's current plans for select 300 ultra-high-speed broadband deployments.

Third, Charter-TWC would likely 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. Agency precedents, such as the FCC's *Time Warner-Insight Order* (2012), 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.

Significantly, there appears to be no potential downside for consumers. Charter-TWC is a "non-horizontal" merger. FCC precedents recognize that such mergers typically do not pose anticompetitive threats. As explained in the *Adelphia Order* (2006), "[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." 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 routine orders by of the FCC's Media Bureau.

In this case, the merging entities have little to zero overlap in the geographic scope of their operations. Charter, TWC, and Bright House 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.

Furthermore, Charter-TWC poses no likely harm of foreclosure resulting from the parties financial ownership interests of the parties in video programming. In other words, it appears all but certain that the merger would not enable new Charter to withhold affiliated video programming from competing MVPDs or OVDs. To repeat, Charter-TWC merger is primarily a non-horizontal integration, and certainly not a vertical integration.

And Charter has no significant ownership interests in nationwide video programming networks. Nor does Bright House. 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. Post-merger, new Charter would not have the ability, let alone the incentive, to withhold or unreasonably restrict a competitor MVPDs' access to its affiliated video programming.

For that matter, the FCC already has program access rules in place that address anticompetitive harms from foreclosure in video programming. FCC 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." Among other things, vertically integrated MVPDs are prohibited from discriminating between MVPDs in the sale of their programming. Even if foreclosure concerns were posed by the Charter-TWC, the availability of this administrative remedy would provide an adequate backstop. Video programming-related, FCC-imposed conditions on the proposed merger's approval are almost 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 services. New Charter would not possess market share sufficient to ever succeed in such a strategy. If foreclosure was 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 FCC claims for itself through network neutrality regulations.

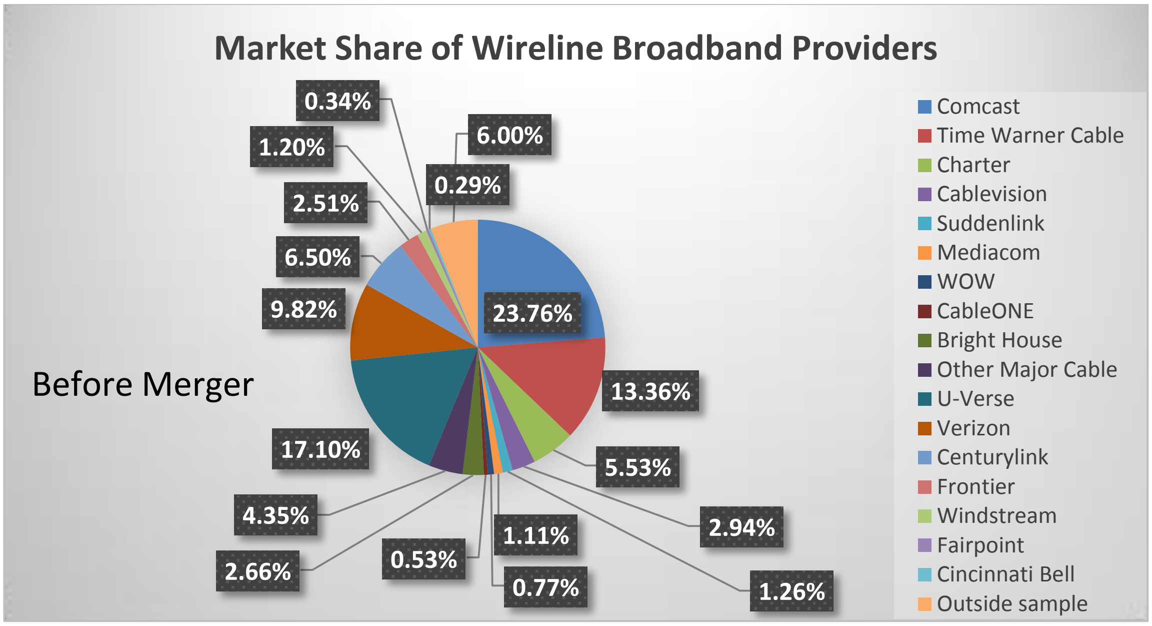
Charter-TWC Does Not Pose the Same Set of Concerns that Preoccupied DOJ's Review of Comcast-TWC

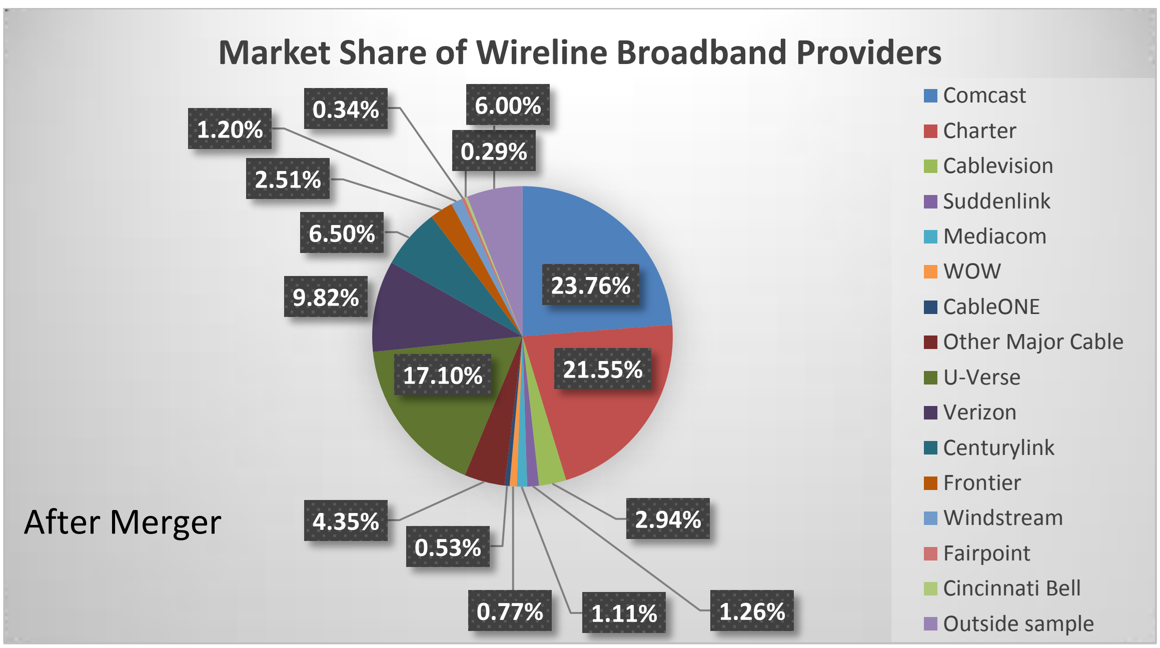
Charter-TWC differs in key respects from the proposed Comcast-TWC that was discouraged and effectively blocked by the U.S. Department of Justice. Those differences make the case for approval of Charter-TWC even more clear-cut.

Based on public media reports, there were three principal areas of concern that led the proposed Comcast-TWC merger 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 to Charter-TWC.

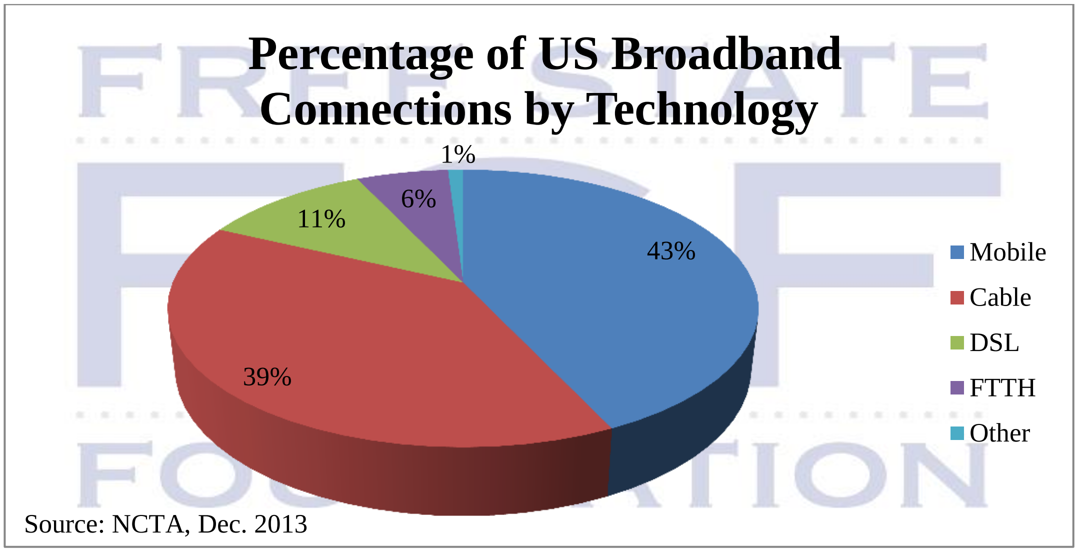
For starters, Charter-TWC poses none of the broadband market share concerns that DOJ supposedly had in Comcast-TWC. Whereas Comcast-TWC would have resulted in a nationwide broadband consumer subscription market share of about 30%, Charter-TWC would result in a nationwide broadband market share of only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

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





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 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 renders such concerns irrelevant.

Conclusion: Calling for a Swift and Disciplined FCC Review of Charter-TWC

Whatever the FCC ultimately decides regarding Charter-TWC, the proposed merger deserves a swift review process. The review should be informed by rigorous economic analysis specific to the merger. The Commission should not depart from its precedents recognizing the potential competition-enhancing effects of non-horizontal mergers. It should stay focused on the pro-consumer benefits Charter-TWC would likely bring through accelerated all-digital video and broadband network upgrades, as well as more competitive business enterprise offerings.

Further, the Commission must not let its process or analysis be distracted by "big is bad" slogans. Nor should its review be swayed by political pressures having nothing to do with the merger's consumer welfare implications. The Commission should not impose any conditions on the merger unrelated to demonstrable concerns over market power and anticompetitive conduct. And if rigorous economic analysis were to reveal any actual concerns, any such conditions should be narrowly targeted to address them.

Mergers are a critical component of the entrepreneurial, competitive process. And in free markets characterized by dynamism – like today's advanced telecommunications and video marketplace – mergers can significantly benefit consumers. Today's video market is unmistakably innovative and competitive. And in this dynamic market context, the Charter-TWC merger proposal has strong potential to enhance the welfare of broadband and video consumers. The FCC should take that seriously.

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